THE DIGEST OR PANDECTS.

BOOK XVIII.

TITLE I.

CONCERNING THE CONTRACT OF PURCHASE AND AGREEMENTS BETWEEN PURCHASER AND VENDOR, AND WHAT THINGS CANNOT BECOME THE OBJECTS OF THE SAME.

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

The origin of purchase and sale is derived from exchanges, for formerly money was not known, and there was no name for merchandise or the price of anything, but every one, in accordance with the requirements of the time and circumstances exchanged articles which were useless to him for other things which he needed; for it often happens that what one has a superabundance of, another lacks. But, for the reason that it did not always or readily happen that when you had what I wanted, or, on the other hand that I had what you were willing to take, a substance was selected whose public and perpetual value, by its uniformity as a medium of exchange, overcame the difficulties arising from barter, and this substance, having been coined by public authority, represented use and ownership, not so much on account of the material itself as by its value, and both articles were no longer designated merchandise, but one of them was called the price of the other.

(1) But while it may be doubted whether a true sale can be made to-day without the employment of coin, as, for instance, if I gave a toga and received a tunic instead; Sabinus and Cassius think that, in this case, there is a veritable purchase and sale, but Nerva and Proculus are of the opinion that this is an exchange, and not a purchase.

Sabinus gives Homer as an example, who relates that the army of the Greeks purchased wine with copper, iron, and slaves, as follows: "The long haired Greeks here purchased wine, some of them with copper, others with glittering iron, others with hides, others again with cattle, and still others with slaves."

These verses, however, seem to indicate an exchange and not a purchase, like the following: "Jupiter, the son of Saturn, obscured the faculties of Glaucus until he changed arms with Diomedes, the son of Tydeus." In support of the opinion of Sabinus, the following can be quoted with greater effect, that is, where the same poet says, "He purchased with his possessions."

The opinion of Nerva and Proculus is, however, the better one, for it is one thing to sell, and another to purchase; one thing to be a purchaser, and another a vendor; just as the price is one thing, and the merchandise another; but in an exchange it cannot be ascertained which is the purchaser and which is the vendor.

(2) Purchase is derived from the Law of Nations, and therefore it is accomplished by consent, and can be contracted between parties who are absent, by a messenger, as well as by letters.

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

A purchase cannot be contracted between father and son, except where it has reference to *castrense peculium*.

(1) No sale can take place without a price. It is not, however, necessary for the purchase-money to be actually paid, but an agreement perfects the sale without having been reduced to writing.

3. *The Same, On Sabinus, Book XXVIII.*

Where an article is sold with the understanding that if it does not please the purchaser it shall not be considered to have been bought, it is settled that it is not sold under a condition, but that the purchase may be annulled conditionally.

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

A purchase is understood to take place where the object of it is a freeman, or a sacred or religious place, which is not susceptible of sale, if it is bought by a party who is ignorant of the fact:

5. *Paulus, On Sabinus, Book V*. Because a freeman is not easily distinguished from a slave.

6. *Pomponius, On Sabinus, Book IX*.

Celsus, the son, says that you cannot purchase a man whom you know to be free, nor any other property if you know that it is not subject to alienation; as, for instance, sacred and religious places, or such as are not the object of commerce, but are public property, which, while they do not absolutely belong to the people, are used for public purposes, as, for instance, the Campus Martius.

(1) Where a tract of land has been sold on three annual payments, with the understanding: "That if the money is not paid at the times indicated, the sale of the land shall be void, and if the purchaser should, in the meantime, cultivate said land and harvest the crops from the same, they shall be returned if the sale is annulled, and the purchaser must make good to the vendor the amount of the price which is lacking, if he should fail to sell the property afterwards to someone else;" if the money is not paid at the stated times, it is established that the vendor will be entitled to an action of sale on this ground.

We should not consider it confusing that where a purchase has been annulled, an action of sale can take place, for in the case of both purchase and sale consideration must rather be paid to the intention of the parties than to the language employed; and, according to what has been said with reference to the intention, it is evident that the understanding merely was that the vendor should not be bound to the purchaser if the money was not paid at the appointed time, and not that the mutual obligations of both purchaser and vendor should be released. (2) A condition established at the beginning of a contract can afterwards be changed by a different agreement; just as both parties can absolutely rescind a sale, where the acts which were to be performed by both of them have not yet been executed.

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

Where the sale of a slave was made in the following terms, namely: "After he has rendered his accounts, according to the will of his master," it is conditional. Conditional sales are only concluded after the conditions have been complied with. In the condition of sale above-mentioned, does the master himself form his judgment according to his own will, or, in fact, should this be considered to have reference, in general terms, to the judgment of a good citizen? For if we understand the will of the master to be meant, the sale is void; just as if anyone made a sale under the condition, "If he should be willing," or where a party promises a stipulator, "I will pay ten *aurei* if I wish to," for it ought not to depend on the will of the debtor whether he is bound or not.

It was therefore held by the ancient authorities that this clause rather had reference to the judgment of a good citizen, than to that of the owner of the slave. Hence, if the latter could have accepted the accounts of the slave, but did not do so or, if he did accept them, and pretends that he did not, the condition of the sale is fulfilled, and the vendor can be sued in an action on sale.

(1) A purchase made in the following terms: "I will buy this of you at the same price you paid for it, or I will give the amount which I have in my chest," is valid. For the price is not uncertain, as the amount paid at the sale can readily be ascertained, as more doubt exists as to the sum for which the article was purchased, than there does with reference to the property itself.

(2) Where anyone makes a purchase in the following terms: "I will purchase your land for a hundred *aurei*, and as much more as I can sell it for," the sale is valid, and is at once

concluded: for the price, a hundred *aurei* is certain, that is, this price, however, will be increased if the purchaser should sell the land for a larger sum.

8. *Pomponius, On Sabinus, Book IX*.

Neither a purchase nor a sale can be held to take place without property which can be sold; nevertheless, crops, and the yield of cattle can properly be made the object of purchase; and when the births have taken place, as the transaction is complete, the sale is understood to be concluded. If, however, the vendor contrived that the crops should not be raised, or the cattle not be born, an action on purchase will lie.

(1) A sale is, however, sometimes understood to be contracted without property being the object of the same, as, for instance, where a purchase is made dependent upon chance; which occurs where fish or birds which are yet to be caught, or money to be thrown to the populace, is bought.

A purchase is also contracted even if nothing happens, because it relates to the expectation. Where the purchase has reference to money thrown to the populace, and the purchaser is deprived by eviction, of what he had secured, no obligation on the ground of purchase will be incurred; for the reason that this is understood to have been the intention of the parties.

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

It is clear that the consent of both parties is necessary in all sales and purchases. But if they differ either as to the price, or as to something else connected with the sale, it will be incomplete. Therefore, if I thought that I was purchasing the Cornelian Field, and you thought that you were selling me the Sempronian Field, for the reason that we disagree as to the object of the transaction, the sale will be null and void.

The same rule applies where I was under the impression that you had sold me Stichus, and you believed that you had sold me Pamphilus, who was absent; for when there is a disagreement with reference to the object, it is apparent that the sale is of no effect.

(1) If we disagree with reference to the name, but there is no dispute as to the object, the transaction of purchase and sale is undoubtedly valid; for a mistake in the name is of no consequence, when the property itself is agreed upon.

(2) Hence, the question arises, where no mistake is made as to the object itself, but there is one as to the substance of which it is composed; as, for instance, if vinegar is sold for wine, copper for gold, or lead for silver or something else which resembles silver, whether there is a purchase and sale.

Marcellus says, in the Sixth Book of the Digest, that, in this case, there is a purchase and sale, because the object was agreed upon, although there was an error with reference to the matter of which it was composed. I am of the same opinion, so far as the wine and vinegar are concerned; for, as they are very nearly the same thing, that is to say, the same substance, provided the wine becomes sour, but if it did not become sour but was so in the beginning, that is, if it contained vinegar, it will be held that one thing has been sold for another. In the other instances, however, I think the sale was null, whenever a mistake was made with reference to the substance of which the articles were composed.

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

The case would be different where a party had actually sold gold, and the purchaser thought that it was a metal of less value, for then the sale will be valid.

11. *Ulpianus, On Sabinus, Book XXVIII*.

Otherwise, what can we say where a blind man was the purchaser, or where a mistake was made in the substance, or where he was unskilled in detecting the nature of substances; shall we hold that the parties have agreed as to the property? And how can he agree to it, who has not seen it?

(1) If I think I am buying a virgin slave, when she, in fact, is a woman, the purchase will be valid; for there is no mistake as to her sex. If, however, I should sell you a woman, and you thought that you were buying a boy, for the reason that there is a mistake in the sex, the purchase and sale will be void.

12. *Pomponius, On Quintus Mucius, Book XXXI.*

In all the questions above stated, the personality of the purchasers and vendors should be considered, and not that of those through whom the right of action on contract is acquired; for if my slave or my son who is under my control, makes a purchase in his own name, in my presence, the inquiry is not what my opinion is, but what the party who made the contract thinks.

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

If you sell a slave, knowing that he has the habit of running away, either to one of my slaves, or to a party whom I have directed to purchase him, and the latter is ignorant of the fact, and I am not; it is certain that you will not be liable to an action on purchase.

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

But what shall we say where both parties are mistaken as to both the substance and the nature of the object of the sale; as, for instance, where I think I am selling gold, and you think that you are purchasing gold, when, in fact, the metal is brass; or where, for example, two co-heirs sell a bracelet which is said to be of gold, at a high price to another co-heir, and it is discovered that it is, for the most part, copper? It is held that this is a sale, because the bracelet contained some gold, for if the article is gilt, even though I think it to be gold, the sale will be valid, but where copper is sold for gold the sale will not be valid.

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

Even though the parties may agree upon the article which is the object of the sale, still, if, in accordance with the course of nature, it ceases to exist before the sale is concluded, the purchase will be void.

(1) A purchaser can take advantage of his ignorance, provided it is not that of an extremely careless man.

(2) If you sell me my own property, and I am ignorant of the fact, and you deliver it to another by my direction, Pomponius does not think that my ownership passes, since it was not intended that mine should pass to the other party, but that yours should do so. Therefore, the same rule applies where I intend to give some property of mine to another, and you deliver it to him under my direction.

16. *Pomponius, On Sabinus, Book IX.*

The purchase of my own property is not valid, whether I made it knowingly or not, but if I buy it while unaware of the fact, I can recover what I paid, because no obligation arose.

(1) It is no impediment to the sale, however, that only the usufruct of the property in question has been enjoyed by the purchaser.

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

It is, nevertheless, the duty of the judge, in a case of this kind, to reduce the price.

18. *Pomponius, On Sabinus, Book IX.*

Where the property purchased is jointly owned by the buyer and some one else, it should be said that the price must be diminished in proportion, and that the purchase will be valid with respect to a part of the property, and void with reference to the remainder. Where a slave, by the order of his master, in showing the boundaries of a field which has been sold, either by mistake or through fraud, includes more land than is embraced in the tract, it must be understood that he pointed out the boundary-lines where his master intended he should do so.

Alfenus states the same opinion where possession is delivered by a slave.

19. *The Same, On Quintus Mucius, Book XLI.*

What I have sold does not become the property of the purchaser, unless the price has been paid to me, or security has been furnished for payment, or unless we rely upon the good faith of the purchaser without any security.

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

Sabinus gave it as his opinion that, if we wish anything to be made for us; as, for instance, a statue, a vase, or a garment, with the understanding that we shall give nothing but money for it; it is held that this is a true sale, and that it cannot be considered a hiring, if the material is not provided by the party for whom the article is to be made.

The case is different where I furnish the ground upon which you are to build a house; since, in this instance, what constitutes the substance of the structure is provided by me.

21. *Paulus, On Sabinus, Book V.*

Labeo says that the ambiguity of an agreement should rather prejudice the vendor who mentioned the terms, than the purchaser; because the former could have stated them more clearly before anything had been done.

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

It is not superfluous to insert the following sentence in a contract of sale, namely: "If the property is, in any respect, sacred or religious, it will not be included," as this is only applicable to certain tracts of land of limited extent; for if the entire tract is religious, sacred, or public, the purchase will be void.

23. *Paulus, On Sabinus, Book V.*

The purchaser can revoke what he has paid on the ground of its not having been due.

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

An action on purchase will lie in the case of small portions of a tract, as above stated; because, while the place may not be expressly sacred or religious, still, it is included with the greater part of what is bought, as an accessory.

25. *The Same, On Sabinus, Book XXXIV.*

If the sale is made in the following terms: "Either this or that property," the purchase will apply to whichever property the vendor may select.

(1) The person who sells the property is not required to transfer it to the purchaser, as he who makes a promise of land to a stipulator is compelled to do.

26. *Pomponius, On Sabinus, Book XVII.*

If I, knowingly, purchase anything from a person whose property is forbidden to be sold, or from one to whom time has been granted to decide whether or not he will accept an estate, in such terms that he has no authority to diminish the assets of the estate; I will not become the owner of said property.

The case will be different, however, if I purchase property from a debtor knowing that his creditor was being defrauded.

27. *Paulus, On Sabinus, Book VIII.*

He who buys property from anyone whomsoever, thinking that it belongs to him, buys it in good faith; but he who buys anything, from a ward, without the authority of his guardian, or where he is instigated by an impostor, whom he knows is not his guardian, will not be considered a *bona-fide* purchaser; and this opinion was also held by Sabinus.

28. *Ulpianus, On Sabinus, Book XLI*.

There is no doubt whatever that anyone can sell property belonging to another, for there is a sale and purchase in this case, but the purchaser can be deprived of the property by legal process.

29. *The Same, On Sabinus, Book XLIII*.

When a slave is sold, his *peculium* is not sold with him, and therefore he is not held to be sold with his *peculium*, whether this has not been reserved, or whether it has been specifically stated that the sale did not include the *peculium*. Hence, if anything forming part of the *peculium* has been stolen by the slave, it can be recovered by an action, just like any other stolen property; provided the said property has come into the hands of the purchaser.

30. *The Same, On the Edict, Book XXXII*.

I think that the vendor is, nevertheless, entitled to an action for production, as well as to one on sale.

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

If any accessions have subsequently been made to the *peculium,* they must be returned to the vendor; as, for instance, the offspring of a female slave, and anything which has been obtained through the labor of a sub-slave.

32. *Ulpianus, On the Edict, Book XLIV*.

Where anyone sells shops used for banking purposes, or others which are built on public land, he does not sell the ground, but only the right; for as these are public shops, the use of them alone belongs to private individuals.

33. *Pomponius, On Sabinus, Book XXXIII*.

Where the following clause was inserted in a contract of sale: "The water-courses and gutters shall remain as they now are," and it is not added what water-courses or gutters are meant; the intention of the parties must, first of all, be considered. If this is not apparent, the construction will then be adopted which is prejudicial to the vendor, for the language is ambiguous.

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

If, in a sale of a tract of land, it is stated that: "The slave Stichus is included," and it cannot be ascertained which one is intended, where there are several slaves of that name and the purchaser had one in mind and the vendor another; it is established that the sale of the land will, nevertheless, be valid.

Labeo, however, says that that Stichus should be delivered whom the vendor had in mind, and it does not make much difference what the value of the slave was, whether he was worth more or less than the property in which he was included, for we sometimes purchase property because of its accessories, for example, where a house is purchased on account of the marbles, statues, and paintings which it contains.

(1) A sale can legally be made of all the property which anyone has either in his possession, or which he may subsequently acquire; but there can be no sale of that which either the Law of Nature or of Nations, or the customs of the State, have removed from commerce.

(2) We cannot knowingly purchase a free man, nor can a purchase or stipulation based on the assumption that he may become a slave be admitted; although we have stated that property which is not yet in existence can be purchased; for it is not right to anticipate such a contingency.

(3) Moreover, if the purchaser and the vendor both know that the property sold has been stolen, no obligation will be contracted on either side. If the purchaser alone is aware of the fact, the vendor will not be liable; still, he cannot recover anything on the ground of the sale, unless he voluntarily furnishes what he agreed to do. Where, however, the vendor was aware

that the property had been stolen, but the purchaser was ignorant of the fact, an obligation is contracted on both sides; and this also was stated by Pomponius.

(4) The purchase of one's own property is valid, only where the purchaser intended from the beginning to obtain possession of it from the vendor, and could obtain it by no other means.

(5) It is one thing to taste, and another to measure anything which is offered for sale; for the taste is an advantage, by giving the buyer his own opportunity to reject it; but the measure only enables him to ascertain the amount of the purchase, and not whether the article is sold for too large or too small a sum.

(6) If a purchase is made in the following terms: "Either Stichus or Pamphilus is purchased by me," the vendor has the right to deliver whichever one he pleases, as is the case in stipulations; but if one of them should die, the survivor must be delivered, and hence the risk of the first slave attaches to the vendor, and that of the second to the purchaser. But if both of them should die, the price will still be due, for the one who survives the other is always at the risk of the purchaser. The same must be said if the purchaser had the right to select which one he wished to have; provided it was only left to him which one he would purchase, and not whether he would make any purchase at all.

(7) A guardian, cannot buy the property of a ward. The same rule extends to similar cases, that is, to those of curators, agents, and persons who transact the business of others.

35. *Gaius, On the Provincial Edict, Book X.*

Because earnest is often given where purchases are made, it does not follow that where this is not done the agreement is void; but only that it can be more easily proved that the price was agreed upon.

(1) It is settled that a transaction is imperfect when the vendor says to a party who wishes to buy: "You can purchase this for whatever price you wish to give, or for whatever you think just, or for whatever you consider the article to be worth."

(2) Certain authorities hold that a contract cannot be made for the purchase of deadly poison, because neither a partnership nor a mandate has any force in a case where criminality is involved. This opinion can, indeed, very properly be held with reference to substances which cannot be rendered useful to us, even with the addition of something else. Concerning substances, however, which, after having been mixed with others, lose their harmful nature to such an extent that antidotes and other healthful drugs can be made of them, a different opinion must be given.

(3) If anyone should direct a friend of his, who was about to take a journey, to look for his fugitive slave, and if he found him, to sell him; he cannot be said to have acted in violation of the Decree of the Senate, because he did not sell him, nor can his friend, if he sold him when he was present. A purchaser, also, if he buys a slave who is present, is understood to have engaged in a legal transaction.

(4) If property which is purchased is lost by theft, it must first be considered what had been agreed upon between the parties with reference to its safe-keeping. If no agreement appears to have been entered into, the same care in its custody should be required of the vendor as a good head of a household would exercise with regard to his own property. If he used such care, and the property was nevertheless, lost, he will be secure, for he can assign his right of action to recover it, as well as his right of personal action to the purchaser. Wherefore, we must consider the legal position of him who sells property belonging to another, since he is not entitled to an action to recover it, or to a personal action either. On this account he should have judgment rendered against him, because if he had sold his own property, he would have been able to assign these rights of action to the purchaser.

(5) With reference to articles which are determined by weight, number, and measure (as, for instance, grain, wine, oil, and silver) the sale is held to be perfected in these instances as well

as in others, only when an agreement has been made with reference to the price; and sometimes, even when an agreement has been made as to the price, the sale is not considered to have been perfected, unless the articles have been measured, weighed, or counted. For where all the wine, oil, grain, or silver, no matter how much there may be, is sold for a certain price, the same rule applies as in the case of other property.

If, however, the wine was sold in separate jars, and the oil in separate vessels, the grain in separate measures, and the silver in separate weights, a certain price being fixed for each; the question arises at what time was the purchase perfected? This question might also be asked with reference to articles which are counted, where the price was fixed according to a certain number of said articles. Sabinus and Cassius hold that the purchase became complete when the articles were counted, measured, or weighed; because the sale is considered to have been made under the condition that you should measure them in individual vessels, or weigh them pound by pound, or count them one by one.

(6) Therefore, if a flock is sold as a whole, for a certain amount, the sale is held to be perfect after the price has been agreed upon; but if the animals are sold by the head at a certain price for each one, the rules which we have just laid down will apply.

(7) Where wine is sold from a wine-cellar, for example, a hundred measures, it is perfectly true, (and this also seems to be settled) that it will be entirely at the risk of the vendor before it is measured. It makes no difference whether a price has been fixed for the hundred measures, or where one has been agreed upon for each of them.

(8) Where anyone, in selling a tract of land, conceals the name of his neighbor from the purchaser, and the latter, having learned it, should not purchase the property, we hold that the vendor will be liable.

36. *Ulpianus, On the Edict, Book XLIII*.

Where anyone, in making a sale, puts a price on the property which he does not expect to demand, because he intends to donate said property, he is not held to have sold it.

37. *The Same, Disputations, Book III*.

Where anyone sells a tract of land which has descended to him by hereditary right, in the following terms: "You may purchase this land for the same amount for which it was bought by the testator," and it is subsequently ascertained that it was not purchased by the testator at all, but that it was given to him; it is held that the sale was made without any price, and therefore that it resembled one made under a condition, which is void if the condition did not take place.

38. *The Same, Disputations, Book VII*.

Where anyone sells property at a low price for the purpose of making a donation of the same, the sale will be valid; for we hold that a sale made of the entire amount of anything is not valid where this is done solely for the sake of making a donation, but when the property is sold at a lower price on account of a donation, there is no doubt that the sale will be valid.

This rule applies to transactions between private individuals; but when a sale is made at a low price on account of a donation between husband and wife, it is of no force or effect.

39. *Julianus, Digest, Book XV*.

Where a debtor has redeemed property pledged to his creditor, he will not be liable to an action on sale as the purchaser of his own property, and all the rights of his creditor will remain unimpaired.

(1) It is probable that where anyone sells olives which are still hanging on the trees, and stipulates for ten pounds of the oil to be obtained from the same, that he intended to be paid by what is obtained therefrom up to ten pounds of oil. Therefore, if the purchaser can only extract five pounds of oil from said olives, it is held by several authorities that he will not be

liable for more than the five pounds of the oil which he has obtained.

40. *Paulus, Epitomes of the Digest of Alfenus, Book IV*.

A man who sold a tract of land stated in the contract: "That the purchaser should measure the land within the next thirty days, and should give him notice of the measurement, and if he did not do so Within that time, the vendor should be released from his obligation." The purchaser gave notice of the measurement within the stated time, Which was found to be less in extent than he supposed, and on this account he received money from the vendor. He afterwards sold the land, and when he himself was measuring it for his own purchaser, he found that there was very much less land in the tract than he thought there was. The question arose whether the amount of the deficiency could be recovered from his vendor. The answer was that the terms of the contract should be examined. For if it had been stated "That the purchaser should measure the land within the next thirty days, and notify the owner how much was lacking in the measurement," and he notified him after the thirtieth day had passed, it would be of no advantage to him; but if it had been set forth in the agreement "That the purchaser should measure the land within the next thirty days, and notify him of the measurement of the same," even though he notified him that the tract was smaller in size than had been supposed, he could, even after several years, bring an action to recover the value of the deficiency.

(1) In a contract for the sale of land the vendor granted the right to obtain water; and the question arose whether a right of way to the water was also included. The answer was that this seemed to have been the intention of the parties, and therefore that the vendor was compelled to grant a right of way.

(2) A party who sold a field, stated that it contained eighteen *jugera*, and stipulated that after it had been measured he should receive a certain price for each *jugerum*. The field was found to contain twenty *jugera*, and it was held that payment for twenty was due.

(3) The vendor of a tract of land reserved the grain that had been sowed with the hand, and on the tract a crop had grown from grain which had fallen from the stalk. The question arose whether this was included in the contract. The answer was that the intention should be carefully considered, but, according to the terms of the agreement, the intention seemed to be that what had fallen from the stalk should not be included, any more than if it had fallen from the sack of the sower, or had grown from seeds dropped by birds.

(4) Where a party sold a tract of land and reserved the entire crop of the same, it was held that reeds and wood that were cut were included in said crop.

(5) A slave stated that casks which were on land belonging to his master were accessory to the same. It was held that the casks, which had been bought by the slave who had cultivated the land, and which formed part of his *peculium*, should be delivered to the purchaser.

(6) The wheel also by which the water is drawn is a part of the building as well as the bucket.

41. *Julianus, On Urseius Ferox, Book III*.

A certain person attempted to purchase a tract of land from another who had encumbered it, with the understanding, "That it should be considered to be purchased by him, if the vendor released the land, provided he did so before the *Kalends* of July."

The question arose whether he could properly bring an action of purchase founded on such an agreement, to compel the vendor to remove the encumbrance from the land. The answer was that we should ascertain the intention of the purchaser and vendor, for if it had been intended that the vendor should remove the lien from the land absolutely, before the *Kalends* of July, the action on purchase should be brought to compel him to do so, and that the purchase was not understood to be made under a condition; as, for instance, if the purchaser had addressed the vendor as follows: "I will buy your land if you will remove the lien on the same before the *Kalends* of July," or "If you will redeem it from Titius before that date." Where the purchase was made under a condition, proceedings cannot be instituted until the condition has been

complied with.

(1) You sold me a table plated with silver, with the understanding that it was solid, neither of us being aware that it was not. The sale is void, and the money paid on account of it can be recovered.

42. *Marcianus, Institutes, Book I.*

Masters cannot, either themselves or by their agents, dispose of slaves, even if they have been guilty of criminality, for the purpose of having them fight with wild beasts. The Divine Brothers also stated this in a Rescript.

43. *Florentinus, Institutes, Book VIII.*

Whatever is stated, while sales are being made, in praise of the property, will not bind the vendor, if the truth be clearly apparent; as, for example, where the vendor says that a slave is handsome, or a house well constructed. If, however, he should allege that the slave is well educated, or a skilled artisan, he must make his statements good, for he sold the property for a higher price by reason of them.

(1) There are certain promises which do not bind the vendor if the property is in such a condition that the purchaser cannot be ignorant of it; as, for instance, where anyone buys a slave whose eyes have been torn out, and the vendor stipulates with regard to his soundness, for he is held to have stipulated for every other part of his body, with the exception of that in which he deceives himself.

(2) The vendor should warrant that he is not guilty of fraudulent intent; and this not only applies where he speaks ambiguously for the purpose of deceit, but also where he treacherously and artfully dissimulates.

44. *Marcianus, Rules, Book III.*

Where anyone buys two slaves at the same time for one and the same price, and one of them dies before the sale is concluded, the purchase of the one who survives is void.

45. *The Same, Rules, Book IV.*

Labeo states in the Book of Recent Cases that, where anyone purchases, as new, clothing which has been renovated, it is held by Trebatius that the purchaser must be indemnified to the extent of his interest, if he ignorantly bought the renovated clothing. Pomponius also approves of this opinion, in which Julianus concurs, for he says that if the vendor was ignorant that the clothing was not new, he will be liable only for the value of the property itself, but if he was aware of the fact, he will also be liable for damages sustained by the purchaser on that account, just as if he had ignorantly sold a vase plated with gold for a solid one, for he must make good the gold which he sold.

46. *The Same, On Informers*.

It is not lawful for anyone holding a public office to purchase property belonging to the same, either himself or by any other person; otherwise, he will not only lose the property, but he can also be sued for fourfold damages, in accordance with the Constitution of Severus and Antoninus.

This rule applies to the Steward of the Imperial Household. It can only be enforced, however, where permission to make such a purchase has not been expressly granted to the official in question.

47. *Ulpianus, On Sabinus, Book XXIX.*

If the servitude of a water-course is attached to a field, the right to take the water passes to the purchaser, even though nothing had been said with reference to it; just as the pipes through which the water is conducted also do,

48. *Paulus, On Sabinus, Book V*. Even though they are outside the house.

49. *Ulpianus, On Sabinus, Book XXIX.*

And even though the right to take the water does not follow, for the reason that it has been lost; still, the pipes and the ditches, so long as they are connected, belong to the purchaser as a part of the premises. This Pomponius also stated in the Tenth Book.

50. *The Same, On the Edict, Book XI.*

Labeo writes that if you sell me a library on condition that the Campanian Decurions will sell me a site on which I can build it, and I am not to blame for not obtaining the latter, there is no doubt that an action *De præscriptis verbis* can be brought to force me to comply. I think that an action on sale can also be brought, just as if the condition had been fulfilled, since the purchaser is responsible for its not having been done.

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

The banks contiguous to a tract of land which has been sold, are not embraced in the measurement of the latter, because they do not belong to anyone, but are open to all by the Law of Nations; and this also applies to highways, and religious and sacred places. Therefore it is customary to provide for any advantage of the vendor, by expressly stating that highways, the banks of streams, and public places are not included in the measurement of the property.

52. *The Same, On the Edict, Book LIV.*

The Senate decreed that no one should demolish a building in town or country, with a view to obtaining more for it, and that no one should buy or sell any of the materials of the same in the course of trade.

The penalties fixed for those who violate this Decree of the Senate are, that he who made the purchase will be compelled to pay twice the amount of the price into the Public Treasury, and with reference to him who sold the materials, the sale shall be considered void.

It is clear that if you pay me the purchase-money, since you are required to pay double the amount into the Treasury, you can recover the same from me because the sale is void, so far as I am concerned.

This Decree of the Senate becomes operative, not only where a party sells his country seat or his town residence, but also where he sells one belonging to another.

53. *Gaius, On the Provincial Edict, Book XXVIII.*

In order for the property to vest in the purchaser, it is not material whether the price is paid, or a surety given on this account. What we have stated with reference to a surety must be understood to be of wider application where security is given to the vendor for the purchase-money in any way whatsoever; for example, by means of another debtor, or by the delivery of a pledge; and in these instances it is the same as if the price had been actually paid.

54. *Paulus, On the Edict of the Curule Ædiles, Book I.*

Where property is sold in good faith, the sale should not be annulled for a trifling reason.

55. *The Same, On the Edict of the Curule Ædiles, Book II.*

A sale without consideration and imaginary, is considered not to be made at all, and therefore the alienation of the property is not taken into consideration.

56. *The Same, On the Edict, Book L.*

Where anyone sells a female slave under the condition that she shall not be prostituted, and if this is violated he shall have a right to take her back; he will have power to do so, even if the slave has passed through the hands of several purchasers.

57. *Paulus, On Plautius, Book V.*

I purchased a house, both the vendor and myself being ignorant at the time when the sale was

made that it had been burned. Nerva, Sabinus, and Cassius say that nothing was sold, even though the site remained, and that the money which had been paid could be recovered by suit. If, however, any part of the building was left, Neratius says that, in questions of this kind, it is important to ascertain how much of it escaped being consumed, and if the greater portion of the same was burned, the purchaser cannot be compelled to perfect the contract, and can even recover whatever he may have paid.

If, however, half of the house, or even less than half, has been burned, the purchaser will be compelled to comply with the conditions of the sale, after an appraisement of the property had been made in accordance with the judgment of a good citizen; and whatever diminution of value was found to have been occasioned by the fire should be deducted from the amount to be paid by the purchaser.

(1) But if the vendor knew that the house had been burned, and the purchaser was ignorant of the fact, the sale will not stand, if the entire building was destroyed before the transaction took place. If, however, any part of the building remains, the sale will be valid, and the vendor must refund to the purchaser the amount of his interest in what was destroyed.

(2) In like manner, also, the question should be discussed from the opposite point of view, that is, where the purchaser was aware that the house had been burned, but the vendor was ignorant of it; and in this case the sale must stand, and the entire price be paid by the purchaser to the vendor, if this has not already been done, for if it has been paid it cannot be recovered.

(3) Where both purchaser and vendor knew that the house had been entirely, or partially destroyed by fire, the transaction is of no effect, on account of fraud being set off on both sides, and a contract which depends upon good faith cannot stand where both parties are guilty of deceit.

58. *Papinianus, Questions, Book X.*

The purchase of land is not held to have been contracted for where the trees situated thereon have been overthrown by the wind, or consumed by fire, if it was made in consideration of said trees (as, for instance, in the case of olive trees), and this is true, whether the vendor was aware of the fact, or was ignorant of it. For whether the purchaser was aware of it or not, or whether both parties were aware of it, the same rule prevails which, in previous instances, have been laid down with reference to buildings.

59. *Celsus, Digest, Book VIII.*

When you sell a tract of land and do not state that it is in the very best possible condition, the opinion held by Quintus Mucius is correct, namely, that the vendor must deliver the property not free from all encumbrances, but as it was at the time. The same must be said to apply to urban estates.

60. *Marcellus, Digest, Book VI.*

It was included in the terms of a sale of land that the purchaser should be entitled to sixty casks as accessory to the same, and as there were a hundred of these, it was held that the vendor had the power to select those which he wished to furnish.

61. *The Same, Digest, Book XX.*

I think that I can purchase my own property under a condition, because a case might arise where it would cease to be mine.

62. *Modestinus, Rules, Book V.*

Where a person administers a public office in a province, or serves there as a soldier, he cannot purchase land in said province, unless Where property which belonged to his ancestors is sold by the Treasury.

(1) Where a party ignorantly purchases sacred, religious, or pub«© places, supposing them to

belong to private individuals, it is held that the purchase is void; and an action on sale can be brought against the vendor by the purchaser, to recover the amount of the interest he had in not being deceived.

(2) Where property is purchased in bulk, it is done at the risk of the purchaser, provided the vendor is not guilty of fraud, even if the property has not been transferred.

63. *Javolenus, On Cassius, Book VII.*

Where a master orders his slave to sell property to a certain person, and he sells it to another, the sale will not be valid. The same rule applies to a person who is free, since a sale cannot be made to a party to whom the owner was unwilling that the property should be sold.

(1) Where the contents of a tract of land have been described, it is superfluous to mention the boundaries of the adjacent tracts. If they are mentioned, it is also necessary to state the names of the vendors of the same, if any of them should happen to have adjoining land.

64. *The Same, Epistles, Book II.*

"The tract of land is purchased for myself and Titius." I ask whether the sale includes a portion of said land, or the whole of it, or whether it is void? I answered: I think that the mention of Titius is superfluous, and therefore that the purchase of the entire tract is mine.

65. *The Same, Epistles, Book XI.*

An agreement was made between you and myself that you would sell me a certain number of tiles at a special price. What would you do in a case of this kind, would you consider it to be a sale or a lease? The answer was that, if it was agreed I should furnish you with the material for the tiles to be made on my land, I think it would be a purchase, and not a lease; for a lease only exists where the material of which anything is made always remains the property of the same party, but whenever it is changed and alienated, the transaction should be understood to be rather a purchase than a lease.

66. *Pomponius, On Quintus Mucius, Book XXXI. '* In the sale of a tract of land certain things should be guaranteed, even though they may not be contained in the agreement; for example, that the purchaser will not lose the land or the usufruct of the same by the assertion of a superior title.

Again, there are certain things which the vendor is not compelled to provide unless they are expressly mentioned; as, for instance, a right of way, a pathway, a road on which to drive cattle, and a water-course. This rule also applies to urban servitudes.

(1) Where land which is sold is entitled to a servitude, and the vendor did not mention the fact, but, being aware of it, kept silent, and on this account the purchaser of the property, by not making use of the servitude through ignorance during the time established by law, lost it; certain authorities very properly hold that the vendor is liable to an action of purchase on the ground of fraud.

(2) Quintus Mucius says that anyone who mentions raw materials as not appurtenant to a house or a tract of land, states the same thing twice, for raw materials are things which belong neither to a house nor to land.

67. *The Same, On Quintus Mucius, Book XXXIX.*

Where an alienation of property is made, we transfer the ownership of the same to the other party, together with its accessories, that is, in the same condition as if the property had remained in our hands; and this rule applies to all cases under the Civil Law, unless something to the contrary has been expressly stated.

68. *Proculus, Epistles, Book VI.*

If, when you sell a tract of land, you state in the contract that whatever you collect from the lessee as rent, shall belong to the purchaser; I think that you should not only show good faith,

but also exercise diligence in the collection of said rent; that is to say, that you shall not merely avoid all fraudulent intent but also all negligence.

(1) Some persons are accustomed to add these words, "The vendor is without fraudulent intent," and, even if this is not added, there should be no fraudulent intent.

(2) The vendor is not held to be free from fraudulent intent if he performs any act, or anything is done, to prevent the purchaser from obtaining possession of the land. In this instance, therefore, an action on purchase can be brought, not to compel the vendor to deliver the mere possession, since it might happen for many reasons that he could not do so, but in order that, if he has been guilty, or is now guilty of bad faith, an appraisement of damages for the same may be made.

69. *The Same, Epistles, Book XI.*

Rutilia Polla bought the lake at the corner of the Sabatine estate, and ten feet of ground around said lake. I ask if the lake should become larger, whether the ten feet of land due to Rutilia Polla are those which are under water, or the ten feet around the water, after the lake has increased in size? Proculus answered: "I think that the lake which Rutilia Polla bought was sold to her in the condition that it was at the time, with the ten feet of land which then surrounded i±, and because the lake afterwards increased in size she should not be entitled to the possession of more ground than she purchased."

70. *Licinius Rufinus, Rules, Book VIII.*

Many authorities held that the purchase of a freeman could be made, provided the transaction took place among parties ignorant of the facts. It has been decided that the same rule applies even if the vendor knows that this is the case, and the purchaser is ignorant of it; for if the purchaser, knowing a man to be free, buys him, the purchase will be void.

71. *Papirius Justus, Constitutions, Book I.*

The Emperors Antoninus and Verus made use of the following words in a Rescript addressed to Sextus Verus: "It is in the power of the contracting parties to fix the price and the measure of the wine with reference to which they are negotiating, for no one can be compelled to sell if he is not content with the price or the measure of the article; especially where there is no violation of the custom of the country."

72. *Papinianus, Questions, Book XII.*

Where, after the contract is made, the parties deduct something from the property purchased, this is considered to be included in the original contract, but where they make additions, we do not think that these form part of the contract. This takes place where something is added which supports the purchase; for instance where a bond for double the amount is furnished, or where a bond is furnished together with a surety. But in case the purchaser brings an action where the agreement is not valid, and the vendor also brings one, he will also have the right to avail himself of an exception.

The question has very reasonably been asked whether the same rule applies where the price has been subsequently increased, or diminished; since the substance of the purchase consists of the price. Paulus states in a note that where everything remains in its original condition, and an agreement is afterwards made with reference to the increase or diminution of the price, the parties are held to have withdrawn from their former contract, and a new purchase to have been made.

(1) Papinianus says that where a sale is made in the following terms, namely: "This sale shall be void if it has reference to anything sacred, religious, or public," and the property is not in public use, but belongs to the Treasury, its sale will be valid, and the vendor cannot avail himself of an exception because it will not be operative.

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

If a temple is destroyed by an earthquake, the site of the building is not profane, and therefore cannot be sold.

(1) Where ground has been used for a garden, or for some other kind of cultivation, within the wall enclosing a tomb, it is profane and belongs to the purchaser, if the vendor did not expressly except it.

74. *The Same, Definitions, Book I.*

Possession is held to have been transferred where the keys of a warehouse containing merchandise have been delivered, provided they are given up at the said warehouse; and when this is done, the purchaser immediately acquires ownership, and possession of the same, even though he does not open the warehouse; and if the merchandise does not belong to the vendor, the right of usucaption begins immediately to run.

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

Where anyone sells a tract of land, under the condition that he himself should hold it under a lease or payment of a certain sum, or that the purchaser cannot sell it to anyone else but the vendor himself, or where gome similar provision is agreed upon; the vendor has a right to bring an action on sale to compel the purchaser to comply with his contract.

76. *Paulus, Opinions, Book VI.*

Casks which are buried in warehouses are held to have been transferred with the sale of the former, unless they are expressly excepted.

(1) The person who succeeds to the rights of a purchaser can avail himself of the same defence which the purchaser himself could have employed, including even that of prescription based on long possession, if the possession of both purchasers has lasted during the time established by law.

77. *Javolenus, On the Last Works of Labeo, Book IV.*

In a contract for the sale of land, the quarries on said land, wherever they might be, were reserved, and after a long time quarries were found on said land. Tubero gave it as his opinion that they belonged to the vendor; Labeo held that the intention should be considered, arid if this could not be ascertained, the said quarries could not be held to ' have been reserved, for no one would sell or reserve something which was not in existence, and no quarries are in existence unless they are visible and are worked. In case a different interpretation should be given, the entire tract would constitute a quarry if there should happen to be stone under all of it. I approve this opinion.

78. *Labeo, Last Works, Epitomes of Javolenus, Book IV.*

It was stated in a contract that certain water-pipes referred to in a sale belonged to the purchaser. The question arose whether the building from which the water was conducted by the pipes was an accessory? I answered that it appeared that the intention was that it should be an accessory, although this was not contained in the written instrument.

(1) You purchased a tract of land from a certain person, the guardianship of whose son you afterwards administered, but you did not obtain possession of said land. I stated that possession could be delivered to you by causing the ward and his family to leave the premises, and that then you could enter into possession of the same.

(2) A man purchased a tract of land under the condition that possession of it should be delivered to him as soon as the price was paid. He died leaving two heirs, if one of them should pay the entire sum, he could retain his share in an action in partition; but if he only paid a part of the price, he could not bring an action on purchase against the vendor, since a debt contracted in this way cannot be divided.

(3) Where you sell grain which is uncut, and agree to make good any loss sustained by force, or by bad weather, and the said grain is destroyed by snow; if the fall was very great, and

more than what usually took place at that season, an action on purchase can be brought against you.

79. *Javolenus, On the Last Works of Labeo, Book V.*

You sold half of a tract of land on condition that the purchaser would lease you the other half, which you reserved for the term of ten years at a certain rent, payable annually. Labeo and Trebatius deny that an action on sale can be brought, to compel the purchaser to comply with what he agreed to. I am of the contrary opinion, even if you sold the land at a very low price in order that this lease might be made to you; for this is held to be part of the price of the land, since it was sold under this agreement. This is the law at the present time.

80. *Labeo, Last Works, Epitomes of Javolenus, Book V.*

Where a vendor in a sale reserves all crops which have been sowed by hand, those which have been permanently planted are not held to have been reserved, but only such as are usually sowed every year, in order that their yield may be gathered; for, if this was interpreted otherwise, all vines and trees would be held to have been reserved.

(1) I stated that a purchase could not be made of property in the following terms, namely: "I shall enjoy the right to have my house project over yours," and that on this account an action on purchase can be brought.

(2) The right to cut wood was sold for the term of five years, and the question arose to whom the acorns which might fall would belong? I am aware that Servius gave it as his opinion that what appeared to be the intention of the parties must be followed in this instance. If, however, this cannot be ascertained, any acorns which fell from trees, which were not cut down will belong to the vendor, and those which remained on the trees which were cut down, will be the property of the purchaser.

(3) No one can be held to have sold property whose ownership is in question, unless it was delivered to the purchaser; for this is either a lease, or some other kind of a contract.

81. *Scævola, Digest, Book VII.*

Titius, when he borrowed a certain sum at interest, pledged or hypothecated lands, and gave Lucius as surety, whom he promised to release from liability within the next three years, and, if he did not do so at the appointed time, and the surety paid the debt, he directed him to hold, as purchaser, the lands which he had encumbered to his creditors. I ask if Lucius, as surety, should not be released by Titius and should pay the creditor, whether he would be the purchaser of the aforesaid lands? The answer was that if the surety was to have the land as a purchase, and not on account of the obligation, the purchase was made under a condition, and an obligation was contracted.

(1) Lucius Titius promised to furnish a hundred thousand measures of grain annually from his own land to that of Gaius Seius. Lucius Titius afterwards sold his land, and inserted the following words in the contract: "The land of Lucius Titius is sold today, and is to be held subject to the same rights and the same conditions as it is now held by the vendor." I ask whether the purchaser is responsible to Gaius Seius for the delivery of the grain. The answer was that, according to the facts stated, the purchaser is not bound to furnish it.

TITLE II.

CONCERNING A CONDITIONAL SALE DURING A CERTAIN TIME.

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

A conditional sale during a certain time is made as follows: "Such-and-such a tract of land is considered to be purchased by you, unless before the first *Kalends* of next January, I can obtain better terms by which I can relinquish the ownership of the same."

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

Whenever land is sold for a certain period, it should be determined whether the sale is absolute, or under some condition, and inquiry should be made whether it is not undoubtedly conditional. It seems to me to be the better opinion that the interpretation of the contract depends upon what was the intention of the parties, for if it was understood that the sale should be annulled if more advantageous terms were offered, the purchase is absolute, and will be rescinded if the condition takes place. If, however, the intention was that the purchase should be perfected if better terms were not offered, the purchase will be a conditional one.

(1) Therefore, where, in accordance with the distinction which we have made, the sale is absolute, Julianus states that he to whom the property was sold under such conditions, can acquire it by usucaption, and has a right to the crops and all the accessories, and the loss will be his if the property should be destroyed.

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

Since, after the destruction of the property the condition of the vendor cannot be improved.

4. *Ulpianus, On Sabinus, Book XXVIII*.

Where a sale is conditional, Pomponius denies that the purchaser has the right of usucaption, and that the crops do not belong to him.

(1) Julianus asks the following question in the Fifteenth Book, namely: If during the time appointed for the sale the property should be destroyed, or a female slave should die, can the addition of her offspring or of the profits be allowed on this account? Julianus denies that this can be done, because it is not customary for the addition of property, other than of that which was sold, to be allowed.

(2) Julianus also asks in the same Book. If two slaves have been sold for twenty *aurei* conditionally, for a certain time, and one of them flies, and afterwards a purchaser appears to buy the surviving slave, and makes an offer of more than twenty *aurei*, will the first contract be annulled? He says that this example is different from the one relative to the offspring of the slave, and therefore, that, in this instance, the first purchase is rescinded, and the second may be concluded.

(3) Marcellus, however, states in the Fifth Book of the Digest that, where a tract of land is sold subject to the condition of a better offer, and the latter is made, if the purchaser has pledged the property, it will cease to be encumbered; for which it may be inferred that the purchaser is the owner during the intermediate time, otherwise the pledge will not be valid.

(4) Julianus also says in the Eightieth Book of the Digest, that he who purchases land dependent upon better terms being offered within a certain time, can avail himself of the interdict *Quod vi aut clam*, for he is entitled to this interdict whose interest it is that such an event should not take place.

He says, however, that where land is sold under such a condition, both its advantages and disadvantages belong to the purchaser before a sale is made to a third party; and therefore that, if any forcible or clandestine act is performed, the first purchaser will be entitled to an interdict, even though better terms had been offered; but he also says that he can bring this action, just as he can claim the crops which he has gathered from the property sold.

(5) Therefore, where the sale is annulled after having been absolutely made, or where the condition under which it was contracted is not complied with, if better terms are offered, (on the supposition that there is a spurious buyer), Sabinus very properly states that the property belongs to the first purchaser, because better terms do not seem to be offered, as another genuine purchaser did not appear. Where, however, another purchaser appears, but does not offer better terms than the former one, it must also be said that everything remains in the same condition as if he had not appeared.

(6) Better terms are held to be offered where an addition is made to the price. If, however, the price is not increased, better terms are held to be offered if the payment of the price is

rendered more easy, or is made sooner. Again, if a more convenient place for payment is mentioned, better terms are also held to have been offered, and this Pomponius stated in the Ninth Book on Sabinus.

He also says that better terms are likewise held to have been offered if a more solvent party presents himself as a purchaser. Hence, if another purchaser is willing to give the same price, but agrees to buy the property under less onerous conditions, or does not require security, better terms are held to be offered.

The same opinion must be approved if he is ready to purchase the property for a lower price, but releases the vendor from conditions which were burdensome to him in the first transaction.

5. *Pomponius, On Sabinus, Book IX*.

For whatever contributes to the convenience of the vendor should be considered as affording more advantageous terms.

6. *Ulpianus, On Sabinus, Book XXVIII*.

Moreover, what has been stated, namely, that the crops gathered in the meantime belong to the first purchaser, is only true so long as a purchaser does not appear who offers better terms, or where one who does appear is proved to be false. If, however, another purchaser appears, it is settled that the first one must return the crops to the vendor; and this Julianus stated in the Forty-eighth Book of the Digest.

(1) Where anyone appears who offers better terms, and then the first purchaser bids against him, and the property remains in his hands; it may be doubted whether he is entitled to the crops, as he would have been if no better terms were offered; or whether they belong to the vendor, even though the first purchaser is the one who made the better offer. I think that the last conclusion seems to be reasonable, but still, it is important, as Pomponius says, to ascertain what was the intention of the parties.

7. *Paulus, On Sabinus, Book V*.

The vendor can adjudge the property to the last purchaser, where better terms are offered, unless the former is ready to bid a larger sum.

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

The vendor is required to notify the first purchaser, where better terms are offered, so that, if the other has increased the price, he can do so likewise.

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

Sabinus says that the vendor can reject the better terms offered, and adhere to the first proposal, if he considers it preferable, and we have adopted this rule. But what should be done, if the intention of the parties had been expressly stated to be that the purchaser could withdraw his offer in case a better one was made? It must be said that the first purchase is annulled, even if the vendor does not accept the second one.

10. *Julianus, Digest, Book XIII*.

Where, however, a pledge has been sold by a creditor in the case of a conditional sale, he cannot be held to have acted in good faith, if he does not accept the increased price. But what if the new purchaser was poor, and had intervened only for the purpose of preventing the sale? The creditor can adjudge the property to the first purchaser without incurring any risk.

11. *Ulpianus, On Sabinus, Book XXVIII*.

The opinion of Sabinus, namely, that land cannot be sold a second time where it is subject to a condition of this kind, he defends by the following argument. He holds that the land at once became the property of the first purchaser, just as if better terms were not offered

when it was not adjudged positively to the second purchaser, but only with the view to another bidding up the price. Julianus, however, says in the Fifteenth Book of the Digest, that the intention of the contracting parties is a matter of much importance, and that there is nothing to prevent the land from being frequently transferred, provided this is done by the vendor after the first, second, or third bid.

(1) Sabinus also says that, where of three vendors two adjudge the property to the last purchaser, but one did not consent that this should be done, the share of the latter will belong to the first purchaser; and this is true where the vendors sold their shares to different parties,

12. *Pomponius, On Sabinus, Book IX.*

Even though the shares of the vendors were unequal.

13. *Ulpianus, On Sabinus, Book XXVIII.*

Where all three parties sold their shares at the same price, it must be said that the entire property belongs to the first purchaser; just as if someone had sold me an entire tract of land for a time under this condition, and afterwards had adjudged half of it to another party at a higher price.

Celsus states in the Eighth Book of the Digest, that Mucius, Brutus, and Labeo were of the same opinion as Sabinus. Celsus also approves this opinion, and he adds that he is surprised that it had been remarked by no one that if a first purchaser had made a contract with the understanding that he was unwilling to make the purchase unless the entire property was included, he could not be compelled to buy that portion which one of the joint-owners refused to adjudge to a subsequent purchaser.

(1) It is true, however, that one of the vendors can himself offer better terms, because we can also purchase our share along with the remainder of the entire property.

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

If a vendor pretends that better terms have been offered, while, in fact, the price was lower; and he should sell the property to the party for this, or for the same that had been previously offered, he will be liable to both purchasers for the entire amount.

(1) Where the purchaser provides another who is not solvent, and the land is adjudged to him, Sabinus says, "I do not see how the property can be purchased by the former, since another and a genuine sale has subsequently been made." It is true, however, that where the vendor has been deceived, he will be entitled to an action on sale against the first purchaser, to the extent that he was interested in not having this done. By means of this action, the vendor will recover the crops which the first purchaser gathered, as well as damages to the extent that the property was deteriorated by the negligence or fraudulent acts of the latter. This opinion was also held by Labeo and Nerva.

(2) But where neither of the parties provided the new purchaser, but the land was adjudged to him on account of the larger amount which he offered, even though he may not be solvent, the first purchase is annulled; because what the vendor approved is understood to be more advantageous, since he had the right not to adjudge the property to the last purchaser.

(3) Where, however, a ward purchases property at a higher bid, without the authority of his guardian, if the vendor accepts his bid the first purchase will be annulled; and the same rule applies to the case of a slave belonging to another.

It would be otherwise, however, if the vendor, through mistake, should adjudge the property to his own slave, or to his son who is under his control, or to the owner of the property himself, because there can be no sale under such circumstances. On the other hand, if he should adjudge the property to the slave of another whom he believed to be free, he would be liable; and the case will be similar to that of an insolvent debtor.

(4) Where a purchaser offers better terms, he acquires nothing except the property which is

sold.

(5) Still, however, better terms are not offered where another party is willing to pay the same price, because he does not obtain the crops which belonged to the first purchaser, since these are not the object of the transaction between a second purchaser and the vendor.

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

Where land has been sold conditionally in this manner, and the vendor dies before the expiration of the time, or his heir appears afterwards, or does not appear at all, the land will belong to the first purchaser; because it cannot be understood that better terms have been offered which would be accepted by the owner, since he who sold the property is no longer living. Where, however, the heir appears before the expiration of the time, better terms can be offered to him.

(1) When a tract of land is sold subject to a condition of this kind, and more has been paid for it with the understanding that such accessories as have not been received by the first purchaser shall be delivered to the second; if these accessories are not less in value than the increase of price of the second sale, the former sale will be valid, because, if they are less, the terms of the second sale will not be more advantageous than those of the first.

A similar estimate should also be made where a longer time for -payment is granted the second purchaser, in order that the calculation of the interest may be made for the additional time.

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

The Emperor Severus stated in a Rescript: "Just as where a house is sold under a condition in this manner, the profits must be restored to the vendor, in case of a better offer; so he will be entitled to retain

the income from the property where he shows that it is not sufficient to pay the necessary expenses which the first purchaser proves that he has incurred in the meantime." I think that the Emperor had the action on sale in his mind.

17. *Julianus, Digest, Book XV*.

Where two slaves have been thus conditionally sold separately for ten *aurei*, and someone appears who says that he will pay thirty for both; it should be ascertained whether he wishes to add ten to the price of one, or five to the price of each. In the first instance, the slave to whose price the addition is made, will not be bought by the first purchaser, and, in the second instance, both slaves will belong to the second. If it is uncertain to the price of which one an addition is made, it will be held that the first purchase is not annulled.

18. *Africanus, Questions, Book III*.

Where a tract of land has been sold conditionally in this manner to two partners, and one of them increases the price, it is very properly held that the first sale is annulled, even with reference to the share of the party who increases the amount.

19. *Javolenus, On Plautius, Book II*.

Where a tract of land has been sold dependent upon a better offer being made, and a higher price is subsequently offered, and the vendor adjudges the said tract to the second purchaser, together with another adjoining it, and does this without fraudulent intent; he will not be liable to the former purchaser, even though he not only sold him what was included in the offer at a higher price, but also another tract; still, if the vendor was not guilty of fraud, the transaction with the first purchaser is at an end, for it should only be considered whether the transfer to the second purchaser was made in good faith.

20. *Papinianus, Opinions, Book III*.

The first purchaser, after better terms have been offered by another, cannot bring an action

against the second for the money paid to the vendor, unless in compliance with the terms of the stipulation a substitution was made of the second purchaser for payment.

TITLE III.

CONCERNING THE CONDITIONAL ANNULMENT OF A SALE.

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

Where a tract of land is sold conditionally on the payment of the purchase-money, it is held rather to be annulled under a condition, than to be contracted under one.

2. *Pomponius, On Sabinus, Book XXXV.*

Where the vendor of a tract of land provides in a contract that if the money is not paid at the appointed time the property shall not be considered sold, the latter clause is understood to mean if the vendor wishes that it should not be sold, because this provision is made for his benefit. For if it was understood in another sense, and the house which was purchased should be burned, the purchaser would have it in his power, by not paying the money, to annul the sale of property which was at his own risk:

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

As the clause relative to the annulment of the sale in case of non-payment, which is inserted in the contract, is dependent upon the will of the vendor, for, if unwilling to do so, he cannot be compelled to carry it into execution.

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

Where a tract of land has been sold conditionally upon payment of the purchase-money, that is to say, that the sale will be void if the price is not paid within a certain time; let us consider in what way the vendor can proceed with reference to the land as well as the profits which he has received therefrom, and also in case the land has become deteriorated through the act of the purchaser. The purchase, indeed, is at an end, but it has already been decided that an action on sale will lie, as is stated in the Rescripts of the Emperor Antoninus and the Divine Severus.

(1) What Neratius says is, however, reasonable, namely, that sometimes the purchaser is entitled to the profits when he loses the price which he paid. Therefore, this opinion of Neratius, which is just, applies when the purchaser has paid a certain portion of the purchase-money.

(2) Papinianus very properly says in the Third Book of Opinions that as soon as the clause in the contract becomes operative, the vendor must determine whether he wishes the sale to be annulled, or whether he will demand the price; for if he chooses to annul the sale, he cannot afterwards adopt a different course.

(3) It is customary in a sale of this kind to also agree, "That if the vendor should sell the same tract of land, he can collect from the first purchaser the amount of the deficiency in the price." Hence, in this instance, an action on sale can be brought against a first purchaser.

(4) Marcellus, in the Twentieth Book, is in doubt whether a contract of this kind is operative where he who is notified to pay does not do so, or where, in fact, he does not tender the money. I think the better opinion is that he should tender it, if he wishes to be released from liability on the contract of sale. If, however, no one should appear to whom he can tender it, he will be secure.

5. *Neratius, Parchments, Book V.*

Where it is stated in the contract for the sale of land that if the price is not paid within a certain time, the property will not be considered sold; it must be understood to be the intention that the purchaser shall, in the meantime, be entitled to the crops of said land, but if it is restored to the vendor, Aristo is of the opinion that an action for the recovery of the crops

should be granted to him against the purchaser, because nothing derived from the property should remain in the hands of the party who has not complied with his contract.

6. *Scævola, Opinions, Book II*.

Having been interrogated with reference to a contract for the sale of land dependent upon payment, I answered that, if anything was done by the purchaser to prevent the execution of the contract, and the vendor wishes to enforce it, the land would remain unsold; and whatever had been paid by way of earnest, or for any other reason, should remain in the hands of the vendor.

(1) The same opinion was given that, where the land remained unsold on account of non-compliance with the contract, whatever might be classed as accessories should not remain in the possession of the purchaser.

(2) A vendor received the remainder of the purchase-money after the day mentioned in the contract of sale. The opinion was that the vendor should be considered to have renounced the privilege of the contract, if he did not enforce its execution, and receive the balance of the money due after the day fixed for its payment.

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

If the vendor demands the price, after the time mentioned in the contract for its payment has elapsed, he is held to have renounced the benefit of said contract, for he cannot do otherwise and have recourse to the contract.

8. *Scævola, Opinions, Book VII*.

A woman sold certain lands to Gaius Seius, and received a sum of money by way of earnest, a time having been fixed for the payment of the remainder of the amount; and it was agreed that if the purchaser should not comply with the terms of the contract he should lose the earnest, and that the property should remain unsold. Upon the appointed day the purchaser, in the presence of witnesses, offered to pay the balance of the purchase-money, and sealed the bag containing the same with the seals of all the parties, but the vendor was not present. The next day the purchaser was notified by the Treasury, in the presence of witnesses, not to pay the woman until a claim of the Treasury was satisfied. The question arose whether, in this instance, the lands should not be recovered by the vendor in accordance with her agreement.

(1) The answer was that, in accordance with the facts stated, the purchaser had not committed any act in violation of the contract of sale.

TITLE IV.

CONCERNING THE SALE OF AN ESTATE, OR OF A CLAIM.

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

If the right to inherit an estate is sold during the lifetime of the party who owns it, or if it is sold where it is worthless, the sale is void, because there was nothing in existence which could be sold.

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

The vendor of a right to an estate is not compelled to give security against recovery by a better title, for the implied understanding between the purchaser and the vendor is that the former should have nothing more or less than the heir would be entitled to. It is clear that the vendor can be compelled to give security for what actually conies into his hands.

(1) Where a right of succession is sold, should it be considered whether an account is to be taken of the amount of the estate at the time of the death, or when the estate was entered upon, or of the assets when the sale took place? The better opinion is that the intention of the parties should be carried into effect, and it is generally held that the intention was that whatever formed part of the estate at the time when the sale was concluded is considered to be sold.

(2) It may also be asked whether, when the person who sold the estate of the testator was himself substituted for a minor heir, what came into the hands of him who sold the estate from the inheritance of the minor heir would afford ground for an action on purchase. The better opinion is that it would not be included, because the estate of a minor is different from that of his father, for, although there is but one will, there are, nevertheless, two estates. It is evident that if this was the intention, it must be held that the estate of the minor is also included in the sale; above all, if the right of inheritance was sold while the succession of the minor was still intact.

(3) A question arises as to the construction of this clause, namely: "Whatever has come into the hands of the heir who sells his right of inheritance."

It is my opinion that it applies to a case where the vendor has not yet obtained any of the property belonging to the estate, and that he has only acquired the privilege of assigning his rights of action to the purchaser, for where he has obtained possession of the property of the estate, or has collected debts due to the same, it is held that the property has come into his hands in a broader sense.

Where, however, he has obtained the price of property sold before the sale of his right of inheritance, it is clear that the price of said property has come into his hands. This should be retained by him, since it seems to have actually come into his possession, and not at first sight would merely appear to have done so; and therefore what he has paid by way of legacies is not considered to have come into his hands. Moreover, where there is any indebtedness, or other burden of any kind attaching to the estate, it is very properly said not to have come into his hands. The demands of equity, however, require the heir to pay to the purchaser the value of any property belonging to the estate which he gave away before the sale.

(4) Again, not only what has come into the hands of the vendor of the right to a succession, but also whatever has come into the hands of his heir from the estate must be delivered to the purchaser; and not only what he has already obtained, but also whatever may, at any time hereafter, come into his possession must be given up.

(5) Moreover, where any act has been committed through the fraudulent intent of the parties to prevent property from coming into the hands of the heir, this also must be made good to the purchaser. He is held to have been guilty of malicious intent to prevent property from coming into the hands of the heir who alienates any of the assets of the estate; or releases a debtor from liability by means of a receipt; or fraudulently prevents possession thereof from being acquired, where this can be done. A party is also liable not only where he has committed an act with fraudulent intent, but also where he has been guilty of gross negligence. Anything, however, that has been lost or depreciated without fraudulent intent on the part of the vendor, will not have to be made good.

(6) The question has been asked whether the vendor of the right of succession to an estate should be accountable to the purchaser for a debt due from his son who was under his control, or from his slave, to the party, the right to whose estate he sold? It is held that he should account to him only for what was ascertained to have belonged to the *peculium* of his son, or was used for the benefit of his own property.

(7) The question is often asked whether, where the vendor of the right to an estate has obtained any profit by reason of the same, he must make this good to the purchaser? This point is discussed by Julianus in the Sixth Book of the Digest. He says that the heir can retain whatever he may have collected that was not due, and that he will not be held accountable where he has paid what was not due; for the rule that the heir is not required to make good to the purchaser a debt which he collected that was not due must be observed, and that he cannot collect from him anything which he paid when it was not owing. If, however, the heir should make payment after judgment has been rendered against him, it will be sufficient for him that he suffered an adverse decision without any fraud on his part, even though the creditor was not the party in whose favor the decision was rendered. I concur in this opinion.

(8) It must be said that the heir should assign to the purchaser not only any rights of action belonging to the estate, but also such obligations as the heir himself has contracted for his own benefit, and which he derived from the estate; therefore, if the heir has accepted a surety from a debtor to the estate, he should assign to the purchaser any claim which he may have against said surety. Where, however, he has renewed the obligation, or instituted judicial proceedings with reference to it, he must assign the right of action which be has obtained.

(9) As all the profits of the succession to an estate are acquired by the purchaser, so also he must bear any loss growing out of the same.

(10) Hence, if an heir should sell the right of succession to an estate, and, in consequence, should have judgment rendered against him, he will not be entitled to an action against the purchaser; as the decision was rendered against him, not because he was the heir, but for the reason that he had made the sale. Let us see, however, if he pays to the purchaser of the succession the price received for the property sold, whether there will be ground for an action on sale. I think that there will be.

(11) Where the vendor himself gave something on behalf of the estate, or his agent, or anyone else who was transacting his business did so, there will be ground for an action on sale; provided anything was paid out of the property of the vendor of the right of succession. If, however, the vendor was at no expense on his own account, it must be held, in consequence, that an action in his favor will not lie.

(12) It is stated by Julianus that, if the vendor of a right of succession reserves a slave without his *peculium*, and an action *De peculio* is brought against him on account of said *peculium*, or he is sued for money expended for the benefit of the property of the deceased; that can only be recovered which he would have paid on account of said *peculium* and would have passed to the purchaser, or the amount which had actually been expended on the property of the deceased; for, in these instances, he has paid the debts of the purchaser, and. in all others, the vendor will have judgment rendered against him in his own name.

(13) What then, if the vendor of the right of succession to an estate should reserve a slave together with his *peculium* and an action was brought against him on the *peculium*, would he be compelled to pay? Marcellus holds in the Sixth Book of the Digest, that this cannot be recovered from him, provided the intention of the parties was that the vendor should be entitled to what remained of the *peculium*, after Payment of the claim. If, however, the intention was different, he very properly says that the purchaser can bring an action against him for its recovery. Where nothing was expressly agreed upon between the Parties, but mention was only made of the *pecidium*, it is established that an action on sale will not lie.

(14) Where the vendor of the right of succession to an estate reserves a house, on account of which security has been given for the prevention of threatened injury, the intention of the parties is a matter of importance; for if the reservation was made in such a way that he must sustain the burden of the loss, as well as that of the security against injury, nothing can be recovered from the purchaser; but if the intention was that the purchaser should pay this debt, the burden of the stipulation will rest upon him.

If the intention cannot be ascertained, the probability is that it was understood that the responsibility for any injury which occurred before the sale was made will rest upon the purchaser, but that what may occur at any other time must be assumed by the heir.

(15) If Titius should sell to Seius his right of succession to the estate of Mævius, and, having afterwards been appointed the heir of Seius, sells his right of succession to Attius, can an action be brought against Attius on the ground of the former sale? Julianus says that whatever the vendor of the right of succession can recover from any foreign heir, he can recover from the purchaser of the right of succession. It is clear that if another heir of Seius should appear, whatever the vendor has paid on account of the estate of Mævius he can recover from the said heir in an action on sale; for if I have stipulated with Seius for double the amount of the value of a slave, and I become his heir, and sell the estate to Titius, and the slave is acquired by

someone else through a better title, I will have to make good the property to Titius.

(16) Where the vendor of the right of succession to an estate has paid anything by way of public taxes, it must consequently be said that the purchaser will be required to make this good to him, for these are burdens constituting a charge on the estate. And if the heir should happen to pay anything on account of duties, the same rule will apply.

(17) If, after the funeral has taken place, the heir should sell his rights to the estate, can he recover the funeral expenses from the purchaser? Labeo says that the purchaser must refund the funeral expenses, because they, also, are part of the liability of the estate. Javolenus thinks that this opinion is correct, and I agree with him.

(18) Where anyone becomes the heir to a debtor, he ceases to be a creditor, through confusion. If, however, he should sell his right of succession to the estate, it is held to be perfectly just that the purchaser should occupy the place of the heir, and therefore be liable to the vendor either for what the testator owed at the time of his death, (although his indebtedness ceased when the vendor entered upon the estate), or for what was owing within a certain time, or under some condition, after the condition had been complied with; provided, nevertheless, that an action will lie against the heir of the debtor, for an action should not be brought against a purchaser on any ground on which it could be brought against an heir.

(19) Where an appointed heir loses any servitudes, through entrance upon an estate, he can bring an action on sale against the purchaser to compel him to restore said servitudes.

(20) If, however, the vendor has not yet paid anything, but has bound himself in any way whatsoever on account of the estate, he can, nevertheless, proceed against the purchaser.

3. *Pomponius, On Sabinus, Book XXVII.*

Where the vendor of an estate loses money belonging to the latter which he has collected, without being guilty of fraud or negligence, it is held that he will not be liable to the purchaser.

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

Where a claim is sold, Celsus states, in the Ninth Book of the Digest, that the vendor is not obliged to guarantee the solvency of the debtor, but only that he is a lawful debtor; unless something else has been agreed upon.

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

And this is the case without any exception, unless the intention was otherwise. If, however, a party is alleged to be a debtor for a certain sum, the vendor will be liable for that amount; but if the sum is said to be uncertain, and nothing is due, he will be liable to the amount of the interest of the purchaser,

6. *The Same, Questions, Book V.*

The right of action for the recovery of a pledge should also be assigned to the purchaser, even where the pledge has been received by the vendor after the sale; for the advantages of the vendor must accrue to the purchaser.

7. *The Same, On Plautius, Book XIV.*

Where a party sells the right of succession to an estate, there must actually be an estate in order that a purchase may take place; for, in this instance, a purchase is not made by chance, as in hunting, and other cases of this kind; since, where there is no property, a contract for purchase cannot be made, and therefore the price can be recovered by an action.

8. *Javolenus, On Plautius, Book II.*

Where the vendor has no right of succession to an estate, in order to ascertain how much he should pay the purchaser, a distinction must be made, namely: where a right of succession, in fact, exists, but does not belong to the vendor, it should be appraised; but if there is no right of

succession at all, with reference to which the agreement appears to have been made, the purchaser can recover from the vendor only the price which he paid, and any expenses which he incurred on account of the property.

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

And whatever interest the purchaser had in having the sale concluded.

10. *Javolenus, On Plautius, Book II*.

If it was agreed upon in the sale of the succession to an estate that any rights of the vendor should be sold, but that afterwards nothing should be guaranteed by him, and even though the right of succession did not belong to the vendor, he would, nevertheless, not be liable on this account, because it was manifestly the intention that as any profit arising from the transaction would belong to the purchaser, he must also bear the risk.

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

For it is admitted that a sale of the right of succession to an estate can be made in the following terms: "If I have any rights in the estate they are sold to you," just as if the expectation of a right was purchased; for a sale in this way can be made of anything that is uncertain, as for instance, of whatever may be caught in a net.

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

But this should be understood to be operative only where a party is not aware that he had no right to the succession which he sold; for if he did, he would be liable on the ground of fraud.

13. *Paulus, On Plautius, Book XIV*.

If a right to a succession exists, although it has not been agreed upon that the purchaser shall be entitled to all the rights which the vendor possessed, then the latter must guarantee that he is the heir. If this is inserted in the contract, the vendor will be released, if it should be ascertained that he has no right to the succession.

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

Where anyone sells claims against a son under paternal control, he must also assign any rights of action which he has against the father of the debtor.

(1) Where the right of succession to an estate is sold, the vendor shall deliver the property belonging to the same; and it makes no difference what its value is.

15. *Gaius, On the Provincial Edict, Book X*. Unless the vendor has stated the amount.

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

Where you, as an heir, sell the right of succession to an estate, since the estate must be restored to you in accordance with the Trebellian Decree of the Senate, you will be liable to the extent of the purchaser's interest.

17. *Ulpianus, On the Edict, Book XLIII*.

We are accustomed both to purchase and sell claims due from debtors under certain conditions, or which are payable within a certain time; for this is property which can be purchased and sold.

18. *Julianus, Digest, Book XV*.

If one of several heirs should pay all of a sum of money which was due from the testator under a penalty, before the other heirs had entered upon the estate, and should afterwards sell his right of succession to said estate, and he is unable to recover anything from his co-heirs on account of their property, he can properly proceed against the purchaser of the right of succession, either on the ground of the stipulation, or on that of sale, since it is manifest that all the money was paid by him on account of the estate, for the same principle applies as in a

suit for partition, by which each of the heirs can recover nothing more than what he expended in the capacity of heir.

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

It makes a great deal of difference whether a claim is sold under some condition, or whether the obligation is incurred under a condition and the sale is absolute. In the first instance, if the condition is not fulfilled, the sale is void; in the second, the sale is made as soon as contracted; for, if Titius owes you ten *aurei* under some condition, and I purchase his note from you, I can immediately bring an action on sale to compel you to release him.

20. *Africanus, Questions, Book VII*.

If you should sell me your right to the succession of Lucius Titius, and you afterwards become the heir of his debtor, you will be liable to an action on sale.

(1) This is much more simple in the case where a party becomes the heir of his creditor, and sells his right of succession to the estate.

21. *Paulus, Questions, Book XVI*.

A vendor sold to a party his right of succession to an estate, and agreed by a stipulation to transfer to him everything belonging to the estate. The question arose as to what he ought to deliver in accordance with the stipulation; for a stipulation is, by no means, doubly binding, so that both the property and the price are due. And, in fact, if the party afterwards sold the property, and the stipulation was entered into, we think that the price is included in the stipulation. If, however, the stipulation was made beforehand, and the party then obtained the property, in this instance, he will owe the property. If he should sell a slave, and the latter died, would he owe the price of said slave? If he who had promised Stichus should sell him, the slave being dead at the time, he would not owe the price if he had not been in default.

Where, however, I sold the right of succession to an estate, and afterwards disposed of property belonging to the same, it will be held that I was transacting the business of the purchaser, rather than that of the estate. But this does not apply to a case where any particular property is concerned, for if I sell you a slave, and, before he is delivered, I sell him again to a third person, and receive the price, and the slave dies; let us consider whether I do not owe you something on account of the purchase, since I was not in default in making delivery, for the price of the slave that was sold to the second purchaser was not collected on account of the property, but on account of the transaction; and hence the result is just as if I had not sold the slave to another, for I will owe you the property, and not the right of action against the second purchaser.

Where, however, a right to the succession of an estate is sold, it is held to be tacitly agreed that if I do anything as heir, I must make it good to the purchaser, in the same way as if I was transacting his business; just as the vendor of a tract of land is obliged by considerations of good faith to surrender the crops, even though he were not at all to blame for neglecting to harvest crops belonging to another, unless he could be called to account for negligence.

But what if I sold property while another party was in possession, and I accepted the damages appraised, would I owe the party the property or the price of the same? I would certainly owe him the property, for I would not be compelled to transfer to him my rights of action but the property itself. If I was deprived of the property by force, or had been condemned to pay double damages on account of an action for theft, this would not in any way affect the purchaser, for if the vendor ceased to hold possession of the property without his fault, he would be obliged to assign his rights of action and also the damages he received, but not the property; and in case a building was consumed by fire, he ought to transfer the ground on which it stood.

22. *Scævola, Opinions, Book II*.

The vendor of the right of succession to an estate received a portion of the price, but the

purchaser did not pay him the remainder. The question arose whether the property belonging to the succession could be held on the ground of pledge? I answered that there was nothing in the facts stated to prevent it from being so held.

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

The vendor of a claim which he has against a principal debtor is obliged to transfer every right of action arising out of the same, not only against the debtor himself, but also against the sureties of said claim, unless it was otherwise agreed upon.

(1) The vendor of a claim is compelled to deliver intact to the purchaser whatever he has obtained, either by way of set-off, or through collection.

24. *Labeo, Last Works, Epitomes of Javolenus, Book IV*.

You sold your right of succession to the estate of Cornelius; then Attius (to whom Cornelius bequeathed a legacy with which you, as heir, were charged) before he received the legacy from the purchaser, died, making you his heir. I think that an action on sale can properly be brought by you in order that payment of the legacy may be made to you, because the right of succession was sold at a lower price in order that the purchaser might pay the legacy; nor does it make any difference whether the money was due to Attius, who appointed you his heir, or to the legatee.

25. *The Same, Probabilities, Book II*.

Where the right of succession to an estate is sold with the exception of a tract of land belonging thereto, and then the vendor acquires something on account of said tract of land, he must surrender it to the purchaser of the right of succession. Paulus says that, in an instance of this kind, inquiry must always be made as to the intention of the parties. If, however, this cannot be ascertained, the vendor must transfer the property which has been acquired by him in this way to the purchaser; for it appears to have come into his hands on account of the succession, and not otherwise; just as if in disposing of the succession he had not excepted the said tract of land.

TITLE V.

CONCERNING THE RESCINDING OF A SALE, AND WHEN IT IS PERMITTED TO WITHDRAW FROM A PURCHASE.

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

Celsus, the younger, was of the opinion that if a son under paternal control should sell me property which formed part of his *peculium*, even though an agreement was made that the sale should be annulled, it ought to be entered into between the father, the son, and myself; for if I made the agreement with the father alone, the son would not be released from liability; and it was asked whether such a contract would not be absolutely void, or whether, in fact, I would not be released and the son remain bound; as, for instance, in the case where a ward made a contract without the authority of his guardian, he himself would be released, but the party with whom he made the contract would not be. For what Aristo stated is not true, namely, that a contract could be entered into so that only one of the contracting parties would be liable, because one of them cannot annul an agreement for a sale; therefore, if the contract is renewed by one party, it is held that such an agreement is not valid. It must, however, be said that where a father makes a contract, and the other party is released from liability, the son will also be released at the same time.

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

If, after I have purchased something from you, I again purchase it from you at a higher or a lower price, we are understood to have annulled the first sale; for the sale is still held to be incomplete by our agreement while matters remain unchanged, and thus the subsequent sale will stand, just as if no other had preceded it. But we cannot apply the same principle if the

sale is renewed after the price was paid, because after it was paid we could not render the sale incomplete.

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

Purchase and sale are contracted by common consent, and so they can also be rescinded by common consent before the transaction has been concluded. Therefore, the question arose as to whether the obligation could be rescinded by the mere will of the parties, if the purchaser has accepted a surety, or the vendor had entered into a stipulation. Julianus says that then, indeed, an action on sale would not lie, because exceptions based on the contract are included in a *bona fide* agreement. It should be considered, however, whether an exception would be available to release the surety. I am of the opinion that if the principal should be released, the surety will be also. The same rule applies where, if the vendor institutes proceedings on the ground of the stipulation, he can be barred by an exception. The law is also the same where the purchaser has included the delivery of the property in the stipulation.

4. *Paulus, Notes on the Digest of Julianus, Book VIII*.

Where a contract was for the purchase of a toga, or a dish, and the vendor agreed that one of said articles should not be sold, I think that only the obligation with reference to said article is rescinded.

5. *Julianus, Digest, Book XV*.

Where the purchaser released the vendor or the vendor released the purchaser from liability, it seems to be the intention of both parties that the transaction should be at an end; and the result is the same as if it had been agreed between them that neither should claim anything from the other. It is, in this case, however, more evident, that the release is not valid on account of its nature, but through the force of the agreement.

(1) A sale is annulled by the mere agreement of the parties, if the transaction has not been concluded.

(2) Where a slave that has been sold dies, the sale is held to be in the same condition as if he had been delivered; that is to say, the vendor is released from liability, and the loss of the slave must be borne by the purchaser. Wherefore, unless some other lawful agreement has been entered into, actions on purchase and sale will lie.

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

If it was agreed between the parties that the property which was sold be returned within a certain time, if it did not suit, Sabinus thinks that an action on purchase will lie, or that one *in factum*, resembling an action on purchase, should be granted.

7. *The Same, Questions, Book V*.

If I purchase a second time, under a condition, something which I have already purchased absolutely, the subsequent purchase is void.

(1) Where a ward personally makes a contract without the authority of his guardian, and afterwards makes a purchase with his consent, although the vendor is already bound by a contract with him, still, because the ward is not liable, the sale is renewed in order that they may be mutually bound. If the authority of the guardian was interposed in the first place, and afterwards the ward made a purchase without his authority, the second purchase is void.

The question may also be raised if the purchase can be annulled, where an agreement was entered into by the ward without the authority of his guardian, since such an agreement has the same effect as if the ward had, in the first place, made the purchase without the authority of his guardian, and therefore he himself is not liable; but if he brings an action for the property, can the vendor retain it until it is paid for? It may reasonably be held, however, that since the purchase was properly contracted for in the beginning, it is hardly consistent with good faith that an agreement should be adhered to if, by means of it, the other party should be

taken at a disadvantage; and this is especially the case if the latter was misled by a plausible error.

8. *Scævola, Opinions, Book II.*

Titius, the agent of Seius, was appointed the heir of the latter at his death, and Titius, not being aware that he was dead, sold a tract of land through a slave belonging to the estate, and signed his name as agent. The question arose whether the agent could have annulled the sale, if he had known of the death before the purchase was concluded? The answer was that if Titius himself had not sold the property, he would not be liable to a civil action, for the reason that he signed the contract of the slave who made the sale, but that he would be liable to a Prætorian action in the name of said slave.

9. *The Same, Digest, Book IV.*

A certain tract of land which belonged to Lucius Titius was sold on account of a public tax. Lucius Titius, having acknowledged that he was the debtor, said that he was ready to pay the whole of the tax; and, as the sale of the property was not sufficient to pay the entire amount, the Governor of the province rescinded the sale, and ordered the land to be restored to Lucius Titius. The question arose whether, after the decision of the Governor and before the land was restored, it was included in the property of Lucius Titius? The answer was that this was not the case before the price had been refunded to the purchaser, or if the price had not yet been paid by him before the claim for taxes was satisfied.

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

Seius bought a tract of land from Lucius Titius under the condition that the property would remain unsold if payment was not made by a certain time. Seius, having paid a portion of the price at once, and the vendor having died, he was appointed guardian of the minor children of Titius, along with others, but did not pay the remainder of the price to his fellow-guardians, in compliance with the contract, and did not place the amount among the assets of the guardianship.

The question arose whether the purchase was void. The answer was that, in accordance with the facts stated, the sale was held to be of no effect.

(1) The purchaser of certain lands, suspecting that Numeria and Sempronia would raise a controversy with reference to the sale of the same, agreed with the vendor that a certain portion of the price should remain in his hands until a surety should be furnished him by the vendor. The vendor afterwards inserted the following provision into the contract, namely: "That if all the money was not paid by a certain time, and the vendor did not wish the lands to be sold, they would remain unsold." In the meantime, the vendor gained his case against one of his female adversaries, and made a compromise with the other, so that the purchaser might obtain possession of the lands without any dispute.

The question arose, as no surety was furnished, and the entire sum of money was not paid at the appointed time in accordance with the terms of the contract, whether the land remained unsold? The answer was that if the agreement had been that the money should not be paid before a surety had been furnished on account of the sale, and nothing had been done by the purchaser to prevent the execution of the contract, the latter portion of the same could not be enforced.

TITLE VI.

CONCERNING THE RISK AND ADVANTAGES ATTACHING TO PROPERTY SOLD.

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

If wine should become sour after having been sold, or should undergo any other defect, the purchaser must bear the loss; just as if it had been spilled on account of the vessels in which it was contained being broken, or for some other reason. If, however, the vendor assumes the

risk, he must do so for the time during which he subjects himself to it; but where he did not designate the time, the wine will be at his risk until it is consumed, because, when this is done, the sale is then entirely concluded. Therefore, whether it is agreed that the wine shall be at his risk or not, he will be responsible for it until it is used up. If, however, before it is consumed, the vessels or cask containing it are sealed by the purchaser, we hold that the wine will still be at the risk of the vendor, unless some other agreement is made.

(1) The vendor must also be responsible for the safe-keeping of the wine until it is measured, for before it is measured it is, to a certain extent, not considered to be sold. After the measurement has been made, it ceases to be at the risk of the vendor, and, even before it is measured, he will be released from responsibility if he did not sell it by measure, but sold it by jars or by casks.

(2) Where a cask has been sealed by the purchaser, Trebatius says that it is held to have been delivered to him; Labeo, however, holds the contrary. The opinion of the latter is correct, for it is customary to seal a cask in order that the wine may not be changed, rather than to consider that it is delivered at the time.

(3) The vendor has a right to pour out the wine if he appointed a certain time for it to be measured, and this is not done on the day which was designated. He should not, however, pour it out before notifying the purchaser, in the presence of witnesses, either to remove the wine, or warning him that if he does not do so he will pour it out. It will be more praiseworthy, however, if he should not pour it out when he had a right to do so. Hence he can demand some compensation for the use of the casks, but only if it is to his interest for the casks which contained the wine to be empty; as, for example, if he was about to lease them, or if it was necessary for him to lease others instead.

It is, however, more convenient to lease other vessels, and not to deliver the wine until the rent of the others has been paid by the purchaser, or to sell the wine in good faith; that is to say, to manage to do everything without inconveniencing one's self, so that the least possible loss may result to the purchaser.

(4) If you buy wine in casks, and nothing has been agreed upon as to the time of its delivery, the intention will be held to be that the wine shall be drawn off before the casks will be needed for the next vintage. If they are not emptied by that time, the course adopted by the ancients should be taken; that is to say, the vendor should measure the wine by means of a basket, and let it run away, for the ancient authorities established this rule on account of the measurement, so that the amount of the measurement would not be apparent, but that the loss sustained by the purchaser would be known.

2. Gaius, Daily Occurrences, Book II.

The following also is true, namely: if the vendor has need of the vessels for the new vintage, and he is a merchant who is in the habit of purchasing and selling wine, the time must be considered when the wine can conveniently be removed from the possession of the vendor.

(1) Moreover, let us see in what way the vendor must take care of the wine before the time appointed to measure it arrives; must he exercise exact or ordinary diligence, or is he only liable for fraud? I think that the vendor should merely exercise ordinary diligence, and is excusable in case of unavoidable accident or the display of superior force.

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

The vendor must exert the same care that he should do where articles are loaned for use; that is to say, he must exercise more exact diligence than he would with reference to his own property.

4. *Ulpianus, On Sabinus, Book XXVIII.*

If anyone should sell his wine, and state that it must be tasted within a certain time, and he, afterwards, was to blame for this not being done; should the vendor bear the risk of the

sourness or mould of the wine, only for the time which had passed before the day which was fixed? Or would he also be liable after the time had elapsed; or, if the wine was spoiled after that time, must the vendor assume the risk? Or should it rather be held that the sale was concluded, since it had been made under a condition, that is to say, that the wine should be tested before a certain date? The intention of the parties is a matter of importance. I think, however, that if the intention cannot be ascertained, it should be held that the purchase still subsists, and that the vendor must assume the risk even after the day appointed for tasting the wine has gone by, because this was caused by himself.

(1) If the wine is sold in bulk, the vendor is only responsible for its custody; and from this it is apparent that if it is not sold under the condition of being tasted, the vendor will not be held liable for its sourness, or its mould, but the purchaser must bear the entire risk. It is, however, unusual for anyone to purchase wine without tasting it; and therefore if no day has been appointed for that purpose, the purchaser can taste it when he pleases, and up to the time when he does so, the vendor must be responsible for its sourness or mould; for when the day for tasting it has been fixed, it renders the condition of the purchaser better.

(2) Where wine has been sold in bulk, its custody ceases when the time for its removal arrives; and this must be understood to apply when the time is mentioned. If, however, it should not be mentioned, it must be considered whether the vendor is required to take care of it indefinitely. The better opinion is (in accordance with what we have explained above) that either the intention of the parties with reference to the time should be ascertained, or the purchaser should be notified to remove the wine. It is certain that the wine ought to be removed before the casks are required for the vintage.

5. *Paulus, On Sabinus, Book V*.

If it was the fault of the purchaser that the wine was not removed at the appointed time, the vendor is not obliged to be responsible for it afterwards, unless the delay was caused by fraudulent intent on his part. If, for example, a hundred jars of wine in a certain cellar were sold, the vendor must bear the risk until they are measured, unless the purchaser was to blame for the delay.

6. *Pomponius, On Sabinus, Book IX*.

If I purchase certain wine, that which is sour and mouldy being excepted, Proculus says that, although this exception is made for the benefit of the purchaser, if he is willing to accept wine that is acid, still, acid and mouldy wine will not be included in the sale; for whatever the purchaser is not willing to accept, he should not be compelled to take, for this is unjust, and the vendor should not be permitted to sell the wine to another.

7. *Paulus, On Sabinus, Book V*.

If, after a sale, an addition is made to land by alluvial deposit, or its amount is diminished from the same cause, the purchaser will enjoy the advantage, or suffer the inconvenience. For if, after the sale, the entire field is covered by a river, the purchaser must bear the loss, and therefore, in the same manner, he is entitled to any benefit arising therefrom.

(1) Everything that is sold must be conveyed with the land, unless it has been agreed upon that this should not be done. Whatever cannot be measured must also be transferred, if this was the understanding; as, for instance, highways, boundaries, and groves adjoining the premises.

Where, however, nothing was said on the subject, these need not be transferred; and therefore it is customary to expressly provide that groves, and public highways which are in the tract of land shall all be measured, and included in the transfer.

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

It is necessary to ascertain when the sale is complete, for we will then know who must be responsible for the risk; as, when the sale has been perfected, the purchaser must assume it. If

the quality and quantity of the property to be sold are determined, as well as the price of the same, and it is sold without any condition, the transaction is complete. If, however, it is sold under a condition, and the condition should not be complied with, the sale is void, just as in the case of a stipulation. Proculus and Octavenus say that the property is at the risk of the purchaser as soon as the condition is complied with, and Pomponius approves this opinion in the Ninth Book. If, however, while the condition is still pending, either the purchaser or the vendor should die, it is established that if the condition is fulfilled, their heirs will also be bound, just as if the transaction had been concluded with reference to some time that had passed.

But, if the property is delivered while the condition is pending, the purchaser, as such, cannot acquire it by usucaption, and he can recover any of the price which he may have paid, while the crops gathered during the intermediate time will belong to the vendor; in the same way as stipulations and conditional legacies are terminated if, the property should be destroyed while the condition remains unfulfilled. It is clear that if the property survives, although in a damaged condition, the purchaser must bear the loss.

(1) Where a sale is made in the following terms: "This slave is sold whether a certain ship does, or does not arrive from Asia." Julianus is of the opinion that the sale is instantly concluded, since it is certain that the contract is complete.

(2) If you sell me the usufruct of certain property, it makes a difference whether you merely dispose of the right of using and enjoying it, which alone belongs to you, or whether, if you own the property, you sell me the usufruct of the same; for, in the first instance, even if you should immediately die, your heir will owe me nothing, but if you live, the right will pass to my heir. In the second instance, nothing will pass to my heir, but your heir will incur the obligation.

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

If, after the examination of a tract of land, and before the contract of sale is made, the trees on said tract are overthrown by the force of the wind, the question arises whether they, also, should be delivered to the purchaser? The answer is that they should not, because he did not purchase them, since before he bought the land they ceased to be a part of it.

Where, however, the purchaser was not aware that the trees had been overthrown, but the vendor knew it and did not inform him, he will be liable for damages to the amount of interest of the purchaser, provided the sale takes place.

10. *Ulpianus, Disputations, Book VIII.*

Where, in a conditional sale, it was also agreed that the property should remain at the risk of the purchaser, I think that the agreement will be valid.

(1) Scævola says in a note on the Seventh Book of Julianus, that a purchaser cannot bring an action for the recovery of land which has been sold, when, before its measurement was taken, a portion of said land was destroyed by an inundation, or by an earthquake, or by any other accident.

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

Where a house which has been sold is burned, as a fire cannot take place without someone being responsible, what is the law? The answer is that, because a fire can take place without the fault of the head of the household, if it was not caused by the negligence of his slaves, the master will not necessarily be to blame.

Hence, if the vendor exercises the same diligence in taking care of the house as thrifty and diligent men are accustomed to do, and any accident should happen, he will not be responsible.

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

The *Ædile* broke up some beds which a party had purchased, and which had been left on the highway. If they had been delivered to the purchaser, or if he was to blame for their not having been delivered, he must bear the loss.

13. *Julianus, On Urseius Ferox, Book III*.

The purchaser would be entitled to an action under the *Lex Aquilia* against the Ædile, if he acted illegally; or he will certainly have an action on sale against the vendor, to compel him to assign to him the rights of action which he has against the Ædile.

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

If the beds had not been delivered, and the purchaser had not prevented their delivery by delay, the loss must be borne by the vendor.

(1) Where materials that have been purchased are lost by theft, after delivery, it is held that the purchaser must bear the loss; otherwise, the vendor must do so. Timbers are considered to have been delivered as soon as the purchaser has marked them.

15. *Gaius, Daily Occurrences, Book II*.

Where wine in casks is sold, and it is spoiled on account of its nature, before it is removed by the purchaser, and the vendor has vouched for the good quality of the wine, he will be liable to the purchaser; but if he said nothing with reference to this, the purchaser must bear the loss, either because he did not taste the wine, or, if he did taste it, he formed an incorrect opinion, and has only himself to blame.

It is clear that if the vendor knew that the good quality of the wine would not last until the day when it was to be removed, and did not notify the purchaser, he will be liable to the extent of the interest of the latter in being warned.

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

Where the purchaser of a slave asks permission to hire him until he can pay his price, he will acquire nothing through the services of said slave, since he is not held to be delivered whose possession is retained by the vendor through hiring him. The purchaser will be responsible for the slave, where anything happens to him without the fraud of the vendor.

17. *Pomponius, On Quintus Mucius, Book XXXI*.

It must be noted that, as soon as the purchaser begins to be in default, the vendor will be responsible, not for negligence, but only for fraud. If both vendor and purchaser should be in default, Labeo says that the purchaser will be more prejudiced thereby than the vendor.

It must, however, be considered, whether the party who is last in default, is not the more prejudiced, for what would be the case if I notify the vendor, and he does not deliver the property which I bought, and then, when he afterwards tenders it, I refuse to accept it? It is clear that, in this instance I should be the one to suffer by the default. But if the default was caused by the purchaser, and then, while everything was intact, the vendor should be in default when he was able to make the delivery, it is only just that he should suffer by the later delay.

18. *Papinianus, Opinions, Book III*.

Where the obligation of furnishing a lodging to freedmen is terminated by their death, the purchaser of the property will not be liable to the vendor on this account; if no other agreement was made than that a lodging should be furnished the freedmen in compliance with the will of the deceased, in addition to the price paid.

(1) Where a controversy arises, with reference to the ownership of property, before the price is paid; the purchaser is not compelled to pay it, unless solvent securities against his eviction are furnished by the vendor.

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

Where the purchaser is in default to the vendor for the payment of the price, he must only pay him interest, and he will not be liable for anything that the vendor might have obtained, if there had been no delay; as, for instance, if the vendor was a merchant, and the price having been paid, he could have gained more from the sale of his merchandise than from the interest.

TITLE VII.

CONCERNING THE REMOVAL OF SLAVES, AND WHERE A SLAVE IS SOLD UNDER THE CONDITION OF BEING MANUMITTED, OR THE CONTRARY.

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

Where a slave is sold under the condition that he is not to remain in a certain place, the party who sold him under this condition can remit that part of the contract, and allow him to remain at Rome. Papinianus says in the Third Book that this condition is to be observed on account of the safety of the master, to prevent his being exposed to danger.

2. *Marcianus, Public Affairs, Book II.*

Where a slave is sold on condition of his being removed from Italy, he can remain in a province unless this was expressly prohibited.

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

Where a slave is sold under the condition that he shall be manumitted within a certain time, if he is not manumitted, he becomes free; notwithstanding that the party who sold him may still adhere to his original intention. It is not necessary to ascertain the wish of the heir.

4. *Marcellus, Digest, Book XXIV.*

If a minor under twenty years of age sells you a slave and delivers him, under the condition that you will manumit him, the transfer is of no effect; even though he may have delivered him with the intention that, when he had reached the age of twenty, you should manumit him; for it makes very little difference if the date of his freedom is deferred, for the law opposes a provision of this kind as not being well founded.

5. *Papinianus, Questions, Book X.*

Where a slave is forbidden by an agreement with the vendor to reside in the suburbs of a certain city, he is also held to be forbidden to reside in the city itself. And, indeed, although this has been prescribed by the Edicts of the Emperors, its meaning is obvious, for he who is deprived of a residence in the less important parts of a city, cannot enjoy one in the more important parts of the same.

6. *The Same, Questions, Book XXVII.*

Where a vendor takes security from a purchaser that he will not manumit a female slave, or subject her to prostitution, and, if any act is committed in violation of this provision she can be recovered by her master or considered free, and a penalty be demanded on the ground of a stipulation; certain authorities hold that an exception based on bad faith can be pleaded, but Sabinus thinks that this cannot be done. Reason, however, suggests that a stipulation cannot legally stand, if the condition, "That she should not be manumitted," is left out, for it is incredible that one should have intended to have manumitted a slave, and not have had in mind an act which would accomplish it.

But where it is provided that the slave shall not be subjected to prostitution, there is no reason why the penalty should not be sued for and collected, as the purchaser would have brought disgrace upon the slave and impugned the intentions of the vendor at the same time; for, leaving the stipulation out of consideration altogether, it has been established that an action on sale will lie.

(1) Where a purchaser either commits, or does not commit an act contrary to the provisions governing the sale, we have sometimes decided that the vendor cannot bring an action on sale

to have him punished, unless the vendor had a pecuniary interest in the matter, as, for example, because he himself had promised a penalty; but it is not expedient to believe that a good citizen would hold that it was to the interest of the vendor to have his rage appeased in this way. The opinion of Sabinus, however, induces me to hold the contrary, for he thinks that an action can properly be brought, as the slave seems to have been sold for a lower price on account of the condition.

7. *The Same, Questions, Book X.*

A slave was sold under the condition that he should not remain in Italy, and it was agreed between the parties, without a stipulation, that if the condition was not complied with the purchaser should pay a penalty. It is difficult to conclude that the vendor can bring an action on this ground through a desire for vengeance; but he can properly do so if the condition is not observed, and liability for the penalty promised should attach. The result of this will be, that he can only bring suit for what the purchaser is obliged to pay, for whatever is in excess of that is a penalty, and not an attempt to recover the property.

If, however, the agreement had been that the slave should not be removed by way of penalty, an action can properly be brought on the ground of affection; nor do these two cases seem to be antagonistic, since it is the interest of one man that another should be benefited; for, in fact, the indignity of the penalty which is not inflicted possesses only the attribute of cruelty.

8. *The Same, Questions, Book XXVII.*

The question arose whether, where a man sold his own slave, and directed that he should be manumitted within a certain time, and afterwards changed his mind, and the purchaser, nevertheless, manumitted him, he would be entitled to any action on this ground. I stated that the right of action on the ground of sale was extinguished if the slave was manumitted, or the vendor changed his mind.

9. *Paulus, Questions, Book V.*

Titius sold a slave on condition that if he remained at Rome he would be permitted to arrest him. The purchaser sold him to another party under the same condition, and the slave escaped from the second purchaser, and remained at Rome. I ask whether he could be arrested, and if this was the case, by whom? I answered, there was no doubt that, as he was a fugitive, nothing would be held to have been done contrary to the condition, as he had no right to leave his master; nor, merely because he was a fugitive, could he establish his residence at Rome. If, however, he remained there with the consent of the second purchaser, the party who imposed the condition should be preferred, and the second vendor is only held to have had recourse to it for the purpose of warning the purchaser, and releasing himself from liability; for he could, in no way deprive his vendor of the benefit given by the condition, as if he promised to pay a penalty he would be liable even though he himself had also stipulated for the same penalty. But where a penalty is promised, two actions will lie, and the slave can be arrested.

If, however, the first vendor made the sale under the condition that if the slave became a prostitute she should be free, and the second one that she could be seized; freedom will be preferred to the right of arrest. It is clear that if the first condition included the right of seizure, and the last one that of freedom, it must be held that the one granting her freedom will have the preference; since both conditions are added for the benefit of the slave, and, as arrest by the vendor releases her from harm, so freedom produces the same effect.

10. *Scævola, Digest, Book VII.*

A certain man sold Pamphilus and Stichus, and inserted in the contract of sale that, as he had sold the said slaves at a low price, they should be subject to no servitude but that of Seius, and that, after his death, they should remain in freedom.

The question arose whether the slaves, concerning whom this agreement had been made between the purchaser and the vendor, would become free by mere operation of law, after the

death of the purchaser? The answer was that, in accordance with the Constitution of the Divine Hadrian, promulgated with reference to this point, if Pamphilus and Stichus, the slaves in question, were not manumitted, they would not become free. Claudius says that the Divine Marcus decided that where a condition of freedom was inserted in the contract of sale, the slaves would become free in six months, even if they were not manumitted, although the vendor had deferred their freedom until the death of the purchaser.

THE DIGEST OR PANDECTS.

BOOK XIX.

TITLE I.

CONCERNING THE ACTIONS OF PURCHASE AND SALE.

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

If the property sold is not delivered, the purchaser will be entitled to an action to recover the amount of his interest in having this done. This interest sometimes is greater than the price of the property itself, where it is worth more to the buyer than the value of the property, or what it was purchased with.

(1) If the vendor knew that the property was subject to a servitude, and concealed the fact, he cannot avoid an action on purchase, provided the buyer was ignorant that this was the case; for everything which is done in violation of good faith is included in an action on purchase. We understand the vendor to be aware of the encumbrance, and to conceal it, not only where he does not notify the purchaser, but also where he denies that the said servitude is due, when questioned on the subject. If you suggest, as an instance, that the vendor said: "No servitude is due, but in case one should unexpectedly appear, I will not be liable," I think that he will be liable to an action on purchase, because the servitude was owing, and he knew it. If, however, the vendor took measures to prevent the purchaser from ascertaining that a servitude was due, I hold that he will be liable to an action on purchase.

And, generally speaking, I should say that, if he acted fraudulently in concealing the existence of the servitude, he should be held liable, but not after he has consented to furnish the security. These principles are correct, when the purchaser did not know that the servitudes existed, because he is not considered to have concealed anything where the other party is aware of it, nor should he be informed who is not ignorant of the facts.

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

Where the dimensions of a tract of land are mentioned at the time of the sale, and the amount is not delivered, an action on purchase will lie.

Full possession of property is not understood to be transferred to a purchaser, if any legatee or trustee appointed for its preservation is in possession of the same, or any creditors hold it. The same must be said where an unborn child is in possession, for the term full possession also applies to this case.

3. *Pomponius, On Sabinus, Book IX.*

The delivery of possession which should be made by the vendor is of such a nature that if anyone can legally deprive the purchaser of it, possession will not be understood to have been delivered.

(1) Where the purchaser stipulates for full delivery of possession, and brings an action on the stipulation, the profits will not be included in said action; because when anyone stipulates for the delivery of land, it is understood that full possession of the same must be delivered, and the delivery of the crops is not embraced in such a stipulation, as nothing more should be included in it than the mere transfer of the land; but an action on purchase for the delivery of the crops will lie.

(2) If I purchase a pathway, a driveway for cattle, a general right of way, or the right to conduct water through your premises, there is no delivery of mere possession; and therefore you should furnish me security that nothing will be done by you to prevent the exercise of my right.

(3) When a vendor of wine is in default with reference to its delivery, he should be condemned to pay the highest price for said wine, either at the time of the sale, or when the damages were assessed in court, and also its greatest value either at the place where the sale

was made, or where the suit was brought.

(4) When the purchaser is responsible for the default, the value of the wine must be estimated at the time when the action was brought, and with reference to the lowest price of the same at the place where this was done. Default is said to occur where the vendor is prevented by no difficulty from delivering the wine, especially if he has always been ready to deliver it. Moreover, it is not necessary to consider the price of the wine at the place where suit is brought, but where the wine is to be delivered, for if wine is sold at Brindisi, even though the contract may have been made elsewhere, it must be delivered at Brindisi.

4. *Paulus, On Sabinus, Book V*.

If you sell me a slave, being aware that he is a thief or has committed some damage, and I am ignorant of the fact, even though you may have promised me double damages, you will be liable to me in an action on purchase to the amount of what my interest would have been in knowing the character of the slave; because I cannot bring an action against you on the ground of the stipulation, before I myself have actually lost something.

(1) Where the measurement of a field is found to be less than had been stated, the vendor will be liable for the amount of the deficiency; because where the measurement falls short, the quality of ground which does not exist cannot be ascertained. And not only will the purchaser be entitled to an action where the measurement of a field falls short in its entirety, but also with reference to any portion of the same; as, for instance, if it were stated that there are so many *jugera* in a vineyard, or an olive-orchard, and the amount is found to be less. Therefore, in these instances, an estimate should be made with reference to the good quality of the soil.

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

When an heir is charged by will to sell property belonging to the estate, and he does so, an action can be brought against him either on sale or on account of the will, for all the accessories belonging to the property purchased.

(1) Where, however, he, erroneously believing that he is charged with the sale of the property, sells it; it must be held that an action on sale cannot be brought against him, since he can be barred by an exception on the ground of fraudulent intent; just as if he, laboring under a mistake, having promised that he will deliver property subject to such a charge, can bar the other party if he brings an action, by pleading an exception based on fraudulent intent. Pomponius even holds that he can bring an action for an indeterminate amount, in order to obtain his release.

6. *Pomponius, On Sabinus, Book IX*.

A vendor will be liable to an action on sale, even if he was not aware that the measurement of the field was less than had been represented.

(1) If I should sell you a house for a certain amount, under the condition that you will repair another house belonging to me, I can bring an action on sale to compel you to repair it. If, however, it had only been agreed upon that you should repair said house, a purchase and sale, as Neratius says, is not held to have been made.

(2) Moreover, if I sold you a vacant lot for a certain price, and delivered it, on the condition that after you had built a house you will re-convey half of the same to me; it is certain that I am entitled to an action on sale to compel you to build, and also to make the transfer to me after the building has been completed; for so long as any condition relative to the property sold is not complied with by you, it is established that I am entitled to an action on sale.

(3) If you purchase ground for a burial-place, and a house is built by the vendor near said place, before any interment is made there, you can have recourse to an action against him.

(4) If you sell me a vessel of any kind, and state that it is of a certain capacity, or of a certain weight, if it is deficient in either respect, I can bring an action on sale against you. But if you

sell a vase to me, and guarantee it to be perfect, and it should prove not to be so, you must make good to me any loss which I may have sustained on that account; but if it is not understood that you guarantee it to be perfect, you will only be liable for fraud.

Labeo is of a different opinion, and thinks it should only be held that the party must guarantee that the vase is perfect, where the contrary had not been agreed upon; and this opinion is correct. Minicius states that Sabinus gave it as his opinion that a similar guarantee should be understood to be made where casks were hired.

(5) If I sell you a right of way, you can only notify me to prove my title to the same where the land for which you wish to acquire the servitude is yours; for it would be unjust for me to be liable, if you could not acquire the servitude because you were not the owner of the adjoining land.

(6) If, however, I should sell you a tract of land, and state that a right of way was attached to the same; I will certainly be liable on account of the right of way, because I am bound as the vendor of both these rights of property.

(7) If a son under paternal control sells and delivers property to me, he will be liable, just as if he were the head of a household.

(8) If the vendor has committed any fraudulent act with reference to the property sold, the purchaser will be entitled to an action of purchase on that ground. For it is necessary to consider any fraud in the trial of the case, and whatever the vendor has promised to furnish he must deliver to the purchaser.

(9) If the vendor knowingly sells property which is encumbered, or which belongs to another, and it is set forth in the contract that he binds himself for nothing on this account, it is necessary to take into consideration his fraudulent conduct which ought always to be absent in the transaction of a sale which is one of good faith.

7. *The Same, On Sabinus, Book X.*

When you sold me a tract of land of which the usufruct was reserved, you stated that the said usufruct belonged to Titius, when, in fact, it remained in your hands. If you should bring an action to recover possession of said usufruct, I cannot have recourse to you as long as Titius is living; and he is not in such a situation that even if the usufruct was his, he would lose it, for then, (that is to say, if Titius should forfeit his civil rights, or die) I could have recourse to you as the vendor.

The same rule of law applies if you should state that the usufruct belongs to Titius, while, in reality, it belongs to Seius.

8. *Paulus, On Sabinus, Book V.*

If I should deliver to you a field free of all encumbrance, when, in fact, I ought to have delivered it as subject to a servitude; I will have the right to bring an action for the recovery of an unascertained amount, in order to compel you to permit the servitude which is due to be imposed.

(1) If I transfer a field subject to a servitude, which I should transfer to you as free; you will be entitled to an action on purchase, in order to release said servitude, which you ought not to be burdened with.

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

If he who purchased stones on a tract of land refuses to remove them, an action on sale can be brought against him to compel him to do so.

10. *Ulpianus, On Sabinus, Book XLVI.*

It is not unusual for one person to be liable to two obligations with reference to the same matter, at the same time; for when one who has a vendor bound becomes heir of another to

whom the same vendor is liable, it is established that there are two concurrent rights of action united in the same person, one which he has as his own, and the other

which is derived from the estate; and the appointed heir, if he wishes for his own convenience to avail himself of the two actions separately, must bring his own against the vendor before he enters on the estate, and then, after he has done so, bring the one which is derived from the latter.

If he should first enter upon the estate, he can only bring one action, but he can do this in such a way as to obtain the greatest advantage from both contracts. On the other hand, if one vendor should become the heir to the other, it is clear that he must guarantee the purchaser doubly against eviction.

11. *The Same, On the Edict, Book XXXII.*

He who makes a purchase can avail himself of the action on purchase.

(1) In the first place, it must be remembered that, in a case of this kind, there should only be introduced what can properly be the subject of a guarantee, for since this is a *bona fide* action, there is nothing more consistent with good faith than that what was agreed upon between the contracting parties should be carried out. If, however, nothing was specially agreed upon, they will then be liable to one another for whatever naturally comes within the scope of the transaction.

(2) First, the vendor must transfer the property itself, that is to say, deliver it; and the ownership of said property will pass to the purchaser, if, in fact, it belonged to the vendor. If it did not belong to him, the vendor will only be bound in case of eviction, provided the price was paid, or security furnished for the same. The purchaser, however, can be compelled to pay the purchase-money to the vendor.

(3) Both Labeo and Sabinus hold that the restitution of the price in case of a defective title is also embraced in the transaction of purchase; and we approve their opinion.

(4) The vendor should also guarantee the soundness of animals and he who sells beasts of burden usually promises that they will eat and drink as they should do.

(5) Where anyone thinking that he is purchasing a female slave as a virgin, when she is a woman, and the vendor knowingly permits him to make this mistake; an action for the restitution of the price will, however, not lie in this instance, but an action can be brought on purchase for the rescinding of the contract, and when the price is refunded, the female slave should be returned.

(6) Where a person purchases wine, and pays a certain sum by way of earnest, and afterwards it is agreed that the purchase shall be void; Julianus says that an action on purchase can be brought for the recovery of the earnest, and that an equitable action on purchase will also lie for the purpose of annulling the sale.

I propose the following question, namely: Suppose a ring is given by way of earnest, and that the sale is concluded, the price paid and the property delivered, but the ring is not returned; what proceeding should be instituted? Should it be a personal suit for recovery, where something has been given for a certain purpose and the purpose has been accomplished; or ought an action on sale to be brought? Julianus says that an action on sale will lie. It is certain that a personal action for recovery can be brought, for the ring is now in the hands of the vendor without any reason.

(7) Neratius says that the vendor will be liable to the purchaser, if he sells him a slave as not being in the habit of running away, even if he is not aware of the fact.

(8) Neratius says that the same rule applies, even if you should sell a slave belonging to another, and that you are obliged to guarantee him to be free from liability to prosecution for theft, or damages of any kind; and that it has generally been held by all authorities that an

action on purchase will lie, to enable the buyer to be furnished security to hold the slave without interference, and, also, that possession may be delivered to him.

(9) He also says that if the vendor does not deliver the slave, judgment shall be rendered against him for the amount of the interest of the purchaser; and if he does not furnish security, judgment must be rendered against him for the largest amount for which a vendor can be liable.

(10) Neratius also says that, in all these instances, security must be given for the greatest amount that can be recovered; that is to say, in case of subsequent action, the damages must be assessed after deduction has been made of the amount of the security.

(11) He also very properly holds that if security is not furnished for one article, when it has been done for others, judgment must be rendered without any deduction.

(12) He also says in the Second Book of Opinions: "Where a purchaser has judgment rendered against him in a noxal action, he can only recover in an action on purchase the least amount for which he could be released." He likewise holds that, if an action on stipulation was brought by the purchaser, whether the latter has defended the noxal action or not, for the reason that it was evident that the slave had committed damage, he can, nevertheless, proceed by an action on stipulation, or by one on purchase.

(13) Neratius also says that a vendor should, in delivering the property, place the purchaser in such a position that he will have the advantage in a contest for its possession. Julianus, however, in the Fifteenth Book of the Digest, states that the property should not be held to be delivered, if the better title to possession is not enjoyed by the purchaser. Therefore, an action on purchase will lie unless this advantage is conferred.

(14) Cassius says that a party who has obtained an assessment of damages founded upon a double stipulation cannot recover anything on account of other property, with reference to which it is customary to provide security in the case of sales. Julianus thinks that where there is no double stipulation, an action on purchase should be brought.

(15) Finally, he says in the Tenth Book on Minicius, "That if anyone sells a slave under the condition that he will pay double damages within thirty days if the title is not good, and that he shall not, after that time, be liable for anything," and the purchaser does not require the amount to be paid within the designated period, the vendor will not be liable, provided he ignorantly sold a slave belonging to another; for, in this instance, he is only compelled to guarantee the purchaser that the title will not be disputed by himself or by his heirs.

Where anyone knowingly sells a slave belonging to another, he holds that the vendor is not free from fraud and therefore will be liable to an action on purchase.

(16) I think that the opinion of Julianus with reference to pledges is also perfectly correct; for where the creditor lawfully sells a pledge, and afterwards the purchaser is deprived of it by someone with a better title, he will not be liable, and he cannot be sued in an action on purchase for the recovery of the price; for this point has been settled by several Imperial Constitutions.

It is clear that the vendor must give a guarantee against fraud; for he expressly binds himself in this respect, but even though he does not do so, and sells the property, being aware that he had no claim on it, or that it did not belong to the party who pledged it to him; he will be liable to an action on purchase, because we have shown that he should be responsible for bad faith.

(17) If anyone should sell property, and should state at the time that its accessories will pass to the purchaser, everything which we have said with reference to the sale of property will apply in this instance, except that the vendor will not be liable for double damages in case of eviction, but will only be required to maintain the purchaser in possession, and this not only applies to himself but to all others.

(18) Where a person who makes a sale agrees to maintain the purchaser in possession, let us see to what extent he becomes liable. I think that it makes considerable difference whether he promises that the purchaser shall not be disturbed either by him or by persons descended from him, or whether he agrees that his possession shall not be disputed by anyone whomsoever; for where he makes the promise for himself he is not held to warrant the title against others. Hence, if the property is recovered by someone with a better title, or a stipulation is entered into, the vendor will not be liable under the stipulation; or, if one should not be made, he will not be liable on the ground of purchase.

Julianus, however, states in the Fifteenth Book of the Digest that, even if the vendor plainly states that the purchaser shall have undisturbed possession, so far as he and his heirs are concerned; the defence can be made that the party is not liable on purchase for the amount of the interest of the buyer, but will only be liable for the refunding of the price.

He also says that the same rule applies where it is clearly stated in the contract of sale that no warranty is given against eviction, and, that in case eviction takes place, the vendor will be liable for the price paid, but not for any indemnity, as contracts made in good faith do not permit an agreement to be entered into by which the purchaser may lose the property, and the vendor retain the price; unless, as he says, anyone should consent to abide by all the agreements above men-

tioned, just as is the case where the vendor receives the money and the merchandise does not come into the hands of the purchaser; as, for instance, where we buy a future cast of a net by a fisherman, or whatever game may be taken in snares laid by a hunter, or any birds caught by a fowler; for even if nothing is taken, the purchaser will, nevertheless, be required to pay the price.

The contrary, however, must be held with reference to the agreements above mentioned, unless the vendor knowingly sold the property of another; for then, in accordance with the opinion of Julianus quoted above by us, it must be held that he will be liable to an action on purchase, for the reason that he committed a fraudulent act.

12. *Celsus, Digest, Book XXVII.*

If I purchase the cast of a fisherman's net, and the latter refuses to cast his net, the uncertainty of the result must be taken into account in assessing the damages. If the fisherman refuses to deliver to me the fish which he has caught, an estimate should be made of what he did catch.

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

Julianus, in the Fifteenth Book, makes a distinction with reference to rendering a decision in an action on purchase between a person who knowingly sold the property, and one who ignorantly did so; for he says that anyone who sold a flock which is diseased, or a defective beam, and did so ignorantly, must make the claim good in an action on purchase, to the extent that the buyer would have paid less if he had been aware of said defects. If, however, he was aware of them, and kept silent, and deceived the purchaser, he will be obliged to make good all the loss which the purchaser sustained from said sale. Therefore, if a building should fall down on account of the defect in the price of the timber aforesaid, its entire value must be estimated in assessing damages; or if the flock should die through the contagion of the disease, the purchaser must be indemnified to the extent of the interest he had in the sale of the property in good condition.

(1) Moreover, where anyone sells a slave who is a thief, or one who has the habit of running away, and does this knowingly, he should indemnify the purchaser to the amount of his interest in not being deceived. If, however, he was ignorant of this when he sold him the slave, he will be liable with respect to a slave who has the habit of run-ing away to the extent of the lesser amount which the purchaser would have paid if he had known that he had such a habit; but he will not be liable at all, where the slave is a thief.

The reason for this distinction is, that a fugitive slave cannot be kept in custody, and the

vendor is held liable, as it were, on the ground of eviction; but we can restrain a slave who is a thief.

(2) A great deal is included in the clause which we mentioned, namely: "To the amount of the interest of the purchaser in not being deceived," as, for instance, if he had solicited others to run away with him, or had stolen property at the time he fled.

(3) What would be the case, however, if the vendor was not aware that the slave was a thief, and had given the assurance that he was frugal and faithful, and sold him at a high price? Let us see if he would be liable to an action on purchase. I think that he would be liable, but suppose that he was ignorant of the character of the slave? He ought not to assert so positively something that he did not know.

There is then a difference between this instance and that where the vendor knew the character of the slave, for he who knows should warn the purchaser that he is a thief, but in the other instance, he should not be so ready to make a rash statement.

(4) Where the vendor committed a fraudulent act in order to sell the property at a higher price; for example, if he lied concerning the skill of the slave, or with reference to his *peculium*, he will be liable in an action on purchase, for the additional amount which he was paid for the slave on the assumption that he had private property, or was skilled in some trade.

(5) On the other hand, Julianus also says that Terentius Victor died leaving his brother his heir, and that a steward abstracted from the property of the estate certain articles, documents, and slaves, and after these were taken away, the estate was easily made to appear to be of little value; and the steward persuaded the heir to transfer to him his rights in the same. Would he be liable to an action on sale? Julianus says that an action on sale will lie only for the extent to which the estate would have been more valuable if the said property had not been removed.

(6) Julianus also says that the vendor is usually responsible for fraud, and he explains this by means of the following case. Where a vendor knew that the land which he offered for sale was charged with legacies to several municipalities, and stated in the advertisement that it was only indebted to one municipality, but afterwards inserted in the contract of sale that, if any tributes, taxes, or anything by way of imposts, or for the repair of highways, should be due, the purchaser must make payment, perform said acts, and be responsible; the vendor will be liable to an action on purchase as having deceived the purchaser. This opinion is correct.

(7) But as it was, in fact, suggested that certain guardians had acted in this way who sold property belonging to a ward, he says that the question is whether the ward should be held liable for the fraud of his guardians? If, indeed, the said guardians sold the property, there is no doubt whatever that they are liable to an action on purchase. Where, however, the ward sold the property by their authority, he will only be liable for the amount by which he profited by the transaction, and judgment should be rendered against the guardians for the remainder, without reference to limitation of time, because liability for fraudulent acts of his guardians does not attach to the ward after he arrives at puberty.

(8) When the buyer brings an action on purchase, the price should be tendered by him; and therefore, even though he only tenders a portion of the price, an action on purchase will not lie, for the vendor has a right to retain the property which he sold, by way of pledge.

(9) Wherefore, the question arises where part of the price is paid and the property is delivered, but is afterwards lost through proof of a superior title, can the purchaser proceed by an action on purchase to recover the entire price of the property, or merely what he paid?

I think the better opinion is that he can recover only what he paid; otherwise, he would be met by an exception on the ground of fraud.

(10) Where a field is sold on which the crops have already matured, it is settled that they must also be delivered to the purchaser; unless some other agreement has been made.

(11) If, however, the field was leased, the rent must be paid to the party who leased it. The same rule applies to urban estates, unless some express agreement is made to the contrary.

(12) Where, however, the vendor had acquired any rights of action for injury committed against the property; for instance, for the prevention of threatened injury, or for the care of rainwater, or under the *Lex Aquilia,* or an interdict against clandestine or violent possession, they must be assigned to the purchaser.

(13) Again, where any profit has been obtained from the labor of slaves, or from transportation by beasts of burden, or ships, it must be turned over to the purchaser, as well as any increase of the *peculium* of the slaves; but not, however, where any gain has been acquired by means of the property of the vendor.

(14) Titius sold a tract of land containing ninety *jugera*, and it was stated in the contract of sale that there were a hundred *jugera* in said tract, and before the measurement was taken ten *jugera* were added to it by alluvial deposit; I concur in the opinion of Neratius, who held that if the vendor was aware of the deficiency when he sold the land, an action on purchase could be brought against him, even though ten *jugera* had been added to the tract; because he was guilty of fraud which was not removed by the addition. If, however, he made the sale ignorantly, an action on purchase will not lie.

(15) If you sell me a tract of land belonging to another, and it afterwards becomes mine by a good title, I will, nevertheless, be entitled to an action on purchase against you.

(16) With respect to those things, however, which it is customary to furnish with the property purchased, I think that the vendor will not only be liable for fraud but also for negligence; as Celsus states in the Eighth Book of the Digest that, when it is agreed that the vendor shall collect any rent which is past due, and pay it to the purchaser, in case of his failure to do so, he will not only be liable for fraud but also for negligence.

(17) Celsus also says in the same book: You sold your share of a tract of land which you held in common with Titius, and before you delivered possession you were compelled to join issue in an action in partition. If the tract of land was entirely adjudged to your fellow-owner, you can recover from Titius on this account the amount which you are obliged to pay to the purchaser; but if the entire tract is adjudged to you, he says that you can transfer it all to the purchaser, in such a way, however, that he must pay to Titius the amount for which judgment has been rendered against you in this matter, and that you must provide security against eviction with reference to the part which you sold; but so far as the remainder is concerned, you will only be responsible for fraud. For, indeed, it is only just that the purchaser should be placed in the same position as if the action for partition had been brought against him.

If, however, the judge divided the tract between you and Titius by certain boundaries, there is no doubt that you must deliver to the purchaser whatever has been adjudged to you.

(18) Where a vendor has given anything to a slave who was sold before his delivery took place, this also must be turned over to the purchaser, as well as any estates, and all legacies acquired by the slave; nor shall any distinction be made with reference to him by whom these things were left. Moreover, whatever has been obtained by the labors of the slave must be delivered to the purchaser, unless the day of delivery has been deferred by agreement, in order that the proceeds of the labors of the slave may belong to the vendor.

(19) The vendor is entitled to an action on sale to recover from the purchaser all that the latter is obliged to give him.

(20) All the matters hereinafter stated are included in this action; first, the price for which the property was sold, as well as the interest on the same after the day of delivery, for when the purchaser enjoys the property, it is perfectly just that he should pay interest on the purchase-money.

(21) We must understand delivery of possession to take place to mean even where the

possession is precarious; for we should only consider whether the purchaser has the power to gather the crops.

(22) Again, the vendor can also recover any expenses incurred with reference to the property sold, by bringing an action on sale; for example, if something was expended on the buildings which were disposed of; as Labeo and Trebatius both say that an action on sale can be brought on this ground.

The same rule applies where expense has been incurred for the cure of a sick slave before his delivery, or where anything has been expended in instruction, which it is probable that the purchaser would wish to be so expended. Labeo goes still further, and says, that where anything has been expended on the funeral of a dead slave, it must be recovered in an action on sale, provided the slave died without any blame attaching to the vendor.

(23) Moreover, if, when the property was sold, it was agreed that a solvent debtor should be furnished by the purchaser, the vendor can proceed by an action on sale to compel him to do this.

(24) If it was agreed between the purchaser and the vendor of certain lands, that, if the purchaser or his heir should sell said lands for a higher price than he had paid, that he would refund to the vendor half the amount of the excess; and the heir of the purchaser should sell said lands at a higher price, the vendor can, by means of an action on sale, recover the amount of his share of the excess for which the property had been sold.

(25) If an agent should make the sale and furnish security to the purchaser; the question arises whether an action should be granted in favor of the owner, or against him? Papinianus, in the Third Book of Opinions, thinks that an equitable action on purchase can be brought against the owner in the same way as an Institorian Action, provided the owner directed the property to be sold. Hence, on the other hand, it must be said that an equitable action on purchase can be brought by the owner.

(26) Papinianus says in the same place, that he gave it as his opinion that, where it had been agreed upon that if the price was not paid at the appointed time, double the amount should be paid to the vendor, such a provision seemed to have been added in violation of the constitution, because it exceeded the lawful interest; and he also stated that the case of a conditional rescission of a sale was different from this one; for, in that instance, illegal interest is not agreed upon, and the terms of the contract are not considered dishonorable.

(27) Where anyone, acting in collusion with my agent, makes a purchase from him, can he bring an action on purchase against me? I think he can, to the extent of compelling me either to abide by the purchase, or annul it.

(28) Where anyone takes advantage of another under the age of twenty-five, we will grant him an action on purchase, to the same extent as that which we mentioned in the former instance.

(29) Where anyone makes a purchase from a ward without the authority of his guardian, the contract is only valid on one side; for he who makes the purchase is liable to the ward, but he does not make the ward liable to him.

(30) Where a vendor reserves a lodging, for instance, that it shall be permitted for a tenant to reside in the house, or that a tenant, who was a farmer, shall have a right to the crops for a certain time; Servius thinks the better opinion to be that an action on sale will lie. Finally, Tubero says that, if the said tenant causes any damage, the buyer, by bringing an action on purchase, can compel the vendor to proceed against the tenant in an action on lease, and pay the purchaser whatever he recovers.

(31) Where a house is sold or devised, we are accustomed to state that everything is included in the house which is considered to be part of the same, or is used for the benefit of it; as, for instance, the stone edge of a well.

14. *Pomponius, On Quintus Mucius, Book XXXI.*

That is to say by means of which use of the well is obtained.

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

Well-ropes and basins, projecting gutters, and also the pipes connected with the latter, although they may project a considerable distance beyond the building, belong to the latter as well as the gutters.

Fish, however, which may be in a reservoir, do not belong either to the house or to the land;

16. *Pomponius, On Quintus Mucius, Book XXXI.*

Any more than the chickens or other animals on the premises.

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

Nothing belongs to the land unless it is attached to the soil. It must not be forgotten that many things form part of a building which are not attached to the same, as for instance, locks, keys, and bolts. There are also many things buried in the earth which do not belong to the land, or to a farm-house, for example, wine-vats and presses, for since these are rather considered implements, they also are attached to the buildings.

(1) Moreover, it is settled that wine, and crops which have been gathered, do not belong to the house.

(2) Where a tract of land is sold or devised, the manure-heaps and straw belong to the purchaser or the legatee, the wood, however, belongs to the vendor or the heir; for the reason that the former do not constitute part of the land, even though they may have been collected for the benefit of the same. With reference to the manure-heaps, a distinction is made by Trebatius, who holds that if they have been prepared for the purpose of fertilizing the ground, they belong to the purchaser, but if for the purpose of sale, the vendor is entitled to them, unless some other agreement has been made; and that it makes no difference whether the manure remains in a stable or has been placed in a heap.

(3) Any paintings attached to the wall, as well as any marble encrusted upon the same, belong to the house.

(4) Nets about the columns and couches around the walls, as well as hangings of haircloth, are not parts of the house.

(5) Moreover, anything which has been prepared for a house but has not yet been finished, even though it may be placed in the building, is, nevertheless, not considered to be a part of it.

(6) Where, in a sale, reservation is made of everything which has been taken out, or cut down; sand, lime, and other things of this kind are held to have been taken out, and trees which have been felled, charcoal, and other similar articles are considered to have been cut.

Gallus Aquilius, however, whose opinion is given by Mela, states very properly that a provision with reference to articles which have been taken out and cut down is included, without effect, in a contract of sale; because if they are not expressly sold, an action can be brought to compel them to be produced; as a vendor is not required to give security with reference to any material which has been cut, or for stone or sand, any more than he is for other things which are more valuable.

(7) Labeo states, as a general proposition, that whatever is in a building for its perpetual use belongs to it, but that which is only for temporary use does not; as, for instance, pipes which are only attached to it for a time, do not belong to the house, but if they are fastened to it permanently, they form a part of it.

(8) Reservoirs lined with lead, wells, and the covers of the latter which are placed upon the land, but are not attached to it, it is settled belong to the house.

(9) It is also settled that small images, columns, and figures through the mouths of which water is accustomed to flow, belong to the house.

(10) Anything which has been removed from a building with the intention of being replaced, forms a part of it; but whatever has been prepared to be placed upon it does not.

(11) Stakes which have been prepared for a vineyard do not form part of the land before they have been placed in position, but they do belong to it if they have been purchased with the understanding that they shall be so placed.

18. *Javolenus, On Cassius, Book VII.*

Granaries, which are usually made of boards, belong to the building, if their foundations are in the earth; but if they are above ground, they should be classed as movable property.

(1) Tiles which have not yet been placed upon buildings, although they have been brought there for that purpose, are included in the class of personal property. A different rule applies to those which have been removed with the intention of being replaced, for they are accessories to the house.

19. *Gaius, On the Edict of the Prætor, Title "Publicans."*

The ancients, in speaking of purchase and sale, made use of these terms without distinction.

20. *The Same, On the Provincial Edict, Book XXI.* The same rule applies to cases of leasing and hiring.

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

Where a female slave is sold with her offspring, and she proves to be sterile, or more than fifty years of age, and the purchaser was ignorant of the fact, the vendor will be liable to an action on sale.

(1) Where the vendor of a tract of land knowingly refrains from mentioning any tax which is due upon the same, he will be liable to an action on purchase. But, if he did not give notice of it through ignorance, because, for instance, the land belonged to an estate, he will not be liable.

(2) Although we stated above that, while we may agree with reference to the object of a sale, but differ as to its quality, a sale will take place; still, the vendor should be liable for the amount of the interest the purchaser had in not being deceived, even if the vendor also is ignorant of the facts; as, for example, where tables are sold as being made of cedar-wood, when in fact they are not.

(3) When the vendor is to blame for not delivering the property, all the interest of the purchaser in its delivery, which merely has reference to the property itself, should be taken into consideration; where, for instance, he could have profited by the sale of wine, this need not be taken into account any more than if he had purchased wheat, and, because it had not been delivered, his slaves suffered from hunger; for the value of the wheat, and not that of the slaves about to die of hunger, was the object of the claim. Nor does the obligation become greater, where proceedings are instituted subsequently, even though the wine may have increased in value. This is reasonable, because if the wine had been delivered, the purchaser would have possession of it; but where this has not been done, the vendor is at all events obliged to deliver at present what he should have delivered long before.

(4) If I sell you a tract of land on condition that I can lease it from you for a certain sum, I will be entitled to an action on sale, because this transaction is, as it were, a part of the price.

(5) Even though I sold you a tract of land on condition that you would not sell it to anyone but myself, for this reason an action on sale will lie if you should sell it to another.

(6) A man sold a house and reserved for himself a lodging therein as long as he lived, or in consideration of the payment of ten *aurei* every year. The first year, the purchaser preferred to

pay the ten *aurei*, the second year, he furnished the lodging. Trebatius says that he had the right to change his mind, and could comply with either one of the conditions every year, and as long as he was ready to do so there would be no cause of action.

22. *Julianus, Digest, Book VII*.

If the vendor makes a false statement as to the quality of the land, but not as to its amount, he will still be liable to the purchaser. For suppose that he alleged that there were fifty *jugera* of vineyard and fifty of meadow, and it was ascertained that there were less than this in the vineyard, and more in the meadow, there would, nevertheless, be one hundred *jugera* in all.

23. *The Same, Digest, Book XIII*.

If anyone should manumit a slave, after he had sold him together with his *peculium*, he will be liable not only for the *peculium* which the slave had at the time when he was manumitted, but also for what he acquired afterwards; and he must, in addition, furnish security to restore anything which might come into his hands from the estate of the freedman. Marcellus says in a note that the vendor is compelled, in an action on sale, to deliver whatever the purchaser would have obtained if the slave had not been manumitted. Therefore, nothing is included which he would have acquired if the slave had not been manumitted.

24. *Julianus, Digest, Book XV*.

Where a slave in whom you had an usufruct purchases a tract of land, and, before the purchase-money is paid, you lose your civil rights, even though you may have paid the price, you will not be entitled to an action on purchase, because of your loss of civil rights, but you can bring suit against the vendor to recover money which was not due. It makes no difference whether you, or the slave, have made payment out of the *peculium* belonging to you, where this is done before your loss of civil rights, for, in both instances, you will be entitled to an action on purchase.

(1) I purchased your slave from a thief in good faith, not knowing that he had been stolen, and the said slave bought another with the *peculium* belonging to you, and delivered him to me; Sabinus says that you can bring a personal action against me to recover the latter slave. If, however, I have lost anything by the transaction, which he negotiated, I can, on the other hand, bring an action on the ground of the *peculium* against you. Cassius states that this opinion of Sabinus is correct, with which I also agree.

(2) Where one slave, having sold another, furnishes a surety, the latter should guarantee the validity of the sale by which he will be bound to the same extent as if he were giving security for a freeman; as an action is granted to the purchaser against the master for the purpose of recovering everything which he could have recovered if the sale had been made by a freeman; but the master cannot have judgment rendered against him for an amount above the value of the *peculium*.

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

When anyone purchases a vintage which is not yet harvested, and is forbidden by the vendor to gather the grapes, he can avail himself of an exception against him if suit is brought for the purchase-money, and not for the recovery of the property which was sold, but not delivered. But if, after delivery has been made, the purchaser is forbidden to press the grapes which have been gathered, or to remove the new wine, he can bring an action for production, or for injury committed, just as if he were forbidden to remove any other property whatsoever which belonged to him.

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

If anyone, when he sold a tract of land, stated that there were a hundred casks on the premises, which were accessory to the same; even though there was but one cask there, he will, nevertheless, be compelled to furnish a hundred casks to the purchaser.

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

Whatever the vendor states is an accessory must be delivered sound and in good condition; as, for instance, where he says that a certain number of casks are an accessory to the land, he must furnish them whole and not broken.

28. *Julianus, On Urseius Ferox, Book III*.

You sold me certain lands, and it was agreed between us that I should perform some act, and that, if I did not do so, I should be liable to a penalty. The opinion was given that the vendor can bring an action on sale before suing for the penalty under the stipulation, and if he should recover an amount equal to that fixed as a penalty, he will be barred by an exception on the ground of fraud, if he brings an action on the stipulation. If you should recover the penalty by an action on the stipulation, you will be prevented by operation of law from bringing an action on the sale, unless the amount of the judgment is less than the interest of the vendor in having the agreement executed.

29. *The Same, On Minicius, Book IV*.

Where property has been left to someone under a condition, and the latter, ignorant of the fact, buys it from the heir, the purchaser can recover the price by an action on purchase, because he has not possession of the property as derived from the legacy.

30. *Africanus, Questions, Book VIII*.

A slave that you purchased from me together with his *peculium,* committed a theft against me before he was delivered to you. Although the property which he stole has been destroyed, I will, nevertheless, have the right to retain its value out of the *peculium*, that is to say, the act of the slave diminishes the *peculium* to the extent to which he has become my debtor on account of his crime. For even if he should steal something from me after his delivery, or I should not be entitled to an action for recovery from the *peculium* on that ground, or I should be entitled to it to the extent that the *peculium* was increased by the addition of the stolen property; I would still have a right, in the proposed case, to retain the *peculium*, and I could bring a personal action for recovery on the ground that I had paid more than was due, if the entire risk attached to you.

In accordance with this, it must be held that if the said slave had stolen any money from me, and you, being ignorant of the fact that it had been stolen, should take and use it as a part of the *peculium;* I will be entitled to an action for recovery against you on the ground that property belonging to me had come into your hands without any consideration.

(1) If you should knowingly sell me property belonging to another, while I was ignorant of the fact, Julianus holds that I can properly bring an action on purchase against you, even before I am deprived of the property on the ground of a better title, for an amount equal to my interest in having it become mine; for although, on the other hand, it is true that the vendor is only liable for the delivery of the property to the purchaser, and not to transfer the title to him, still, for the reason that he should guarantee that he is not committing fraud, he who knowingly sells the property of another to one who is ignorant that it is not his, is liable. This rule is especially applicable if he should manumit a slave, or sell property which was to be given in pledge.

31. *Neratius, Parchments, Book III*.

If the property which I am obliged to deliver in accordance with the contract of sale is taken from me by force, although I am required to be responsible for its safe-keeping, it is still more proper that I should only be required to transfer to the purchaser my rights of action for the recovery of said property; because its safe custody is of very little advantage where violence is employed. I should assign to you not only the rights of action which relate to profit, but also such as have reference to loss, so that you may obtain all the gain as well as be responsible for the expense.

(1) I should assign to you not only what I myself have acquired by means of the said property, but also what the purchaser would have acquired if the slave had been delivered to him at once.

(2) Two of us purchased the same property from a party who was not the owner, the purchase and sale were concluded without bad faith. and the property was delivered. Whether we both made the purchase from the same person, or from two different ones, he must be protected who first acquired his right; that is to say, the one to whom delivery was first made. Where one of two parties makes a purchase from the owner of the property, he must by all means be protected.

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

If anyone should buy oil from me, and accept it after having employed false weights in order to deceive me, or the purchaser is taken advantage of by the vendor through the use of weights that are too light, Pomponius says that the vendor will be entitled to an action to compel the purchaser to pay the value of the excess; which is reasonable. Hence the buyer will also be entitled to an action on purchase for the purpose of obtaining satisfaction.

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

Where several articles are purchased for a single price, an action on purchase and sale can be brought with reference to each one of them.

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

Where a tract of land is sold, and fraud is committed with reference to the quality of the *jugera*, an action on purchase will lie.

35. *The Same, On the Edict, Book LXX*.

Where anyone purchases a tract of land presumed to be free from rights of way, and he is forbidden to pass through it, and is defeated in court; he will be entitled to an action on purchase. For although no stipulation with reference to eviction was made, because the judgment rendered with reference to the servitude is not final, so far as the property itself is concerned, still it must be said that an action on purchase will lie.

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

The vendor of a house should enter into a stipulation relative to threatened injury before he conveys it, for the reason that he is obliged to exercise proper care and diligence before he delivers the possession of the property, and it is a part of said care and diligence to make such a stipulation, and therefore if he neglects to do so he will be liable to the purchaser.

37. *The Same, On Plautius, Book XIV*.

Since, as it is only just that a purchaser in good faith should not be injured by the fraud of another, so it is unjust that the vendor himself should profit by his own fraud.

38. *Celsus, Digest, Book VIII*.

Where the vendor of a slave stated that his *peculium* consisted of ten *aurei*, that he would not deprive him of any of it, and that if it included more, he would surrender it all; if it is more than that, he must give it all, unless the intention was that he should only deliver the ten *aurei;* if it is less than that, he must pay the ten, and give a slave who is possessed of a *peculium* of that amount.

(1) Where the purchaser is to blame for the non-delivery of the slave to himself, Sextus Ælius and Drusus have stated that he can be compelled by arbitration to indemnify the vendor for the maintenance of the slave; and this opinion appears to me to be perfectly just.

(2) Firmus asked of Proculus whether the pipes which conduct water from a leaden reservoir under ground into a brazen vessel built around the sides of a house are to be considered part of the latter? Or are they to be considered as personal property, united and stationary, which

do not belong to the house? He answered that the intention of the parties should be taken into account. But what if neither the purchaser nor the vendor had paid any attention to the subject, as very frequently occurs in cases of this kind? Would it not seem to be better if we should hold that what is inserted and enclosed in a building forms a portion of the same?

39. *Modestinus, Rules, Book V*.

I ask if anyone should sell a tract of land under the condition that all should be considered to be sold which he possessed within certain boundaries, and the vendor, nevertheless, well knew that he did not possess a certain part of said land, and did not notify the purchaser of the fact; would he be liable to an action on sale, since this general rule ought not to apply to those portions of the land which the party who sold them knew did not belong to him, and yet did not except them? Otherwise, the purchaser would be taken advantage of, who if he had known this, would perhaps not have purchased the property at all; or would have bought it at a lower price if he had been notified with reference to its true amount; as this point has been settled by the ancient authorities, with respect to a person who made an exception, in the following terms, "Any servitudes that are due, shall remain due." For persons learned in the law gave it as their opinion that, if a vendor, knowing that servitudes were due to certain persons, did not notify the purchaser, he would be liable to an action on purchase; for this general exception does not refer to matters which the vendor was aware of, and which he could and should expressly except, but to things of which he was ignorant, and concerning which he could not notify the purchaser. Herennius Modestinus was of the opinion that if the vendor in the case stated did anything for the purpose of deceiving the purchaser, he could be sued in an action on purchase.

40. *Pomponius, On Quintus Mucius, Book XXXI*.

Quintus Mucius stated the following case. The owner of a tract of land sold the standing trees on the same, and, after having received the money for the property, refused to deliver it. The purchaser asked what course he should take, and feared that the said trees would not be considered to belong to him. Pomponius replied that the trees standing upon the land were not separate from the latter, and therefore the purchaser could not bring suit to recover the trees as the owner of the same, but he would be entitled to an action on purchase.

41. *Papinianus, Opinions, Book III*.

In a contract of sale, nothing was stated with reference to the annual payment due for an aqueduct passing under a house at Rome. The buyer having been deceived would be entitled to an action on purchase on this ground; and therefore, if he should be sued in an action on sale for the price, the unexpected burden imposed upon him should be taken into consideration.

42. *Paulus, Questions, Book II*.

If the vendor of two tracts of land should make statements with reference to the measurements of each, and then deliver both for a single price, and the full amount should be lacking to one of the tracts, but the other should contain more; for example, if he stated that one of them contained a hundred *jugera*, and the other two hundred, it would be of no advantage to him if one of them was found to contain two hundred, and the other fell short ten. A decision on this point is given by Labeo. But can it be doubted that an exception on the ground of bad faith will be available by the vendor? For instance, if a very small portion of woodland was lacking, and the tract included a larger extent of vineyard than had been promised, would not he who availed himself of his perpetual right be guilty of fraud? For in the case where the amount of land is found to be greater than had otherwise been stated, this is not for the benefit of the vendor, but for that of the purchaser; and the vendor is liable whenever the measurement is ascertained to be short. Let us see, however, whether the vendor has no cause of complaint with reference to the same land, where the vineyard is found to include more than the meadow, and the measurement of the whole is correct.

The same question may arise in the case of two tracts of land, as where anyone sells two slaves conditionally entitled to their freedom, for one price, and says that one was ordered to pay ten *aurei* when he should have paid fifteen; for he will be liable to an action on sale, even if the purchaser should have received twenty *aurei* from the two.

It is more just, however, in all the above mentioned cases, for the profit to be set off against the loss, and if anything is lacking to the purchaser, either in the measurement or the quality of the land, he should be indemnified for the same.

43. *The Same, Questions, Book V*.

When Titius died, he left Stichus, Pamphilus, and Arescusa in trust to Seia, and directed that all of them should be given their freedom after the lapse of a year. As the legatee was unwilling to accept the trust, and still could not release the heir from the claim which she had against him, the heir sold the said slaves to Sempronius, without mentioning that their freedom had been bequeathed by the terms of the trust. The purchaser, after having made use of the labor of the aforesaid slaves for several years, manumitted Arescusa; and when the other slaves, having ascertained the intentions of the deceased, demanded their freedom granted under the trust, and brought the heir before the Prætor, the slaves were manumitted by the former on the order of the Prætor.

Arescusa answered that she was unwilling to have the purchaser for her patron. When proceedings were instituted by the purchaser in an action on purchase to recover from the vendor the price paid for the slaves including Arescusa; an opinion of Domitius Ulpianus was read, in which it was held that if Arescusa declined to have the purchaser for her patron, her act was justified by a rescript of the Imperial Constitutions, but that the purchaser, after her manumission, could not recover anything from the vendor.

I remember that Julianus held, with reference to this opinion, that the right to an action on purchase continued to exist even after the manumission, and I ask which opinion is correct? In this proceeding it was petitioned in the name of the purchaser, that the expenses which he had incurred in the instruction of one of the slaves should be refunded to him. I also ask, since Arescusa refused to have the purchaser as her patron, by whose act she was liberated, and whether she could have either the legatee who did not liberate her, or the heir as her patron, for the other two slaves were manumitted by the heir. I answered that I have always approved the opinion of Julianus, who thought that the right of action was not extinguished in this way by manumission.

But with reference to the expenses which the purchaser incurred in the instruction of the slave, there is a point to be considered, for I think that an action on purchase will be sufficient in a case of this kind, since not only is the price involved, but all the interest of the purchaser in not being deprived of the slave by eviction. It is clear that if the expense incurred in the case you suggest exceeds the price to such an extent that the vendor would not have thought that it would amount to so much; as, for instance, if we suppose that the slave was purchased for a small sum and instructed as a charioteer or an actor, and the owner was afterwards deprived of him by eviction, it would seem to be unjust for the vendor to be liable for a larger amount.

44. *Africanus, Questions, Book VIII*.

And suppose that the vendor was only in moderate circumstances, he cannot be compelled to pay more than double the price.

45. *Paulus, Questions, Book V*.

Africanus states that Julianus held the same opinion, and this is just, as the amount to be paid will be diminished if the value of the slave has depreciated while in the hands of the purchaser, when he is recovered by a better title.

(1) The following is held to be more convenient, namely, if you should sell me a vacant lot

belonging to another, and I should build upon it, and the owner of the property should recover it by eviction; for since the latter, in bringing an action to recover said property, can be barred by an exception on the ground of bad faith unless he pays the cost of the buildings, the better opinion is that the vendor is not responsible for this. It must also be held in the case of a slave that, if he is recovered under a better title, while he is still in slavery and not after he has been set free, the owner must make good any outlay and expenses incurred on his account. If the buyer is not in possession of the building or the slave, he will be entitled to an action on purchase. In all these instances, if anyone knowingly sells property belonging to another he will, unquestionably, be liable.

(2) There still remains the third point, that is to say, who shall be the patron of the freedwoman Arescusa, who refused to accept the purchaser as such? It is held, and not without reason, that she ought to become the freedwoman of the person by whom she is sold, that is to say, of the heir, because he himself is liable to an action on purchase. This only applies where Arescusa does not select the purchaser as her patron, for if she does, she will remain his freedwoman, and he will not be entitled to an action on purchase, because he has no longer any interest since he has her as his freedwoman.

46. *The Same, Questions, Book XXIV*.

Where anyone sells property belonging to another, and, in the meantime, becomes the heir to the owner of said property, he will be compelled to conclude the sale.

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

Lucius Titius, having received money in payment for materials sold under a fixed penalty, with the understanding that if they were not delivered in good condition within a designated time, the penalty could be collected, died, after a part of the materials had been delivered. Then, since the testator has become liable for the penalty, and his heir will not produce the remaining materials, can he be sued for the penalty and interest, especially when the purchaser had borrowed the money at a very high rate of interest? Paulus answered that, under the contract as stated, the heir of the vendor could be sued for the penalty, and that, also, in an action on purchase, the court would take into consideration the interest from the day when the vendor began to be in default.

48. *Scævola, Opinions, Book II*.

Titius, the heir of Sempronius, sold a tract of land to Septicius as follows: "I sell you the field which belonged to Sempronius, together with any rights enjoyed by Sempronius in the same, for so much money." He delivered the mere possession of said land, but did not point out the boundaries of the same. The question arose, whether he could be compelled in an action on purchase to show by documents belonging to the estate what rights the deceased had in said land, and to point out its boundaries? I answered that everything should be done under this written contract, which the parties understood to have been intended. If this cannot be ascertained, the vendor must produce the documents relating to the land, and point out its boundaries, for this is consistent with the good faith of the contract.

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

Where anyone, for the purpose of deceiving the purchaser, produces a false tenant who is in collusion with him, he will be liable to an action on purchase; nor can he defend himself by stating that he assumes the responsibility for the tenant, and the rent for five years, if, by this means, he contrived more readily to conceal the fraud.

(1) Where the principal of the price has been paid, although this has been done after default, interest on it cannot be claimed, because it is not included in the obligation, but depends upon the decision of the Court.

50. *Labeo, Later Epitomes by Javolenus, Book IV*.

Good faith does not tolerate that, where a buyer, through the indulgence of some law, is not

compelled to pay the price of the property purchased before it is delivered to him, the vendor shall be compelled to deliver it, and relinquish possession of the same. Where, however, possession has already been delivered, the result will be that the vendor will lose the property; for example, where the purchaser opposes the vendor, who claims the property, with an exception on the ground of sale and delivery; and hence the case will be the same as if the claimant had not either sold or delivered the property to him.

51. *The Same, Later Epitomes by Javolenus, Book V.*

Where the purchaser and the vendor are both in default with reference to the delivery and acceptance, the result will be the same as if the purchaser alone was responsible. For the vendor cannot be held to be in default with reference to the purchaser, when the latter himself is also guilty of delay.

(1) Where you purchased a tract of land under the condition that you would pay the purchase-money on the *Kalends* of July; even though, when the time had expired, the vendor was at fault for the money not being paid to him, and afterwards you were to blame for not paying it; I stated that the vendor could avail himself of the condition stated in the contract, as against you; because in making the sale it was the intention of the parties that if the purchaser was in default for non-payment of the money, he would be liable for the penalty mentioned in the contract. I think this opinion to be correct, unless the vendor was guilty of fraud in the transaction.

52. *Scævola, Digest, Book VII.*

A creditor held a tract of land which was encumbered to him, and also had in his possession receipts for taxes previously paid by the debtor which had been deposited with him; and he sold the land to Mævius on the condition that the purchaser should pay any taxes which might become due. The said land was sold by the collector of taxes of the district in which it was situated, on account of the taxes that had already been paid; the same Mævius bought it and paid the amount.

The question arose whether the buyer could sue the vendor in an action on purchase, or in any other action, and compel him to surrender the receipts for the payments above mentioned. The answer was that the buyer could proceed, by an action on purchase, to compel the documents in question to be produced.

(1) A father having given to his daughter, by way of dowry, a certain tract of land whose value had been appraised, the said land was found to be encumbered to a creditor. The question arose whether a son, who had accepted the estate of his father, would be liable to an action on purchase to obtain a release from the creditor, and furnish the property free of encumbrance to the husband, as the daughter, content with her dowry, had declined to accept her share of the estate. The answer was that he would be liable.

(2) It was agreed between the vendor and the purchaser of an office in the army, that the salary due to the former should be paid to the purchaser. The question arose as to the amount which the purchaser should demand, and what the vendor should pay to the purchaser in a transaction of this kind? The answer was that the vendor should assign the extraordinary right of action which he held on this account.

(3) A party who had a house on the sea-shore built a wall so that the shore, as well as the house, was enclosed by it, and then sold the house to Gaius Seius. I ask whether the shore which was enclosed with the house by the vendor also belonged to the buyer by the right of purchase? The answer was that the house would be sold in the same condition in which it was before the sale was concluded.

53. *Labeo, Probabilities, Book I.*

Where it is stated in a contract that the rent of a house shall belong to the purchaser; whatever the said house is rented for should be paid to the purchaser. Paulus says that this is not

altogether true, for if you rent an entire house to one tenant for a certain sum, and the tenant sublets it for a larger amount, and, in selling the house, you state that the rent is to be paid to the purchaser, that only is included which the tenant owes you for the entire house.

(1) If you sold a tract of land in which you have a burial-place and do not expressly except it, you will have no security on this account. Paulus says that this opinion is, by no means, just, provided a public highway runs by the side of the burial-place.

(2) If, where a house is sold, lodgings in the same are reserved for the occupants under the terms of the sale, such a reservation is properly made with reference to all the occupants of said house, with the exception of the owner. Paulus, however, says that if you had given free lodgings to anyone in the house which you sold, and you should make the reservation in such a way that the occupants, or any one of them, will have rent to pay at a certain time, you will not properly provide for this; for it is necessary to make an express reservation with reference to them. Therefore, the purchaser can, with impunity, prevent the occupants from lodging in the house.

54. *The Same, Probabilities, Book II*.

Where a slave whom you have sold breaks a leg in doing something by your order, the risk is not yours, if you directed him to perform some act which he was accustomed to perform before the sale, and if you ordered him to do something which you would have ordered him to do, even if he had not been sold. Paulus says that this opinion is by no means correct; for if the slave had been accustomed to perform some dangerous task before the sale, it will be held that you were to blame for this; as, for instance, if you had been accustomed to compel your slave to go down into a vault, or into a sewer.

The same rule of law applies if you were accustomed to order him to do something which the wise and diligent head of a family would not order his slave to do. What if this should be made the ground of an exception? He can, nevertheless, direct the slave to perform some new task which he would not have ordered him to perform if he had not been sold; for example, if he should order him to go to the home of the purchaser, who lived in a distant place, for certainly this would not be at your risk. Therefore, the entire matter merely has reference to the fraud and negligence of the vendor.

(1) Where it is stated in the contract that there were eighty casks buried in the ground, which were accessory to the land, and there are more than this; the vendor must give to the purchaser the above mentioned number, making his selection from all the others as he wishes, provided he delivers such as are sound. Where there are only eighty of them, they belong to the purchaser, just as they are; and the vendor will not be obliged to pay him anything for those that are not perfect.

55. *Pomponius, Epistles, Book X*.

Where a slave who has been purchased or promised is in the power of the enemy, Octavenus thinks that the better opinion is that the sale and stipulation are valid, because it is a transaction entered into between the purchaser and the vendor; for the difficulty exists rather in furnishing what was agreed upon, than in the nature of the transaction, for even if the delivery of the slave should be ordered by the judge, it should be deferred until it can take place.

TITLE II.

CONCERNING LEASING AND HIRING.

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

Leasing and hiring is a natural transaction common to all nations, and it is contracted not by words but by consent, just like purchase and sale.

2. *Gaius, Daily Events, Book II*.

Leasing and hiring resembles purchase and sale, and is established by the same rules of law. For as purchase and sale is contracted by an agreement as to the price to be paid, so also is leasing and hiring understood to be contracted where an agreement is made as to the rent.

(1) Purchase and sale is held to bear such a resemblance to leasing and hiring that, in some instances, it is customary to make the inquiry as to whether the transaction is one of purchase and sale, or one of leasing and hiring; for example, if I have a contract with a goldsmith to make me some rings of a certain weight, and of a designated form, and he agrees to make them for three hundred *aurei;* is this a purchase and sale, or a leasing and hiring? It is held that it is only a single transaction, and is rather a purchase and sale than a leasing and hiring. If, however, I furnish him the gold, and compensation for his work is agreed upon, there is no doubt that this is a leasing and hiring.

3. *Pomponius, On Sabinus, Book IX.*

Where a tract of land is leased, and the tenant receives the implements for its cultivation after they have been appraised, Proculus says that the intention of the parties is that the tenant should have the implements, as being purchased; just as when any property, after having been appraised, is given by way of dowry.

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

A lease, or a precarious tenancy is made in the following terms, namely: "As long as he who leases or gives the property may be willing," and it is terminated by the death of the owner of the property.

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

If I rent you a lodging and afterwards remit the rent, an action on leasing and hiring will lie.

6. *Gaius, On the Provincial Edict, Book X.*

Where anyone has rented property, he is not required to surrender what he recovered on account of said property in an action for theft.

7. *Paulus, On the Edict, Book XXXII.*

If I rent you a house belonging to another for fifty *aurei*, and you rent the same house to Titius for sixty, and Titius is forbidden by the owner to occupy it; it is established that you can bring an action on hiring against me, to recover sixty *aurei*, because you yourself are liable to Titius for sixty.

8. *Tryphoninus, Disputations, Book IX.*

Let us see whether neither sixty nor fifty *aurei* should be paid, but an amount equal to the interest the tenant has in the enjoyment of the property leased, so that the second lessor can only recover the sum that he owes to the party who rented the property from him; and since the profit of the lease is to be computed according to the amount of the higher rent, the result is that the sum recovered should be greater. The first lessor will still have a right to claim the fifty *aurei* which he would have collected from the first tenant, if the owner had not forbidden the last tenant to occupy the house. This is our practice.

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

If anyone rents me a house or a tract of land which has been purchased in good faith, and he is evicted from the same without fraud or negligence on his part; Pomponius says that the lessor will, nevertheless, be liable to an action on lease, in order that the lessee may be enabled to enjoy the property rented to him. It is clear that if the owner will not allow him to occupy the premises, and the lessor is ready to furnish him another house which is just as convenient, he says that it would be perfectly just for the lessor to be released from his obligation.

(1) What Marcellus stated in the Sixth Book of the Digest may be added, namely: "If an usufructuary rents a tract of land subject to an usufruct, for five years, and dies; his heir will

not be liable to permit him to enjoy the same, any more than a lessor would be liable to a lessee after a house has been destroyed by fire. But whether the lessee will be liable to an action on the lease to collect the rent during the time he was in the enjoyment of said property, is a question asked by Marcellus; just as he would have been compelled to pay, if he had leased the services of a slave subject to an usufruct, or a lodging. He states that the better opinion is that he will be liable; and this is perfectly just.

He also asks if the lessee should incur any expense on account of the land through the expectation of enjoying it for five years, whether he can recover the same. He says that he cannot do so, because he should have foreseen that this would take place. But what if the usufructuary had not leased the land to him as such, but as the owner of the same? He will certainly be liable, for he deceived the lessee; and this the Emperors Antoninus and Severus stated in a Rescript. They also stated that, where the house has been destroyed by fire, the rent must be paid for the time that the building stood.

(2) Julianus says in the Fifteenth Book of the Digest, that, where anyone leases land on the condition that if anything should happen to it through the exertion of irresistible force, he will be responsible for the same; he must abide by the contract.

(3) Where, in the terms of a lease of land, the lessee was notified to be careful about fire, and some accident caused a conflagration, he will not be compelled to make good the loss. But where damage is caused by the negligence of the lessee, for which he was responsible, he will be liable.

(4) The Emperor Antoninus, together with his father, stated in a Rescript with reference to a flock of goats, which a party had hired, and which had been stolen from him, "If it can be proved that the robbers drove away the goats without any fraud on your part, you will not be compelled to be responsible for the occurrence in an action on lease, and you can recover any rent for the time following the theft as being money paid which was not due."

(5) Celsus also states in the Eighth Book of the Digest that want of skill should be classed with negligence. Where a party rents calves to be fed, or cloth to be repaired, or an article to be polished, he must be responsible for negligence, and whatever fault he commits through want of skill is negligence, because he rents the property in the character of an artisan.

(6) If you lease me a house belonging to another, which has been bequeathed or given to me, I am not liable to you for the rent in an action on lease. Let us see, however, whether anything is due for the time which has elapsed before the bequest was made. I think that the rent should be paid for that time.

10. *Julianus, On Urseius Ferox, Book III*.

And I can properly bring an action on hiring, or for the purpose of compelling you to release me from the contract.

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

Let us see whether the tenant is liable for the negligence of his slave, and of those to whom he has sublet the property, and also to what extent he is responsible; shall he surrender the slave by way of reparation, or will he be liable in his own name; and, with reference to those to whom he has sublet the premises, must he only assign to the owner any rights of action which he may have against them, or will he be accountable just as if the negligence was his own? It is my opinion that he is responsible in his own name for the negligence of his sub-tenants, even though nothing had been agreed upon with reference to this: provided, however, he committed negligence in subletting the property to such persons, either his own slaves or tenants. Pomponius approves this in the Sixty-third Book On the Edict.

(1) If it was agreed upon at the time of the lease that the tenant could not have fire, and he, nevertheless, has it, he will be liable, even though an accident may cause a conflagration, because he had no right to have it.

The rule is different where he is permitted to have fire which will not cause injury, for, in this instance, he is allowed to have it provided it causes no damage.

(2) The lessee must also be careful not to injure the property, or any right attaching to the same, nor to permit this to be done.

(3) Where a party hired his services for the transportation of wine from Campania, and then, a controversy having arisen between himself and another, he sealed the casks with his own seal and that of the other person, and placed the wine in a warehouse; he will be liable to an action on hiring to return the possession of the wine to his employer, without any dispute, unless the employee was guilty of negligence.

(4) It was agreed upon between a lessor and a lessee that hay should not be placed in a building in a city. It was, nevertheless, placed there, and a slave, having afterwards set fire to the hay, killed himself. Labeo says that the lessee is liable to an action, because he himself was the cause of the disaster, by bringing in the hay in violation of the terms of the lease.

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

Moreover, even if some stranger had kindled the fire, the lessee would be liable for the damage caused.

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

The question is also asked, where the driver of a vehicle, while trying to pass others, overturns one, and injures or kills a slave, what course must be pursued? I think that an action on hiring will lie against him, for he should have been more careful. Moreover, a prætorian action under the *Lex Aquilia* will be granted him.

(1) If the master of a ship should receive a cargo to be taken to Minturnæ, and, as his ship was unable to ascend the river, he should transfer the merchandise to another which was lost at the mouth of the river; in this instance, the first master will be liable.

Labeo says that if he was not guilty of negligence, he will not be liable; but if he acted against the consent of the owner, or transferred the cargo at a time when he should not have done so, or loaded it in a vessel which was less seaworthy than his own; an action on hiring can be brought against him.

(2) Where the master of a ship takes it into a river without a pilot, and, a storm having arisen, he cannot manage the ship and loses it; the owners of the cargo will be entitled to an action on hiring against him.

(3) If anyone leases a slave for the purpose of instructing him, and takes him to a foreign country where he is either captured by the enemy, or loses his life, it is held that an action on hiring will lie, provided he did not hire him for the purpose of taking him into a foreign country.

(4) Julianus also says in the Eighty-sixth Book of the Digest that if a shoemaker, being dissatisfied with a boy employed by him should strike him on the neck with a last so hard as to destroy his eye, an action on hiring can be brought by his father; for although masters are permitted to inflict light punishment, still, this is immoderate. We have stated above that an action under the *Lex Aquilia* will also lie.

Julianus denies that an action on injury can be brought, because the party did not commit the act for the purpose of causing injury, but in the course of instruction.

(5) Where a precious stone has been given to an artisan for the purpose of being set or engraved, and it is broken; if this was caused by any defect in the stone, an action on hiring will not lie, but where it occurred through want of skill, it can be brought. It must be added to this opinion, "unless the workman assumed the risk," for then, even if the accident was caused by a defect, an action on hiring will lie.

(6) If a fuller should receive clothing to be cleaned, and mice gnaw it, he will be liable to an

action on hiring, because he ought to have provided against this. If a fuller changes cloaks, and gives one to one person which belongs to another, he will be liable to an action on hiring, even though he did so ignorantly.

(7) A tenant left the premises on the approach of an army, and the soldiers afterwards removed the windows and other things from the house; if the tenant did not notify the owner when he left, he will be liable to an action on hiring. Labeo says that if he could have resisted, and did not do so, he will be liable; and this opinion is true. But if he could not notify the landlord, I do not think he would be liable.

(8) Where anyone rents measures, and a magistrate orders them to be destroyed; if they were false, Sabinus makes a distinction where the lessee was aware of the fact, and where he was not. If he knew that they were false, an action on hiring will lie, otherwise not. If the measures were correct, he will only be liable where he was to blame for the act of the Ædile. This opinion is also held by Labeo and Mela.

(9) Two lessees can be held liable for the entire amount involved.

(10) Where it is included in the contract for the hire of labor, that if the article is not completed by a certain time it may be given to someone else, the first lessee will not be liable to an action on hiring unless the article is given to someone else under the same contract; nor can this be done until the day fixed for its completion shall have passed.

(11) Where, after the term of his lease has elapsed, the tenant remains on the premises, not only is a renewal of the lease held to have been made, but also any pledges which have been given as security are still considered to be encumbered. This, however, is only true where another party had not encumbered the property at the time of the original lease, otherwise his fresh consent will be necessary. The same rule applies where lands have been leased to the government.

What we have stated, namely, that the tenant is held to have made a new lease through the silence of both parties, must be understood to mean that where they were silent, the lease is renewed for a year, but this does not apply to ensuing years, even though the term of the lease should, in the beginning, have been five years.

Moreover, if no contrary agreement was made during the second year after the end of the term of five years, the lease will be considered to be renewed for that year, as the parties are held to have consented for the year during which they kept silent. This rule must also be observed afterwards for every ensuing year. Another rule is applicable to urban estates, however, for a tenant is liable for all the time he occupies the premises, unless a certain term fixing the duration of the lease is mentioned in the written instrument.

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

Where anyone rents land for a certain time, he remains a tenant even after it has expired; for it is understood that where an owner allows a tenant to remain on the land he leases it to him again. A contract of this kind does not require either words, or writing to establish it, but it becomes valid by mere consent. Therefore, if the owner of the property should become insane or die in the meantime, Marcellus states that it cannot be held that the lease is renewed; and this is correct.

15. *The Same, On the Edict, Book XXXII.*

The action on hiring is granted to the lessee.

(1) Moreover, the action will, to a certain extent, lie in the following cases; for instance, where the party is unable to enjoy the property which he has leased, perhaps because possession of an entire field or of a portion of the same has not been given him; or a house, or a stable, or the place where flocks must be kept, has not been repaired; or where something is not furnished which was agreed upon under the terms of the lease; an action on hiring will lie.

(2) Let us consider whether the lessor is obliged to do anything for the lessee, where bad weather has caused the latter loss. Servius says that the lessor must indemnify the lessee for any violence which could not be resisted; as, for instance, that caused by the overflow of rivers, by birds of different kinds, or by any similar accident, or where an invasion of enemies takes place. If any defect should arise with reference to the property itself, the loss must be borne by the tenant; as, for example, where wine becomes sour, or the crops are ruined by weeds. If, however, an earthquake occurs, and destroys all the crops, the loss will not be sustained by the tenant, for he cannot be compelled to pay the rent of land in addition to the loss of the seed.

Where, however, the olive crop has been spoiled by fire, or this has taken place through the unusual heat of the sun, the owner of the land must bear the loss; but if nothing extraordinary happens, the tenant will be responsible for it. The same must be said where an army that was passing by removed anything in mere wantonness. But if a field should be so ruined by an earthquake that nothing remains of it, the loss must be borne by the owner, for he is obliged to furnish the land to the lessee in such a condition that he can enjoy it.

(3) Where a tenant alleged that a fire had taken place on the land, and asked that the rent be remitted; it was stated in a Rescript, "If you cultivated the land, you are entitled to reasonable relief on account of the occurrence of an unexpected fire."

(4) Papinianus says in the Fourth Book of Opinions that where a landlord has remitted the rent to a tenant for one year on account of sterility, and there was a great yield during the following year, the landlord has lost nothing on account of remitting the rent, and he can even claim the rent for the year which he remitted. He gave the same opinion with reference to the loss under a perpetual lease. If, however, the landlord remitted the rent for a year on account of sterility, as a gift, the same rule will apply, as this is rather an agreement than a donation. But what if he remitted the rent because of sterility during the last year of the lease? It is held to be more correct that, if the preceding years were fruitful, and the landlord was aware of the fact, he should not call the tenant to account for the one which was sterile.

(5) It is stated in a Rescript of the Divine Antoninus that no attention should be paid to a tenant who complains of the smallness of the crops. It is also stated in another rescript, "You are claiming something unusual, when you ask that the rent shall be remitted to you on account of the age of the vines."

(6) Again, where a certain individual, in the case of the loss of a vessel, demanded what he had paid for transportation on the ground that it was a loan; it was stated in a Rescript by the Emperor Antoninus that the Imperial Procurator had not improperly demanded the freight from the owner of the vessel, since he had not performed his duty in transporting the property. This rule must likewise be observed in the case of all other persons.

(7) Wherever there is any ground for the remission of rent for the above-mentioned reasons, the lessee cannot recover any interest to which he may be entitled, but he will be released from the payment of rent in proportion to the time. Finally, it has been already stated that the loss of the seed must be borne by the tenant.

(8) It is clear that if the owner of the property does not allow the lessee to enjoy it, either because he himself has leased it, or for the reason that someone has leased the property of another acting as his agent, or as if it was his own, he must indemnify the lessee to the extent of his interest. Proculus held this opinion where a party pretended to be an agent.

(9) Julianus says in the Fifteenth Book of the Digest that sometimes an action on hiring is brought for the purpose of releasing the parties to the contract; as, for instance, where I leased land to Titius, and he died after appointing a ward his heir, and, as the guardian had

caused the ward to reject the inheritance, I leased the said land to another party at a higher rent; and afterwards the ward obtained possession of the estate of his father. In an action on hiring, he can recover nothing more than to be discharged from liability on his contract, for I

had a good reason for again leasing the property:

16. *Julianus, Digest, Book XV*.

Since, at the time, no right of action was granted me against the ward.

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

He also says that the ward is entitled to an action against his guardian, if he ought not to have rejected the estate.

18. *Julianus, Digest, Book XV*.

There will also be included in this action any profits which the ward could have obtained from the lease of the land.

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

But you should add to the opinion of Julianus that if I was in collusion with the guardian I would be liable to an action on hiring to the extent of the interest of the ward.

(1) Where anyone rents defective casks, not knowing that they are such, and the wine afterwards leaks out, he will be liable to the amount of the party's interest, and his ignorance will not be excusable. This opinion was held by Cassius.

The case is different if you rented a tract of land for pasturage in which poisonous herbs grew; for, in this instance, if any of the cattle died, or were depreciated in value, and you knew of the existence of the herbs, you must indemnify the lessee to the amount of his interest; and if you were ignorant of their existence, you cannot collect the rent. This was also held by Servius, Labeo, and Sabinus.

(2) We must consider where anyone leases a tract of land what implements he must furnish the lessee, and if he does not do this, whether he will be liable in an action on lease. A letter of Neratius to Aristo upon this point is extant which states that casks must be furnished the tenant, as well as a wine-press and an olive-press, equipped •with ropes, and if they are lacking, the owner must provide them, and he must likewise repair a press if it is out of order. If any of the implements become damaged through the fault of the tenant, he will be liable to an action on lease.

Neratius says that the tenant is also required to provide the vessels which we use for pressing the olives. If the oil is pressed out by means of baskets, the owner must furnish the press, the windlass, the baskets, the wheel, and the pulleys by which the press is raised. He must also furnish the brazen kettle in which the oil is washed with warm water, as well as the other necessary utensils for handling the oil, together With the wine-casks, which the tenant must cover with pitch for present use. All these things shall be provided in this manner, unless some other special agreement has been made.

(3) Where the landlord inserted in the lease that he should be entitled to a specified amount of grain at a certain price, and he refuses to accept it, and is unwilling to make any deduction from the rent, he can bring an action to recover the entire amount; but the result will be that, in the discharge of his duty, the judge must take into account the interest which the lessee had in delivering the grain, rather than in paying money by way of rent. The same must likewise be held where an action on the lease is brought.

(4) What action will lie where a tenant adds a door or anything else to a house? The better opinion is that held by Labeo, namely, that an action on lease will lie to permit the tenant to remove it; provided, however, that he gives security against threatened injury, lest he may render the house of less value in some respect when he removes what he added, but only that he will restore the building to its original condition.

(5) If a tenant should bring a metal chest into a house, and the owner subsequently makes the entrance smaller; it is a fact that an action on lease, as well as one for the production of property will lie against the owner, whether he was aware or ignorant of the fact. It is the duty

of the judge to compel him to furnish a passage to enable the tenant to remove the chest, of course at the expense of the landlord.

(6) If anyone should lease a house for a year, and pay the rent for the entire term, and, six months afterwards, the house falls down, or is consumed by fire; Mela very properly says that he will be entitled to an action on lease for the recovery of the rent for the remaining time, but not to one for the recovery of money which was not due; for he did not pay more by mistake, but that he might be benefited with reference to the lease.

The case is different where anyone leases property for ten *aurei* and pays fifteen; for if he paid this sum by mistake, being under the impression that he had rented the property for fifteen *aurei*, he will not be entitled to an action on lease, but can only sue for the recovery of the money; for there is a great deal of difference between one who pays by mistake, and one who pays the entire rent in advance.

(7) Where anyone makes a contract for the transportation of a woman by sea, and afterwards a child is born to her on the ship, it has been established that nothing is due on account of the child; for the transportation was not more expensive, nor did the child consume anything which was provided for the use of those navigating the vessel.

(8) It is clear that an action on hiring can also pass to an heir.

(9) Where a certain copyist leased his services and the party who had contracted for them died; the Emperors Antoninus and Severus stated the following in a Rescript, in answer to an application of the copyist: "Since, as you allege that you are not to blame for not having furnished the services for which you were hired to Antoninus Aquilia, it is only just that, if you did not receive any salary from another during the year, the contract should be carried out."

(10) Papinianus states in the Fourth Book of Opinions that, where an envoy of the Emperor dies, his attendants must be paid their salaries for the remainder of their time of service; provided the said attendants were not, during that time, in the employ of others.

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

A lease, like a sale, can be made under a condition.

(1) It cannot, however, be contracted by way of donation.

(2) Sometimes the lessor is not bound, but the lessee is; as, for instance, where the buyer rents a tract of land until he pays the purchase-money.

21. *Javolenus, Epistles, Book XL*

When I sold a tract of land, the agreement was that, until the entire amount was paid, the purchaser should lease it for a certain rent. When the money is paid, should a receipt be given for the rent? The answer was that good faith requires that what was agreed upon should be done, but that the purchaser should not be responsible to the vendor for a larger sum than the rent of the property would amount to during the time when the money was not paid.

22. *Paulus, On the Edict, Book XXXIV*.

Moreover, where it is inserted in the contract that if the price is not paid, the property shall not be purchased, an action on lease will lie.

(1) As often as any work is given to be performed, it is a lease.

(2) Where I contract for the construction of a house, with the understanding that the person I employ is to be responsible for all of the expense, he transfers to me the ownership of all the material used, and still the transaction is a lease; for the artisan leases me his services, that is to say, the necessity for performing the labor.

(3) Just as in a transaction of purchase and sale it is naturally conceded that the parties can either purchase or buy something more or less, and hence mutually restrain one another, so

the rule is the same in leasing and hiring.

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

And, therefore, a contract of lease when once made cannot be rescinded under the pretext that the compensation was too low, where no fraud by the opposite party can be proved.

24. *Paulus, On the Edict, Book XXXIV*.

Where it is included in the contract of lease that the work shall be approved by the owner, it is considered that this means in accordance with the judgment of a good citizen. The same rule is observed where recourse is to be had to the judgment of any other person whomsoever; for good faith demands that such judgment should be afforded as befits a good citizen. Judgment of this kind has reference to the quality of the work, and not to the extension of the time prescribed by the contract, unless this itself was included in the agreement. The result of which is that where the approval of the work has been obtained by the fraud of the party employed, it is of no effect, and an action on lease can be brought.

(1) Where a tenant rents a tract of land, the property of a subtenant is not bound to the owner, but the crops remain in the condition of a pledge, just as if the first tenant had gathered them.

(2) Where a house or a tract of land is rented for the term of five years, the owner can at once bring an action against the tenant, if he abandons the cultivation of the soil, or vacates the house.

(3) He can, also, bring suit with reference to those things which the tenant ought to do without delay; as, for instance, some labor which he should perform, like the planting of trees.

(4) Where a tenant is unable to enjoy the property, he can legally bring an action at once for his entire term of five years, although the owner may have allowed him to enjoy it for the remaining years, as the owner will not always be released for the reason that he permitted the tenant to enjoy the property for the second or third year. For where the tenant has been ejected under the lease, and has betaken himself to another farm, he will not be able to cultivate both, nor will he be compelled to pay the rent, and he can recover the amount of the profit which he would have obtained if he had been unmolested; for permission to enjoy the property comes too late where it is offered at a time when the tenant, being occupied with other matters, cannot take advantage of it.

If the landlord prevents his enjoyment of the property, and then changes his mind, the affairs of the tenant are held to be unaltered; and the delay of a few days does not lessen the obligation to any extent. Again, a party can properly bring an action on lease, to whom certain articles have not been furnished in accordance with the agreement, or where he is prevented by the owner from enjoying the property, or where this is done by a stranger whom the owner can control.

(5) If a landlord rents a tract of land for several years, and charges his heir by his will to release the tenant, and the heir does not permit the latter to enjoy the property for the remainder of his term, an action on lease will lie. If he allows him to do so, but does not remit the rent, he will be liable to an action under the will.

25. *Gaius, On the Provincial Edict, Book X*.

Where rent has been promised in general terms, to be decided by a third party, a lease is not held to have been made. But where it is stated that the amount of the rent shall be estimated by Titius, the lease will be valid subject to this condition; and if the party mentioned fixes the rent, it must, by all means, be paid in accordance with his estimate, and the lease will become operative. If, however, he refuses to do this, or is unable to fix the rent, the lease will be of no effect, just as if the amount of the rent had not been determined.

(1) Where a man has leased anyone a tract of land to be cultivated, or a house to be occupied, and, for some reason or other, he sells the land or the house, he must see that the purchaser

permits the tenant to enjoy the land or occupy the house, in accordance with the terms of the same contract; otherwise, if he is prevented from doing so, he can bring an action on lease against the vendor.

(2) Where a neighbor, in building a house, cuts off the light from a room, the landlord will be liable to the tenant. There is certainly no doubt that the tenant can give up the lease in a case of this kind; and also, where an action is brought against him for the rent, compensation must be taken into account.

We understand that the same rule applies where the landlord does not repair any doors or windows which may have been damaged or destroyed.

(3) The lessee should do everything in accordance with the terms of the lease, and, above all things, he should be careful to perform the labors on the farm at the proper time, lest cultivation out of season cause the soil to be deteriorated. He should also take care of the buildings in order to prevent them from being damaged.

(4) He will also be considered to be to blame if his neighbor, through enmity, cuts down the trees.

(5) If he himself cuts them down, he will not only be liable to an action on lease, but also to those under the *Lex Aquilia* and the Law of the Twelve Tables with reference to cutting trees by stealth, and to the interdict based on a violent or clandestine act.

It is, undoubtedly, a part of the duty of the judge who hears the case on lease, to see that the lessor abandons the other actions.

(6) Superior force, which the Greeks call "Divine Power," should not cause any loss to the tenant where the crops are injured in an unusual degree, otherwise, he must endure any moderate damage with untroubled mind, where he is not deprived of any extraordinary profit. It is evident, however, that we are speaking of a tenant who pays his rent in cash; on the other hand, where he divides the crops, as in the case of a partnership, he must also share the loss and gain with the owner of the land.

(7) Where anyone takes charge of the transportation of a column, and it is broken when it is raised, or while it is being carried, or when it is unloaded, he will be responsible for the damage, where this happened through his fault, or that of any of the workmen whom he employs. He will not be to blame, however, if all precautions are taken which a very diligent and careful man should take.

We, of course, understand that the same rule applies where anyone agrees to transport casks or lumber, as well as other things which are to be conveyed from one place to another.

(8) If a fuller or a tailor should lose clothing, and satisfy the owner of the same, the latter must assign to him his rights of action to recover the property.

26. *Ulpianus, Disputations, Book II.*

Where anyone has hired his services to two employers at the same time, he must satisfy the one who has first employed him.

27. *Alfenus, Digest, Book II.*

It is not always necessary to make a deduction from the rent in the case where tenants have been put to a little inconvenience, with reference to a part of their lodgings; for the tenant is in such a position that if anything should fall on the building, and by reason of this the owner be compelled to demolish a portion of the same, he ought to bear the slight inconvenience resulting therefrom; but, in doing so, the owner must not open that part of the house of which the tenant is accustomed to make the most use.

(1) Again, the question is asked, if a tenant should leave on account of fear, will he be obliged to pay the rent, or not? The answer is that, if he had good reason to be afraid, even though there was not actually any danger, he will not owe the rent; but if there was no just cause for

fear, it will still be due.

28. *Labeo, Later Epitomes by Javolenus, Book IV*.

Where, however, the tenant still makes use of the house, he must pay the rent.

(1) Labeo thinks that the rent is due, even if the house is out of repair.

(2) The same rule of law applies where the tenant has the power to lease the house and pay the rent. If, however, the landlord does not give the tenant authority to rent the house in which he lives, and he, nevertheless, does rent it, Labeo thinks that he must indemnify him for all that he has paid without fraudulent intent. But if the tenant was occupying the house gratuitously, a deduction should be made in proportion to the unexpired time of the lease.

29. *Alfenus, Digest, Book VII*.

The following was inserted in the contract of a lease: "The lessee shall neither cut down trees, nor girdle nor burn them, nor permit anyone to girdle, cut down, or burn the same."

The question arose whether the lessee should prevent anyone whom he saw doing something of this kind, or whether he should keep such a watch upon the trees that no one could do this. I answered that the word "permit" includes both significations, but that the lessor seemed to have intended that the lessee should not only prevent anyone whom he saw cutting down trees, but should also be careful and take such precautions that no one could cut them down.

30. *The Same, Digest of Epitomes by Paulus, Book III*.

A man who rented a house for thirty *aurei*, sub-let the separate rooms on such terms that he collected forty for all of them. The owner of the building demolished it, because he said that it was about to fall down. The question arose what the amount of damages should be, and whether the party who rented the entire house could bring an action on lease. The answer was that if the building was in such a bad condition that it was necessary to tear it down, an estimate should be made, and the damages assessed in proportion to the amount for which the owner had leased the premises, and that the time when the tenants were unable to occupy them should also be taken into consideration. If, however, it was not necessary to demolish the house, but the owner did so because he wished to build a better one, the judgment must be for the amount of the interest which the tenant had in his sub-tenants not being compelled to leave the premises.

(1) An Ædile rented baths in a certain town for the term of a year, in order that they might be used gratuitously by the citizens. The baths having been destroyed by fire after three months, it was held that an action on lease could be brought against the proprietor of the baths, that a part of the price should be refunded in proportion to the time during which the baths were not available.

(2) Inquiry was made as to the action to be brought where a man hired mules to be loaded with a certain weight, and he who hired them injured them with heavier loads. The answer was that the owner could legally proceed either under the *Lex Aquilia* or in an action on lease, but that, under the *Lex Aquilia*, he could only sue the party who had driven the mules at the time; but, by an action on lease, he could properly proceed against him who hired them, even if someone else had injured them.

(3) A man who contracted for the building of a house stated in the agreement: "I will furnish the stone necessary for the work, and the owner shall pay to the contractor seven sesterces for each foot, and as much for the stone as for the labor." The question arose whether the work must be measured before, or after it was completed. The answer was that it should be measured while it was still unfinished.

(4) A tenant received a house under the condition that he would return it uninjured, except so far as damage might result through violence or age. A slave of the tenant burnt the house, but not accidentally. The opinion was given that this kind of violence would not appear to have

been excepted; and that it was not agreed that the tenant should not be responsible if a slave burnt it, but that both the parties intended that violence exerted by strangers should be excepted.

31. *The Same, Epitomes of the Digest by Paulus, Book V*.

Several persons loaded the ship of Saufeius with grain without separating it; Saufeius delivered to one of them his grain out of the common heap, and the vessel was afterwards lost. The question arose whether the others could bring an action against the master of the ship with reference to their share of the grain on the ground that he had diverted the cargo. The answer was that there are two kinds of leases of property, one of them where the article must itself be returned, as where clothing is entrusted to a fuller to be cleaned, or where something of the same kind must be given back; as, for instance, where a mass of silver is given to a workman to be made into vases, or gold is given to be made into rings. In the first instance, the property still belongs to the owner; in the second, he becomes the creditor for its value.

The same *rule* of law applies to deposits, for where a party has deposited a sum of money without having enclosed it in anything, or sealed it up, but simply after counting it, the party with whom it is left is not bound to do anything but repay the same amount of money. In accordance with this, the grain seems to have become the property of Saufeius, and he very properly gave up a portion of it. If, however, the grain of each of the parties had been separately enclosed by means of boards, or in sacks, or in casks, so that what belonged to each could be distinguished, it could not be changed; for then the owner of the wheat which the master of the ship had delivered could bring an action for its recovery, and, therefore, the authorities do not approve of actions on the ground of the diversion of the cargo in this case, because the merchandise which was delivered to the master was either all of the same kind and at once became his, and the owner became his creditor (for it is not held that there was a diversion of the cargo since it became the property of the master); or the identical article which was delivered must be restored, and in this instance, an action for theft would lie against the master, and hence an action on the ground of the diversion of the cargo would be superfluous.

Where, however, the merchandise was delivered with the understanding that the same kind should be returned, the party receiving it would only be liable for negligence, as liability for negligence exists where the contract is made for the benefit of both parties, and no negligence can exist where the master returned to one of the owners a portion of the grain, since it was necessary for him to deliver his share to one of them before the others, even though he would be in a better condition than the others by his doing so.

32. *Julianus, On Minicius, Book IV*.

A man who leased a tract of land to be cultivated for a term of several years died, and devised the said land. Cassius denied that the tenant could be compelled to cultivate the land, because the heir had no interest in it. If, however, the tenant desired to cultivate it, and was prevented from doing so by the party to whom the land had been left, he would be entitled to an action against the heir, and the loss must be borne by the heir; just as where anyone sells something and bequeaths it to another before he delivers it; for, in this instance, the heir will be liable both to the purchaser and to the legatee.

33. *Africanus, Questions, Book VIII*.

Where a tract of land which you have leased to me is confiscated, you will be liable to an action on lease to permit me to enjoy it, even though it is not your fault that I cannot do so; just as it is held if you contract for the building of a house, and the ground on which it is to be erected is destroyed, you will, nevertheless, be liable. For if you should sell me a tract of land, and it should be confiscated before delivery, you will be liable to an action on purchase; and this is true to the extent that you must return the price, and not that you will be obliged to indemnify me for anything more than my interest in having the vacant tract of land delivered to me.

Hence, I think that the rule also applies to a lease, so that you must return the rent that I have paid for the time I was not able to enjoy the property, but you cannot be compelled to do this by any other action on lease; for if your tenant is prevented from enjoying the land either by you, or by another party whom you have the power to hinder from doing so, you must indemnify him to the extent of his interest in enjoying the property, and in this his profit is also included. If, however, he is hindered by anyone whom you cannot control, on account of his superior force or authority, you will not be liable to him for anything but to release the rent which has not been paid, or to refund that which has been paid.

34. *Gaius, On the Provincial Edict, Book X.*

Just as if this had happened through an attack of robbers.

35. *Africanus, Questions, Book VIII.*

This distinction corresponds to that which was introduced by Servius, and has been approved by almost all authorities; that is to say, where a landlord prevents a tenant from enjoying the use of the house by making repairs upon it, it must be considered whether or not the house was demolished through necessity; for what difference would it make whether the lessor of a building is compelled to repair it on account of its age, or where the lessor of land is compelled to endure injury from a party whom he cannot prevent from inflicting it?

It must be understood, however, that we make use of this distinction with reference to a person who has leased his land to be enjoyed, and has transacted the business in good faith; and not to one who has fraudulently leased land belonging to another and is unable to resist the owner of the same, when he prevents the tenant from enjoying it.

(1) When we hold land in common, and it is agreed upon between us that we shall have the renting of the same during alternate years for a certain amount, and you, when your year has expired, purposely destroy the crop of the ensuing year, I can proceed against you by means of two actions, one based on ownership, and the other on the ground of a lease; for my share is involved in the action on ownership, and yours only in the action on lease. Then, it is asked, will it not be the fact that, so far as my share is concerned, the loss sustained by me on your account must be made good by means of an action in partition? This opinion is correct, but, nevertheless, I think that that of Servius is also true, namely: "That where I make use of either one of the above-named actions the other will be destroyed." This question we may ask more simply, if it is suggested that, where it has been agreed upon between two parties who have separate tracts of land belonging to them, each shall have a right to lease the land of the other, with the understanding that the crops shall be delivered by way of rent.

36. *Florentinus, Institutes, Book VII.*

Where work is to be done under a contract, it is at the risk of the contractor until it is accepted. But, indeed, if it has been contracted for to be paid by feet or measure, it will be at the risk of the contractor, until it is measured; and in both instances the risk must be borne by the employer if he was to blame for the work not being accepted or measured. If, however, the work should be destroyed by superior force, before being accepted, it will be at the risk of the employer, unless some other agreement has been made. The contractor is not obliged to be responsible to the employer for anything more than he could have accomplished by his care and labor.

37. *Javolenus, On Cassius, Book VIII.*

If a work is destroyed by superior force before it has been accepted by the employer, he must bear the loss, if the work was of such a character that he should have accepted it.

38. *Paulus, Rules*.

A man who has hired his services is entitled to compensation for the entire time for which he was employed, if he was not to blame for failing to do the work.

(1) Advocates, also, are not compelled to return their fees, if they are not to blame for not trying a case.

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

A lease does not usually change the ownership of property.

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

He who receives compensation for the safe-keeping of any property is responsible for the custody of the same.

41. *Ulpianus, On the Edict, Boole V*.

Julianus, however, says that an action cannot be brought against one person for an injury committed by another; for by what degree of care can he prevent unlawful damage from being caused by someone else? Marcellus, however, says that this can sometimes be done where the party could have taken such care of the property that it could not have been injured, or where he himself, having charge of it, committed the damage. This opinion of Marcellus should be approved.

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

If you steal a slave that has been leased to you, one of two actions is available against you: the action on lease, and the one for theft.

43. *The Same, On the Edict, Book XXI*.

If you wound a slave that has been leased to you, the action under the *Lex Aquilia* or the one on lease can be brought on account of the wound, but the plaintiff must be content with one or the other of these; and this is a part of the duty of the judge before whom proceedings based on the lease are instituted.

44. *Ulpianus, On the Edict, Book VII*. No one can lease a servitude.

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

If I lease you a house and my slaves cause you any damage, or commit a theft, I am not liable to you on the lease, but in a noxal action.

(1) If I lease you a slave to be employed in your shop, and he commits a theft, it may be doubted whether an action on hiring will be sufficient in this instance; for it is far from being in accordance with the good faith implied by the contract that you should suffer any loss on account of the property which you have hired; or should it be stated that, in addition to the right of action based on the hiring, there is also one on the ground of the crime of theft, and that this offence gives rise to a peculiar right of action of its own? This is the better opinion.

46. *Ulpianus, On the Edict, Book LXIX*.

Where anyone leases property for a coin of trifling value the lease is void, for this resembles a donation.

47. *Marcellus, Digest, Book VI*.

When it is ascertained that a purchaser or a lessee has sold or leased the property to several other parties, in such a way that each of them is responsible for the entire amount, they can only be compelled to pay their shares where it is established that they are all solvent; although, perhaps, it would be more just that, even where they are all solvent, the claimant should not be deprived of the right of suing any one of them that he wishes, if he does not refuse to assign the rights of action which he has against the others.

48. *The Same, Digest, Book VIII*.

If I contract with anyone to perform some labor which I myself have agreed to do, it is settled that I will be entitled to an action on lease against him.

(1) Where a party refuses to restore to me a slave, or any other movable property which I have leased to him, judgment shall be rendered against him for the amount of damages sworn to by me in court.

49. *Modestinus, Excuses, Book VI.*

Where guardians or curators have been appointed, they are forbidden to rent any property belonging to the Emperor before they have rendered their accounts. And if anyone, concealing the fact, should appear for the purpose of renting lands belonging to the Emperor, he shall be punished as a forger. This decision the Emperor Severus also sanctioned.

(1) As a result of this, persons who are administering a guardianship or a curatorship are forbidden to rent anything from the Treasury.

50. *The Same, Pandects, Book X.*

Where anyone ignorantly leases property to a soldier, believing him to be a civilian, it is settled that he can collect the rent from him, for since he was not aware that he was a soldier, he is not guilty of violation of military discipline.

51. *Javolenus, Epistles, Book XL*

I leased a tract of land under the condition that, if it was not cultivated in compliance with the terms of the lease, I should have the right to lease it again to another, and that the tenant should indemnify me for any loss which I might sustain. In this instance, it was not agreed that, if I rented the land for more money, the excess should be paid to you; and, as no one was cultivating the land, I, nevertheless, leased it for more. I ask whether I should give the amount of the excess to the first lessee. The answer was that, in obligations of this kind, we should pay particular attention to what was agreed upon between the parties. It is held, however, that in this instance, it was tacitly agreed that nothing should be paid if the land was rented for more money; that is to say, this provision was inserted in the agreement only for the benefit of the lessor.

(1) I hired work to be done under the condition of paying a certain amount every day for said work to the party employed. The work being badly done, can I bring an action against him on the lease? The answer was, if you hired this work to be done on condition that the party employed to do it should be liable to you for its being properly performed, even though it was agreed upon that a certain sum of money should be paid for each piece of work, the contractor will still be responsible to you if the work was badly done. For, indeed, it makes no difference whether the work is performed for one price, or whether payment is made for each portion of the same, provided the whole of it must be performed by the contractor. Therefore, an action on lease can be brought against him who performed the work badly, unless payment was arranged for separate portions of it, so that it might be performed according to the approval of the owner; for then the contractor is not considered to guarantee to the owner the excellence of the entire work.

52. *Pomponius, On Quintus Mucius, Book XXXI.*

If I lease you a tract of land for ten *aurei*, and you think that I am leasing it to you for five, the contract is void. If, however, I think that I am leasing it to you for less, and you think that you are leasing it for more, the lease will not be for a larger sum than I thought that it was.

53. *Papinianus, Opinions, Book XI.*

Where a surety appears for a tenant of public lands before an officer having charge of the same, and which the said officer has leased to the tenant, he will not be liable to the government; but the crops, in this instance, will remain as a pledge.

54. *Paulus, Opinions, Book V.*

I ask whether a surety who appears for a lessee will also be liable for interest on rent which has not been paid, or whether he can take advantage of the constitutions by which it is

provided that those who pay money for others are only obliged to be responsible for the principal that is due.

Paulus answered that even if the surety bound himself for everything relating to the lease, he also will be obliged to pay interest; just as the tenant is compelled to do, where he is in default for the payment of the rent. For, in contracts made in good faith, even though interest may not so much arise from the obligation, as it is dependent upon the decision of the judge, still, where the surety renders himself responsible for everything relating to the contract of the lessee, it seems but just that he also should bear the burden of interest, if he obligated himself as follows: "Do you bind yourself to the amount of a judgment justly rendered?" Or in these words: "Do you promise to indemnify me?"

(1) It was agreed by the lessor and the lessee of a tract of land that the tenant, Seius, should not be ejected against his will during the term of the lease, and if he was ejected, the lessor, Titius, should pay him a penalty of ten *aurei;* or, if the lessee, Seius, should desire to withdraw during the term of the lease, he should be compelled to pay ten *aurei* to the lessor, Titius, and the parties reciprocally stipulated with reference to this. I ask, as the lessee, Seius, did not pay the rent for two consecutive years, whether he could be ejected without Titius fearing to incur the penalty. Paulus answered that although nothing was stated in the penal stipulation with reference to the payment of the rent, still, it is probable that it was agreed that the tenant should not be ejected during the term of the lease, if he paid the rent, and cultivated the land, as he should do; so that if he understood to bring suit for the penalty, and had not paid the rent, the lessor could avail himself of an exception on the ground of bad faith.

(2) Paulus gave it as his opinion that, where anyone assigns a slave to his tenant after estimating his value, he will be at the risk of the tenant; and therefore, if he should die, his value, as appraised, must be made good by the heir of the tenant.

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

Where a granary has been broken into and plundered, the owner will not be liable, unless he was charged with the safe-keeping of its contents. But the slaves of the person with whom the contract was made can be demanded for the purpose of being tortured, on account of the knowledge of the building which they possess.

(1) Where a tract of land is leased and the lessee makes some addition to the same, by means of his labor, which is either necessary or useful, or erects a building, or makes some improvement which had not been agreed upon, he can proceed by an action on lease against the owner of the property for the recovery of the amount which he has expended.

(2) Where a lessee, contrary to the provisions of his lease, abandons the land without just or reasonable cause before his term has expired, he can be sued in an action on lease for the payment of the rent for the entire term, and for the indemnification of the lessor to the extent of his interest.

56. *The Same, On the Duties of the Prefect of the Night-Watch.* Where the proprietors of magazines and warehouses desire them

to be opened on account of the nonappearance of the lessees, and their failure to pay the rent during the term of the lease, and wish to have an inventory of the contents made by the public officials whose duty it is to do so, they shall be heard. The time to be considered in cases of this kind should be two years.

57. *Javolenus, On the Last Works of Labeo, Book IX.*

A man who owned a house leased an empty space adjoining the same to his next neighbor. The said neighbor, while building upon his own ground, threw the dirt for the excavation upon the said vacant space, and heaped it up higher than the stone foundation of the lessor; and the earth, having become wet by constant rains, weakened the wall of the lessor with moisture to such an extent that the building collapsed. Labeo says that only an action on lease

will lie, because it was not the heaping up of the earth itself, but the moisture arising therefrom that subsequently caused the injury, but that an action on the ground of unlawful damage will only lie where the damage has not been produced by some outside cause. I approve this opinion.

58. *Labeo, Later Epitomes by Javolenus, Book IV.*

You leased an entire house for a gross sum, and then sold it under condition that the rent of the tenants should belong to the purchaser. Even though the lessee may have sub-let the said house for a larger amount, it, nevertheless, will belong to the purchaser, because the lessee owed it to you.

(1) It was stated in a contract for labor that it should be performed before a certain day, and then, if this was not done, the lessee should be liable to an amount equal to the interest of the lessor. I think that this obligation is contracted to the extent that a good citizen would fix the damages with reference to the time; because the intention of the parties seems to have been that the work should be completed within the time during which it could be done.

A certain individual rented a bath in a town for forty *drachmæ* a month, and it was agreed that he should be furnished a hundred *drachmas* for the repair of the furnace, the pipes, and other portions of the bath, and the lessee demanded the hundred *drachmæ*. I think that they were owing to him, if he gave security that the money would be expended for repairs.

59. *Javolenus, On the Lost Works of Labeo, Book V.*

Marcius was employed to build a house by Flaccus. After the work was partly done the building was destroyed by an earthquake. Massurius Sabinus says that if the accident took place through some force of nature, as for instance, an earthquake, Flaccus must assume the risk.

60. *Labeo, Last Epitomes by Javolenus, Book V.*

Where a house is rented for several years, the lessor must not only permit the lessee to occupy it from the *Kalends* of July of each year, but also to sub-let the same during the term of his lease, if he desires to do so. Therefore, if the said house remains in a dilapidated condition from the *Kalends* of January to the *Kalends* of July, so that no one can occupy it, and it cannot be shown to anyone; the lessee will not be obliged to pay any rent to the lessor. Nor, indeed, can he be compelled to occupy the house, if it has been repaired after the *Kalends* of July, unless the lessor was ready to furnish him another house suitable for his residence.

(1) I think that the heir of a lessee, even though he may not be a tenant, will, nevertheless, hold possession for the owner of the property.

(2) If a fuller loses your clothing, and you have the means to recover it, but do not wish to avail yourself of them; you can, nevertheless, bring an action on lease against the fuller. The judge, however, must decide whether it will not be better for you to bring an action against the thief and recover your property from him; of course, at the expense of the fuller. But if he should consider this to be impossible, he must then render judgment in your favor against the fuller, and compel you to assign your rights of action to him.

(3) An agreement having been entered into, a house was contracted for under the condition that it should be subject to the approval or disapproval of the owner, or his heir. The contractor, with the consent of the other party, made certain changes in the work. I have it as My opinion that the work did not seem to have been performed in compliance with the terms of the contract, but since the changes had been made with the consent of the owner, the contractor should be released.

(4) I directed you to make an estimate of the amount you would ask to build a house, and you answered me that you would build it for two hundred *aurei*. I gave you the contract for a certain sum, and I afterwards ascertained that the house could not be built for less than three hundred *aurei*. I had already paid you a hundred, a part of which you had expended, and I

then forbade you to proceed with the work. I held that if you continued to do the work, I would be entitled to an action on lease against you, to compel you to refund to me the remainder of the money.

(5) You remove a harvest, while the tenant is looking on, when you are aware that it belongs to someone else. Labeo says that the owner can sue you for the grain, and that the tenant has a right, under his lease, to bring an action against the owner to compel him to do so.

(6) The lessor of a warehouse had posted upon it that he would not receive deposits of gold, silver, or jewels at his own risk, and afterwards he, knowingly, allowed articles of this kind to be left in said warehouse. Hence, I stated that he would be liable to you just as if the clause in the notice had been erased.

(7) You employed a slave of mine who was a muleteer, and you lost a mule through his negligence. If he hired himself, I hold that I must make good the damage to you on the ground of property employed for my benefit, but only to the extent of the *peculium* of the slave. If, however, I myself leased him, I will not be responsible to you for anything else than fraud and negligence. But if you leased a muleteer from me without the designation of his person, and I deliver to you the one by whose negligence the animal perished, I say that I must be responsible to you for negligence, because I selected the slave who caused you loss of this kind.

(8) You hired a vehicle to carry your baggage and make a journey, and when a bridge was crossed, and the keeper demanded toll, the question arose whether the driver should pay toll for his carriage alone. I think that, if he knew when he hired his vehicle that he would cross the bridge, he should pay the toll.

(9) I hold that the lessee of an entire warehouse should not be responsible to the proprietor of the same for the custody of property, for which the proprietor himself should be liable to those who rented of him, unless it was otherwise agreed upon in the lease.

61. *Scævola, Digest, Book VII.*

A tenant, although it was not included in the terms of his lease that he should plant vines, nevertheless, did plant them on the land, and, on account of the yield of the same, the field was rented for ten *aurei* more every year. The question arose whether the owner could sue the tenant, who had been ejected from the land for non-payment of rent, on the ground that rent was due; or whether he could recover the expense profitably incurred by planting the vines where an exception on the ground of fraud was filed. The answer was that he could either recover the expense, or that he would be liable for nothing more.

(1) A man leased for a certain sum a vessel to sail from the province of Cyrene to Aquileia, it being loaded with three thousand measures of oil and eight thousand bushels of grain. It happened, however, that the vessel, while loaded, was detained in said province for nine months, and the cargo was confiscated. The question arose whether the freight agreed upon could be collected by the owner of the vessel from the party who hired it, in accordance with the contract. The answer was that, in conformity to the facts stated, this could be done.

62. *Labeo, Probabilities, Book I.*

If you make a contract for digging a canal, and complete it, and, before it is accepted, it is destroyed by accident, the risk will be yours. Paulus says that, even if the accident occurred through some fault of the ground, the party hiring the work to be done must be responsible; but if it happened because the work was defective, you must bear the loss.

TITLE III.

CONCERNING THE ACTION FOR THE ESTIMATION OF THE VALUE OF PROPERTY.

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

(1) The estimate of property, however, is made at the risk of the person who receives it, and hence he must either restore the property itself in an undamaged condition, or pay the amount of the appraisement agreed upon.

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

This action is an equitable one, and involves compensation.

TITLE IV.

CONCERNING THE EXCHANGE OF PROPERTY.

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

Just as it is one thing to sell, and another to buy, and as a difference exists between purchaser and vendor, so the price is one thing, and the property another. In an exchange, however, it cannot be ascertained which is the purchaser and which the vendor. Exchanges differ greatly, for a purchaser is liable to an action on sale, unless he pays the purchase-money to the vendor; and it is sufficient for the vendor to bind himself in case of eviction, to deliver possession and be free from fraud, and therefore, if the property sold is not lost by a better title, he owes nothing.

(1) Wherefore, if one of the articles which I have received or given is afterwards taken away through a better title, it is held that an action *in factum* should be granted.

(2) Moreover, purchase and sale is contracted by the mere will of the parties consenting to the same; an exchange, however, gives rise to an obligation by the delivery of the property. Otherwise, if the property was not delivered, we hold that an obligation could be contracted by mere consent, which is only applicable to agreements of this kind which have their own specific designations, as purchase, sale, lease, and mandate.

(3) Therefore Pedius says that where a party gives property which belongs to another an exchange is not contracted.

(4) Hence, where delivery is made by one party, and the other refuses to deliver his property, we cannot institute proceedings for the reason that it is to our interest to have received the article concerning which the agreement was made; but there will be ground for a personal suit for recovery to compel the property to be restored to us, just as if the transaction had not taken place.

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

Aristo says that an exchange resembles a sale in a case where a guarantee must be given that a slave is sound, and free from liability to arrest for theft or damage committed, and that he is not a fugitive who must be surrendered on this account.

TITLE V.

CONCERNING ACTIONS PRAESCRIPTIS VERBIS, AND IN FACTUM.

1. *Papinianus, Questions, Book VIII*.

It sometimes happens that existing and common actions will not lie, and we cannot find the proper name for the proceeding; so we readily have recourse to those designated *in factum*. In order that examples may not be wanting, I will give a few.

(1) Labeo states that a civil action *in factum* should be granted to the owner of merchandise against the master of a ship, where it is uncertain whether he leased the ship, or hired the services of the master, for the transportation of his goods.

(2) Likewise, where anyone delivers property to another for examination in order to establish the price of the same, a transaction which is neither a deposit nor a loan for use, and the party does not show good faith, a civil action *in factum* can be brought against him.

2. *Celsus, Digest, Book VIII*.

For when common and ordinary causes of action are lacking, proceedings must be instituted under that available for the explanation of the terms of the contract.

3. *Julianus, Digest, Book XIV*.

It is necessary to have recourse to this action wherever contracts exist, the names of which have not been stated by the Civil Law.

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

For it arises from the nature of things, that there are more business transactions than terms to designate them.

5. *Paulus, Questions, Book V*.

My natural son is in your service, and your son is in mine. It is agreed between us that you shall manumit mine, and that I shall manumit yours. I did so, but you did not. The question arose as to under what action you will be liable to me. In the consideration of this point every kind of transaction relative to the delivery of property must be taken into account which is shown in the following example, namely: I either give to you that you may give to me, or I give to you that you may perform some act, or I perform some act that you may give to me, or I perform some act for you that you may perform another for me. In these cases it may be asked what obligation arises.

(1) If, in fact, I give money that I may receive some property in return, the transaction is one of purchase and sale. If, however, I give an article in order to receive another, for the reason that it is not held that an exchange of property is a purchase, there is no doubt that a civil obligation arises on account of which an action can be brought, not to compel you to return what you have received, but that you may indemnify me to the extent of my interest in receiving the article which was the subject of the contract; or if I prefer to receive my property, an action can be brought to recover what was given, because property was given on one side but not on the other.

If, however, I gave you certain cups in order that you might give Stichus to me, Stichus will be at my risk, and you will be responsible only for negligence. This is the explanation of the agreement, "I give in order that you may give."

(2) But where I give in order that you may perform some act, and the act is such that it can be hired; for example that you may paint a picture, and money is paid, it will be a hiring, just as a purchase was made in the former instance. Where the transaction is not a hiring, a civil action either arises with reference to my interest, or a suit for the recovery of the property will lie.

But if the act is such that it cannot be the subject of a contract for hire, as, for instance, that you manumit a slave, whether a certain time is added within which he must be manumitted, and when he could have been manumitted the time elapsed during the lifetime of the slave; or whether the time had not elapsed, but a sufficient period had passed when he could and should have been manumitted, an action can be brought for his recovery, or one for the construction of the contract. What we have already stated is applicable to these cases.

If, however, I gave you a slave in order that you might manumit your slave, and you did so, and the one that I gave you is lost through a better title; if I gave him to you knowing that he was the property of another, Julianus says that an action based on fraud should be granted against me. If I was ignorant of the fact, a civil action *in factum* can be brought against me.

(3) If I perform some act in order that you may give me something, and after I have performed the act, you refuse to give it; a civil action will not lie, and therefore one on the ground of bad faith will be granted.

(4) If I perform some act in order that you may perform another, this includes several transactions. For if you and I agree that you can collect a claim from my debtor at Carthage, and that I can collect one from yours at Rome, or, that you may build a house on my land, in

order that I may build one on yours, and I build mine, you fail to build yours; it is held that, in the former example, a mandate is given, as it were, without which money cannot be collected in the name of another. For even though expenses should be incurred on both sides, still, we are each doing a service for one another, and a mandate founded on an agreement may extend beyond its natural limits. For I can direct you to be responsible for the safe-keeping of the property, and, order that, in collecting the debt, you shall not spend more than ten *aurei.* Where we both spend the same amount, there can be no cause for dispute, but if only one performs the act, so that in this instance a mandate seems to have been given, for example, that he should refund to one another the expenses incurred by each, I give you no mandate with reference to your own property.

It will, however, be safer both in the construction of houses and in the collection of debts, to hold that an action should be granted for the interpretation of the contract, which resembles an action on mandate, just as in the former cases a resemblance exists between the action on hiring and the one on sale.

(5) Hence, if these things are true, where it has been agreed upon by both parties to perform reciprocal acts, the same can be said with reference to the question proposed; and it necessarily follows that judgment must be rendered against you to the extent of my interest in the slave that I manumitted. Should a deduction be made because I now have a freedman? This, however, cannot be taken into consideration.

6. *Neratius, Opinions, Book I.*

I sold you a house on condition that you would repair another. The opinion was given that there was no sale, but that a civil action could be brought for an uncertain amount of damages.

7. *Papinianus, Questions, Book II.*

If I gave you ten *aurei* in order that you might manumit Stichus, and you failed to do so; I can at once bring an action *præscriptis verbis* to force you to pay the amount of my interest; and if I have no interest, I can bring an action against you to compel you to restore the ten *aurei*.

8. *The Same, Questions, Book XXVII.*

Where a master, after having stated the value of his slave, delivered him up to be put to torture when he was accused of theft, and he was not found guilty, and he to whom he was delivered would not return him, a civil action can be brought against him on this ground; although, under certain circumstances, a party to whom a slave has been delivered can retain him. For he can retain a slave if the owner prefers to receive the money instead, or where he has been caught committing a crime; for then the amount at which he has been appraised must be paid by his master. But the question, however, arises, by what action the money can be recovered, if the master chooses to receive the appraised value of the slave? I stated that, although what was agreed among the parties was not prescribed by the terms of a stipulation, still, if the intention of the contract was not obscure, an action *præscriptis verbis* could in this case be brought, and that it should not be held that a mere agreement without consideration had been made, since it could be proved that the property was given under a certain condition.

9. *The Same, Opinions, Book XL*

Where anyone is released from liability on condition that he will delegate his obligation to Titius, as debtor, and he does not comply with the condition of the contract, he will be liable to an action for an uncertain amount of damages. Hence it is the duty of the judge, not to see that the old obligation is restored, but that the promise shall be fulfilled, or judgment be rendered.

10. *Javolenus, Epistles, Book XIII.*

A certain man bequeathed the usufruct of a third of his estate. The property of his heir was sold by his creditors, and the woman to whom the bequest was made received, in the place of the usufruct, the amount of the appraisement of the third part of the estate, and, through

ignorance, the ordinary stipulation was omitted. I ask whether suit can be brought by the heir of the woman for the money which was given her, instead of the enjoyment of the usufruct, and if so, what kind of a suit? I answered that an action *in factum* should be granted.

11. *Pomponius, On Quintus Mucius, Book XXXIX.*

For the reason that the number of actions is not sufficient in every instance, recourse, in general, is had to those *in factum*. So far as actions prescribed by the laws are concerned, where one is just and necessary, the prætor supplies it, if no provision for the case has been made by legislation. This he does under the *Lex Aquilia*, by granting actions *in factum* adapted to the purpose, which the utility of said law requires.

12. *Proculus, Epistles, Book XI.*

Where a man sold certain lands to his wife, and an agreement was entered into at the time that, if the marriage was dissolved, the wife should transfer to her husband the said lands for the same price, if he desired her to do so, I think that an action *in factum* ought to be granted, and that this rule should also be observed with reference to other persons.

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

If I give you property to be sold for a certain price, with the understanding that if you sell it for more you can keep the surplus, it is held that neither an action on mandate, nor one on partnership will lie, but that one *in factum* should be brought, as in the case of voluntary agency; for the reason that a mandate should be gratuitous, and a partnership is not held to be formed with reference to a person who does not admit you as a partner in the sale, but reserves a certain portion of the proceeds for himself.

Julianus states in the Eleventh Book of the Digest: "If I give to you the ownership of an unoccupied tract of land belonging to me, on condition that after having built a house thereon, you will convey to me a share in the same; this transaction is not a sale, because I receive a part of my own property instead of the price; nor is it a mandate, because it is not gratuitous, nor a partnership, for the reason that no one, in entering into a partnership, ceases to be the owner of his own property." But if I give you said land for the purpose of instructing a boy, or to pasture a flock, or for the support of a boy with the understanding that if it should be sold after the lapse of a certain number of years, the purchase-money shall be divided between us; this is a very different transaction from that relative to the unoccupied land, because in this case he who formerly owned the property does not cease to be the proprietor of the same, and therefore an action on partnership will lie.

If, however, I should transfer to you the ownership of a young slave, the same rule will apply, as in the case of the land, because the ownership ceases to vest in the former proprietor. What, then, is the rule? Julianus thinks that an action *in factum* should be granted, that is to say, one for the interpretation of the contract. Hence, if the party does not transfer the ownership of the land, but permits you to build upon it with the understanding that either the land, or the price of the same, if sold, shall be divided, this will be a partnership.

The same principle applies where the proprietor transfers the ownership of a portion of the land, reserving that of the remainder, and permits a house to be built under the same condition.

14. *The Same, On Sabinus, Book XLI.*

Where anyone throws merchandise belonging to another into the sea for the purpose of saving his own, he will not be liable to any action. If, however, he does this without any reason, he will be liable to an action *in factum;* and if he should do so with malicious intent, he will be liable to an action on that ground.

(1) If anyone should strip a slave belonging to another, and he dies of cold, an action on the ground of the theft of his clothing as well as one *in factum* on account of the slave can be brought; the right to proceed criminally against the thief remaining unimpaired.

(2) If anyone should throw into the sea a silver cup belonging to another, Pomponius, in the Seventeenth Book on Sabinus, says that neither an action of theft, nor one on the ground of unlawful damage will lie, but that one *in factum* can be brought.

(3) Where acorns fall upon my land from a tree belonging to you, and I permit my cattle to feed upon them, Aristo says that he knows of no legal action whereby I can proceed, because suit with reference to the pasturage of the cattle cannot be brought under the Law of the Twelve Tables, as they did not pasture upon your premises, nor one for trespass, nor one for unlawful damage. Hence an action *in factum* should be brought.

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

Persons who know where fugitive slaves are concealed should inform their masters, and this does not render them guilty of theft; for it is usual for them to receive a reward for doing so, if they disclose the hiding place of said slaves, and the gift in this instance is not deemed unlawful; therefore, the party who receives the reward need not fear a suit for its recovery, because he received it for a good reason, and not for one which is dishonorable.

Where, however, nothing was paid, but an agreement was entered into with reference to the information, that is to say, that a certain sum should be given to the party if he disclosed the hiding-place of the slave, and the latter is apprehended, let us see whether an action can be brought. In fact, this is not an agreement without consideration, from which it may be held that an action will not arise, but it includes a certain transaction, and therefore can become the ground for a civil action; that is, one *præscriptis verbis*, unless someone may say that, in this case, a suit on the ground of fraud will lie, where bad faith can be established.

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

You permitted me to dig chalk on your land on condition that I would fill up the place from whence I took it. I took away the chalk, but did not fill up the excavation. The question arose, what action are you entitled to? It is certain that a civil action for an unascertained amount of damages will lie. Where, however, you sold me the chalk, you can proceed by an action on sale. If, after taking out the chalk, I should fill up the excavation, and you do not allow me to remove the chalk, I will then have a right of action for production against you, because it belongs to me, as I dug it with your consent.

(1) You gave me permission to sow grain on your land, and to remove the crop. I sowed it, but you did not allow me to remove the grain. Aristo says that a civil action will not lie, and it may be a question whether an action *in factum* should be granted, but that one on the ground of bad faith will certainly be available.

17. *Ulpianus, On the Edict, Book XXVIII*.

If I give you a gratuitous lodging in my house, can I proceed against you on the ground of a loan for use? Vivianus says that I can; but it is safer to bring suit for the construction of the contract.

(1) If I give you a jewel the value of which has been appraised, on condition that you will restore it to me, or pay me the price of the same; and it should be destroyed before the sale was concluded, who must bear the loss? Labeo says, and Pomponius also holds that if I, as the vendor, ask you to dispose of it, the risk will be mine, but if you ask me to do so, it will be yours; and if neither one asks the other but we merely make an agreement, you will only be liable for fraud and negligence, and, in this instance, an action *præscriptis verbis* will certainly lie.

(2) Papinianus states in the Eighth Book of the Questions: "If I gave you an article for the purpose of examining it, and you allege that you have lost it, an action for the construction of the contract will lie only if I am ignorant where the article is. For if I know that it is in your possession, I can bring an action of theft, or one for the recovery of the property, or one for its production. Hence, if I have given the article to anyone to be examined, or for his own

benefit, or for the benefit of both of us, I hold that he must be responsible to me for fraud and negligence, because of the advantage accruing to him; but not for its loss. Where, however, I have given the article to him for my own advantage, he will only be responsible for fraud, because this transaction closely resembles a deposit."

(3) Where my neighbor and myself each have an ox, and it is agreed between us that I shall lend mine to him for ten days, and that he shall lend me his for the same space of time, for the purpose of doing our work; and either of the oxen should die while in possession of the other party, an action on loan for use will not lie, because the loan was not gratuitous, but proceedings for the construction of the contract can be instituted.

(4) Where, when you intended to sell me clothing, I requested you to leave it with me that I might show it to others more skilled in such matters than myself, and it was destroyed by fire, or by some other irresistible force; I will not be in the least responsible to you for its value. From which it is manifest that I am liable only for the want of ordinary care.

(5) Where anyone receives rings to be held as security for a wager, and does not surrender them to the one who wins it, an *actio præscriptis verbis* can be brought against him. The opinion of Sabinus, who thinks that, in this instance, an action for recovery, and one on the ground of theft, will lie, should not be adopted. For how can he bring an action on theft with reference to property whose possession or ownership he has never enjoyed? It is clear, however, that if the wager was dishonorable, the successful party can only recover his own ring.

18. *The Same, On the Edict, Book XXX.*

If I deposit a sum of money with you for you to give to Titius if he brings back my fugitive slave, and you do not give it to him because he did not restore said slave, and you fail to return me the money, the best method is to proceed by an action for the construction of the contract, since the pursuer of the fugitive slave and myself did not deposit said money, as is done in sequestration.

19. *The Same, On the Edict, Book XXXI.*

You asked me to loan you money, and as I did not have it, I gave you certain property to be sold that you might make use of the proceeds. If you did not sell said property, or you did sell it and did not take the price received as a loan, it is safer to proceed, as Labeo says, by an action for the interpretation of the contract, as if there had been a certain agreement entered into between us.

(1) If I should mortgage a tract of land for your benefit, and it should afterwards be agreed upon between us that you will furnish me a surety, and you do not do so; I say that the better plan will be to bring an action for the interpretation of the contract, unless some compensation is involved, for if it is, an action on lease will lie.

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

It is asked by Labeo, "If I give you horses that I have for sale to be tried, under the condition that you will return them within three days if they do not please you, and you, being a performer in the circus, ride said horses and win the prize, and then refuse to buy them; can an action on sale be brought against you?" I think the better opinion is that an action should be brought for the construction of the contract, for it was agreed upon between us that you should take said horses for the purpose of trying them gratuitously, and not that you should enter them in a race.

(1) The following question is asked by Mela: "If I let you have some mules for the purpose of trying them, with the understanding that if they please you you will buy them, but if they do not please you that you will pay me a certain sum for each day, and the mules are stolen by robbers within the time given for the trial; what must be made good, the money and the mules, or the mules alone?" Mela says that it makes a difference whether the purchase had already

been concluded, or was to be concluded afterwards, for if the transaction was complete, suit can be brought for the price; but if not, it can only be brought for the mules. He does not mention, however, what actions are available, but I think that if the purchase was perfected, an action on sale will lie; but if this were not the case, that one can be brought like that granted against the circus-performer.

(2) If when you wish to purchase silver plate, and a silversmith brings some to you and leaves it, and, as it does not suit you, you give it to your servant to be returned, and it is lost without fraud or negligence on your part; the loss must be borne by the silversmith, because it was sent for his benefit as well as yours. Labeo says that it is certain that you are responsible for the negligence of those to whom the articles have been committed for safe-keeping and delivery; and I think that an action for the construction of the contract will lie in this instance.

21. *The Same, Disputations, Book II.*

Wherever an ordinary action or exception will not lie, a prætorian action or exception will be available.

22. *Gaius, On the Provincial Edict, Book X.*

If I give you clothing to be cleaned or repaired, and you undertake to do the work gratuitously, an obligation on mandate arises; but if compensation has been given or agreed upon, the transaction is one of leasing and hiring. If, however, you did not undertake it gratuitously, and compensation was neither given at the time nor promised, but the transaction was entered into with the understanding that afterwards payment should be made to the amount agreed upon between us; it is settled that an action *in factum* should be granted, as in the case of & new transaction, that is to say a suit for the interpretation of the contract.

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

Two persons were walking along the Tiber; one of them having asked the other to show him his ring, he did so, and, while he was examining it, it fell from his hands and rolled into the Tiber. The opinion was given that an action *in factum* was available.

24. *Africanus, Questions, Book VIII.*

Titius lent Sempronius thirty *aurei*, it being agreed upon between them that, on the return of the money, Sempronius should pay the taxes which Titius owed, the interest being computed at six per cent; and in case the interest amounted to more than the taxes, Sempronius should return the surplus of said interest to Titius, and where the taxes were more than the interest, the excess should be deducted from the principal; but if the amount of the taxes should exceed both principal and interest, Titius should make good the amount to Sempronius; and no formal stipulation with reference to the matter was made between the parties.

Titius asked for an opinion as to what action he could bring in order to recover from Sempronius the remainder of the interest, after payment of the taxes. The answer was that interest on the money lent was not actually due unless a stipulation had been entered into concerning the same; but in the case stated it should be considered whether the transaction should not be held to be a mandate agreed upon between the parties, rather than a loan at interest, unless the interest collected exceeded six per cent. The action for the recovery of the principal would not, indeed, be based on money loaned; for if Sempronius had either lost the money without bad faith, or had kept it unemployed, it must be said that he would not be at all liable on that ground.

Wherefore, it is the safer plan for an action *in factum* to be granted for the construction of the contract, especially where it is also agreed that if the amount of the taxes exceeds the interest it should be deducted from the principal, which goes beyond the provisions of the law and the terms of the contract for money loaned.

25. *Marcianus, Rules, Book III.*

Where anyone furnishes the services of his slave, who is an artisan, to another, in exchange for those of a similar slave belonging to the latter, for the same length of time, proceedings can be instituted by an *actio præscriptis verbis*, just as in the case where a party gives cloaks in return for tunics. Nor is this inapplicable, if services which were not due should be rendered by mistake, as these cannot be recovered; for in giving one thing in return for another we contract an obligation under the Law of Nations, but where something is given which is not due, either restitution should be legally demanded, or an equal amount of the same thing should be returned, and by neither of these methods can the services above mentioned be recovered.

26. *Pomponius, On Sabinus, Book XXI.*

If I gave you some cups with the understanding that you were to return them to me, an action on loan for use will lie. If, however, I gave them to you on condition that you would deliver to me their weight in silver, whatever that might be; a demand for the recovery of this weight must be made by means of an action for the construction of the contract, as well as one for silver of the same fineness as that of which the cups were composed. But, if it was agreed that you should return the cups, or an amount of silver equal to their weight, the same rule will apply.

THE DIGEST OR PANDECTS.

BOOK XX.

TITLE I.

CONCERNING PLEDGES AND HYPOTHECATIONS AND THE MANNER IN WHICH THEY ARE CONTRACTED, AND THE AGREEMENTS BY WHICH THEY ARE MADE.

1. *Papinianus, Opinions, Book XL*

A general agreement in pledging property, even such as is afterwards obtained, is valid. In a case, however, where an agreement has been made with reference to property belonging to another which was not due to him who pledged it, but the ownership of it is afterwards acquired by the debtor, the creditor will hardly be entitled to an equitable action, if he was not ignorant that the property belonged to someone else, but the retention of the property in his possession will be the better mode of procedure.

(1) Where a slave is given by way of pledge, the creditor cannot sell his *peculium*, unless an agreement has been expressly entered into on this point. It makes no difference when the slave or his master acquired the *peculium*.

(2) Where a tract of land is given in pledge, and it is expressly agreed that the crops thereof shall also be pledged and a *bona fide* purchaser has consumed said crops, he cannot be compelled to restore them by an equitable action under the *Lex Servia;* for it is held that the lien of the pledge is not removed by usucaption, as the question of the pledge is distinct from the intention of the owner. The case is unlike the one involving the crops, since they never belonged to the debtor.

(3) It was agreed in a contract that, if interest on a debt was not paid when due, the crops of the property hypothecated should be set off against the interest, to the limit of that which was lawful. Although matters of less importance were included in the stipulation when it was made, it is held that the agreement is not void; since, if the lower rate of interest should not be paid at the appointed time, the parties could properly agree to pay more than the legal rate of interest.

(4) Where a woman had given a tract of land to her husband and he had pledged it, and after a divorce, the woman recovered possession of her land, and gave it in pledge to the creditor on account of the debt, in this instance the pledge seems to have been only properly made with reference to the money for which she was indebted to her husband for having improved the land; that is to say where he had incurred greater expense than the value of the crops which he had taken from it; for the woman is held only to have transacted her own business to that amount, and not to have undertaken to transact that of another.

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

Where a surety who has had pledges or mortgages assigned to him after he has paid a debt for money loaned, proceeds against the debtor by way of mandate, or brings suit against him on the ground of being his creditor; if he has been guilty of negligence with reference to the pledges, this must be taken into consideration. He cannot, however, sue him by means of the direct action on pledge.

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

Where a debtor who brought suit for his property lost his case because he did not prove that the property belonged to him; the Servian Action will also be granted to the creditor where he proves that the property was in the hands of the debtor at the time that the contract for the pledge was made. Where, however, the debtor who claimed an estate is defeated, the judge who presides in the Servian Action without paying attention to the decision rendered with reference to the estate, must examine the grounds on which the property was pledged. It is held to be different in cases which have reference to legacies and freedmen, where a decision

is rendered in favor of him who claimed a lawful inheritance. Still, a creditor cannot properly be compared in every respect with a legatee, since legacies, in fact, are not valid unless the will is also decided to be so; for it may happen that a pledge may be properly taken, and the suit with reference to the same be improperly brought.

(1) A man who brought suit for the recovery of his property was defeated by an unjust decision, and afterwards pledged the property. The creditor cannot have any more right in this property than the party who gave it in pledge; therefore he will be barred by an exception on the ground that the case has already been disposed of, although the party who gained the case can by no means institute proceedings to recover what is not his own, for in this instance it must be taken into consideration not what he did not have, but what right the debtor would have in the property pledged.

4. *Gaius, On the Hypothecary Formula*.

Hypothecation is contracted by means of an informal agreement, where a party consents that his property shall be encumbered under a mortgage on account of some obligation. It does not matter in what terms the agreement is stated, as is the case in obligations contracted by the consent of the parties; and hence, if it is agreed without an instrument in writing that property shall be hypothecated, and this can be proved, the property will be bound to the extent of the agreement.

Documents are drawn up with reference to these matters to enable the intention of the parties to be the more easily established, and what was agreed to is valid without them if it can be proved, just as a marriage is valid although there may be no written evidence of the same.

5. *Marcianus, On the Hypothecary Formula*.

It must be remembered that property can be hypothecated for any kind of an obligation whatsoever where money is lent, a dowry bestowed, a purchase or sale made, a leasing and hiring concluded, or a mandate given; also where the obligation is absolute, or where it is for a certain time, or under some condition, or where it is assumed in pursuance of an agreement, or to secure a present indebtedness, or one previously contracted. Property can also be hypothecated on account of an obligation to be contracted hereafter, it can be done not only to secure the payment of an entire sum of money but also only a portion of the same, and it is also available in civil or prætorian obligations, as well as in those which are merely natural. Hypothecation in a conditional obligation is not binding, however, unless the condition is complied with.

(1) The difference between a pledge and an hypothecation is only one of words.

(2) A party can hypothecate property not only for an obligation of his own, but also for that of another.

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

By a general obligation, affecting all property which the party now has or may have hereafter, those things are not included which it is probable that one would not have been likely to especially encumber, as for instance, household goods. Clothing must also be left with the debtor, and among the slaves those which he uses so much that it is certain that he would not have given them in pledge, because their services are very necessary to him, or he values them on account of the affection which he entertains toward them.

7. *Paulus, On the Edict, Book LXVIII*.

The Servian Action is not available with reference to articles which are in daily use.

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

Finally, it is settled that a concubine, natural children, and apprentices, or any other attendants of this kind, are not included in a general obligation.

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

This rule also should be observed with reference to property belonging to the debtor at the time when the agreement was made. Whatever is capable of purchase and sale can also be made the object of a pledge.

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

Where a debtor pledges his property to two persons at the same time, so that it is entirely bound to each of them, both can avail themselves of the Servian Action for the entire amount against other persons. When a dispute arises between them, the condition of the possessor is the better one, and he will be entitled to the exception, "You could have the property, if it had not been agreed that it should also be pledged to me." If, however, it was the intention of the parties that the property should be encumbered to each one equally, an equitable action will lie as between themselves and against third parties, by means of which they each may obtain possession of half the property.

11. *Marcianus, On the Hypothecary Formula*.

Where he who has charge of property belonging to the government borrows money for it, he can encumber the property.

(1) Where an agreement is entered into that the use of whatever is pledged can be made by the creditor, and some one is placed in charge of the land or of the house, he can retain possession of the same instead of the pledge, until the money is paid to him; since he can take the profits instead of interest, either by leasing them, or by himself collecting them, or by occupying the premises. Hence, if he should lose possession of the property, it is customary to make use of an action *in factum*.

(2) The question arose whether an usufruct can be given by way of pledge or mortgage, if the owner of the property agrees to this, or only he who is entitled to the usufruct gives his consent? Papinianus, in the Eleventh Book of Opinions, says "that the creditor must be protected, and if the proprietor desires to institute proceedings against him to prevent his using the right of usufruct against his consent, the Prætor will protect him by an exception, if it had not been agreed between the creditor and the party to whom the usufruct belonged, that the usufruct should be pledged; for as the Prætor protects the purchaser of the usufruct, why should he not also protect the creditor?" On the same principle, an exception can be filed against the debtor.

(3) The servitudes of urban estates cannot be given in pledge, and therefore an agreement cannot be made for their hypothecation.

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

Pomponius says that it should be held that an agreement can be made to pledge a right of a pathway, and the right to drive cattle, or to conduct water in such terms that, if the money is not paid the creditor can make use of such servitudes, provided he has adjoining land; and if the money should not be paid within a certain time, he can sell said servitudes. This opinion should be adopted on account of its benefit to the contracting parties.

13. *Marcianus, On the Hypothecary Formula*.

Where a flock is liable by way of pledge, any future increase of the same will also be liable. If, however, the entire flock should be renewed through the death of those previously pledged, it will still be liable as pledged.

(1) A slave who is to be free conditionally can be pledged, although the right to the pledge, as security, will be extinguished as soon as the condition is fulfilled.

(2) As it is held that property in pledge can also be encumbered by the creditor, so long as both debts are due the pledge will be bound to the second creditor, and an exception as well as an equitable action should be granted him. If, however, the owner should pay the debt, the pledge will also be released.

It may be doubted, however, whether or not an equitable action should be granted to the creditor on the ground that money has been paid. For what if the obligation has been discharged? What Pomponius wrote in the Seventh Book of the Edict is correct, namely, that

if he who gave the property in pledge owes money, after it has been collected he should pay his own creditor with it. If, however, he owed some article, and delivered it, it should remain with the second creditor by way of pledge.

(3) A creditor can lawfully claim whatever stands upon the surface of the land, against any possessor whomsoever; whether a mere informal agreement with reference to its encumbrance was entered into, or whether possession of it was delivered which was subsequently lost.

(4) Even if the creditor obtains a judgment against his debtor, the mortgage still continues to exist, because an hypothecary action has its own condition; that is to say, it remains effective where the money is not paid or security given.

If I institute proceedings personally against the defender of an action, even though he may have given me security and lost his case, the hypothecation still remains in force. With much more reason, therefore, where proceedings are instituted personally either against the principal debtor, or against the surety, or against both together, even though judgment has been rendered against them, the hypothecary obligation still continues operative. By this it appears that the creditor has not been satisfied, because he has obtained a right of action on the judgment.

(5) Where property is conditionally encumbered on account of a debt, it must be held that proceedings cannot properly be brought before the condition has been fulfilled; since nothing is owing in the meantime. But where the condition upon which the debt is dependent arrives, if it had been contracted under a condition, the party can then bring suit. If, however, the debt is due immediately, and the hypothecation was made under a condition, and the creditor has brought the hypothecary action before the condition was fulfilled, it is, indeed, true that the money has not been paid, but it would be unjust for the lien to be released. Therefore, a bond should be executed by order of the court, providing that if the condition is fulfilled and the money is not paid, the property hypothecated should be given up, if it is in existence.

(6) If the hypothecation was made to secure the interest also, the interest should be paid. We say that the same rule applies with reference to a penalty.

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

The question arose whether it would be permitted, if the day of payment had not yet arrived, to take action with reference to the pledges? I think that permission to do this should be granted, because the party has an interest in doing so. Celsus also gives the same opinion.

(1) In those instances where a natural obligation exists, it is settled that the pledge remains encumbered.

15. *Gaius, On the Hypothecary Formula*.

Property which is not yet in existence but which will come into existence hereafter, can be hypothecated, as for instance, fruits on the trees, the offspring of a female slave, the increase of flocks, and other things which may be produced, are subject to hypothecation.

The same rule should be observed whether the owner of land makes an agreement either with reference to the usufruct of the same, or concerning anything which may come into existence thereon, or whether he who has the usufruct does so; as Julianus stated.

(1) When it is stated that the creditor must prove that the article in question was included in the effects of the debtor when the contract was made, this refers to an agreement expressly entered into, and not to the one which it is usual to insert into undertakings every day; namely, that where certain property has been specifically hypothecated, whatever else now remains in possession of the debtor, or whatever he may hereafter acquire, shall be liable; just as if the

said property had been explicitly encumbered.

(2) Where parties who have already encumbered their property also bind themselves to a second creditor, in order that the risk may be avoided which those are accustomed to run who hypothecate the same thing several times, it is usual for them to provide that the property is hypothecated to no one else except Lucius Titius, for instance; and that it is liable to such an extent that the encumbrance will exceed the prior obligation, so that it will be pledged to the amount of the excess, or for the entire amount, when the property is released from the lien for the first debt. In this instance, it should be considered whether the property is thus encumbered if such an agreement has been made, or whether it has been simply agreed that only the surplus shall be subject to hypothecation. It is presumed that the entire property is included in the agreement after it has been released by the first creditor. Is there not still a portion of the same encumbered? The opinion which we have first stated is the better one.

16. *Marcianus, On the Hypothecary Formula*.

Where land which has been hypothecated is afterwards increased by an alluvial deposit, it is all liable.

(1) If property is hypothecated without the knowledge of the owner, and the latter afterwards ratifies the transaction, it must be held that what he ratified he intended to have a retroactive effect to the time of the agreement; but the wishes of those only will be observed who have a right to pledge the property.

(2) Where property is hypothecated, and its form is afterwards changed, an hypothecary action will still lie; just as where a house is hypothecated, and its site afterwards becomes a garden. The same rule applies where the agreement was made with reference to a vacant lot, and a house is subsequently built upon it; or where vines have been planted upon ground which was without them when it was hypothecated.

(3) The question is asked, where an action is brought for the recovery of a pledge, whether he who is sued is in possession of the property which is the subject of the action. For, if he is not in possession of it, and has not committed fraud to avoid being in possession, he should be discharged. If, however, he should be in possession, and either pays the debt, or surrenders the property, he should also be discharged, but if he does neither of these things, judgment should be rendered against him. Where he is willing to give it up, but cannot do so because it is not at hand, or is at a distance, or in a province, it is customary for security to be furnished, since, if the party should give security to deliver it, he will be discharged. But if he has ceased to hold possession through fraud, and though, having made every exertion, he is unable to deliver the property, judgment shall be rendered against him for the amount to which the plaintiff will swear in court, as in other real actions; for if judgment should be rendered against him for the amount that is due, of what advantage would a real action be, as he could recover the same amount by bringing a personal one?

(4) The judge should sometimes decide with reference to the profits obtained by the person from the property which is the subject of the action, and render judgment against him for the profits from the time that issue was joined. But what if the land should be of less value than the debt? For he could not decide anything with reference to the profits previously obtained, unless they were still in existence, and the property was not sufficient to satisfy the claim.

(5) The question is asked, "How can a creditor obtain for himself the property hypothecated which has been adjudged to him by a decree of court?" He cannot bring an action to recover its ownership, but he can bring an hypothecary action; and if he is met by the possessor with an exception on the ground that the case has already been decided, he can reply that "that decision is favorable to me."

(6) Where a debtor has had judgment rendered against him for a larger sum than the principal and interest together, because he refused to surrender the pledge; and if he only pays the amount of the debt, will the hypothecation be released? I do not approve of this, so far as it

relates to the subtlety of the law and the authority of the opinion; for the entire obligation seems to be transferred to the decision, and hence the money is due; but I think it is more equitable for the hypothecation to be released, if the party only pays the amount which he actually owes.

(7) The property of another can be legally hypothecated under the condition that it will become the property of the debtor.

(8) Where two creditors enter into an agreement with reference to hypothecated property, the question arises to what extent has each one a lien on the same; whether for the entire amount of the debt, or for an equal portion with the other? It is the better opinion that each one has a lien on the pledge for the amount of the debt. But how would it be if both of them should institute proceedings against the possessor; will the property be encumbered for the amount due to each one, or for the entire amount, as if it was bound for the whole to each of them? It must be held that they can only bring an action for a portion, if the property was pledged separately to both of them on the same day. If, however, the understanding was that it should be encumbered to both of them at the same time, each of them can legally proceed with reference to the entire property; otherwise each one can only bring suit with reference to a share of it.

(9) A pledge or an hypothecation can be made as follows, "If the debt is not paid within a certain time, the creditor may hold possession of the property by the right of a purchaser, and an estimate of the value of the same must then be made at a just price." In this instance the transaction is held to be a species of conditional sale. The Divine Severus and Antoninus stated this in a Rescript.

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

The right to avail himself of his pledge gives the creditor an action *in rem*.

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

If I receive property in pledge from anyone who can make use of the Publician Action, because he has not the ownership of the same, the Prætor will protect me by the Servian Action to the same extent as he will the debtor by the Publician.

19. *Ulpianus, On the Edict, Book XXI*.

Where a party receives several articles in pledge, he is not compelled to release one of them, unless he receives the entire amount that is due to him.

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

When it is agreed that a party who has lent money for the repair of a house shall receive from the rents, by way of pledge, the money which was loaned, he also is entitled to an equitable action against the tenants; just as in the case of security which the debtor has given to the creditor by way of pledge.

21. *The Same, On the Edict, Book LXXIII*.

If an agreement is made between a tenant and my agent with reference to a pledge, and I ratify the agreement, or direct it to be made; it is held that it is entered into between the tenant and myself.

(1) Where a debtor purchases in good faith a slave from some one who is not his master, and pledges him, and retains possession of him, there is ground for the Servian Action; and if the creditor proceeds against him, he can meet the exception by a reply on the ground of fraud. This was the opinion of Julianus, and it is reasonable.

(2) Any other advantage or disadvantage accidentally arising with reference to the pledge must be enjoyed, or sustained by the debtor.

(3) If the property pledged is not returned, damages must be assessed in court against the

possessor; but it is evident that the amount will not be the same where the proceeding is instituted against the debtor, as where this is done against any other possessor; for, so far as the debtor is concerned, a creditor cannot collect more than the former owes, because he has no greater interest, but from other possessors he can recover the value of the pledge over and above the amount of the debt, and he must return the same to the debtor, if an action on pledge is brought against him.

22. *Modestinus, Differences, Book VII*.

Where anyone, without my knowledge, pledges my property to Titius, his creditor, and I become the heir of Titius, the pledge, which indeed was not valid at first, does not immediately become so, but an equitable action on pledge will be granted to the creditor.

23. *The Same, Rules, Book III*.

A creditor can legally lease lands hypothecated to him by way of pledge.

(1) The obligation of pledge can also legally be contracted between parties who are absent.

24. *The Same, Rules, Book V*.

Where anyone is forbidden to purchase property within certain limits, he is not prohibited from receiving such property in pledge.

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

Where the contract for a pledge is void or worthless, there is no ground for the retention of the pledge by the creditor, not even if the property of the latter belongs to the Treasury.

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

A surety obtained permission from the court that, before he paid the debt, he could obtain possession of the pledges, provided he satisfied the creditors. He did not satisfy them, and then the heir of the debtor offered to pay the creditors. I ask whether the surety can be compelled to return the pledges; and Modestinus answered that he can be compelled to do so.

(1) A father easily persuaded his emancipated son, Seius, who has borrowed a sum of money from Septicius, to write an acknowledgment of indebtedness with his own hand, because he himself was unable to do so at the time, for the purpose of giving a house belonging to his said son by way of pledge to his creditor. The question arose whether Seius could legally retain possession of this house with his other property, since he had renounced the estate of his father, and could be interfered with for the sole reason that he had written the said document with his own hand, by the direction of his father, as he did not give his consent to his father either under his own seal or by any other statement in writing. Modestinus answered that when Seius wrote with his own hand that his house would be hypothecated, it was evident that he gave his consent to the obligation.

(2) Lucius Titius hypothecated certain lands and the slaves that were attached to them. His heirs having divided the lands between them, substituted other slaves for those who died. The creditor afterwards sold the land together with the slaves; and the question arose whether the purchaser could properly bring an action to recover the slaves which had recently been placed upon the land. Modestinus answered that if the slaves were not themselves pledged, and were not the offspring of female slaves who had been encumbered, they were, by no means, bound to the creditor.

27. *Marcellus, Digest, Book V*.

A certain man gave a slave in pledge, and then placed him in chains for some trifling offence, and afterwards released him; and, because the debtor did not pay the debt, the creditor sold the slave for a lower price than he was worth when pledged. Can an action be brought by the creditor against the debtor because the suit on the loan was not sufficient to enable him to recover the deficiency? What if the debtor should have killed or blinded the slave? If he had killed him, he would be bound to produce him in court, but if he had blinded him, we should

grant an action for malicious injury to the amount of the interest of the creditor; because by disabling or confining the slave the debtor had diminished the value of the pledge. Let us suppose that no action will lie on the ground of a loan, for the reason that the case has been lost. I do not think that the matter is unworthy of the attention and assistance of the Prætor. Ulpianus says, in a note, that if the debtor put the slave in chains in order to injure the creditor, he will be liable; but if he did so because he deserved punishment, he will not be.

28. *Paulus, Questions, Book III.*

Where a legacy was left to a son under paternal control on a certain condition, his father received his own property from the heir by way of pledge. The father being dead, or the son emancipated, and the condition upon which the legacy was based having been fulfilled, the legacy becomes due to the son. The father could not legally bring an action to recover the pledge, nor could the son, who had now begun proceedings for that purpose, do so; nor could he have any right to the pledge which was acquired during the preceding time; just as has been stated in the case of a surety.

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

Paulus was of the opinion that a general agreement covering all the property of the debtor was sufficient to establish the obligation of pledge; but that such property as was not included in that of the deceased, but was afterwards acquired by the heir in some other manner, could not be recovered in an action by a creditor of the testator.

(1) Where female slaves are pledged, the children born of them are also considered to be encumbered. Still, what we have stated with reference to their children being liable, whether an express agreement was made with reference to them or not, only applies where their ownership is acquired by the person who encumbered them, or to his heir. If, however, the children were born while the female slaves were in the possession of another master, no liability will attach to them under the pledge.

(2) A house which was given in pledge was burned; Lucius Titius purchased the ground on which it had stood, and erected a building thereon. The question arose as to what became of the pledge? Paulus answered that the right to the pledge still remained, and therefore the right of the soil was held to follow the usufruct; that is to say, so far as the right of pledge was concerned; but the *bona fide* possessors will not be compelled to surrender the house, unless the builder should receive the expenses incurred in its construction, to the extent that the property was rendered more valuable.

(3) Where a slave, with the knowledge and consent of his master, enters into an agreement that all the property of the latter shall be hypothecated, the slave himself, who made the contract, will form part of the property pledged.

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

The risk of a claim secured by pledge which is sold by the creditor, must be assumed by the purchaser, if the former proves that the property was actually encumbered.

31. *Scævola, Opinions, Book I.*

The condition under which certain land subject to the payment of rent to the State was, that if, after a certain time, the rent should not be paid, the land would revert to the owner. It was afterwards given in pledge by the possessor, and the question arose whether this could legally be done? The answer was that the pledge was good where the payment of money was involved. It was also asked where the debtor, as well as the creditor, were in default for the payment of the rent, and for this reason a judicial decree had been rendered that the land belonged to the owner in compliance with the terms of the contract, whose position was preferable? The answer was that, according to the facts stated, as the rent had been paid, the owner might avail himself of his privilege, and the right to the pledge was extinguished.

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

A debtor agreed that everything belonging to his land and everything added to it, placed upon it, brought to it, born upon it, or derived from it, should be encumbered. A portion of the said land was without tenants, and the debtor, for this reason, gave it to his steward to be cultivated, and furnished him at the same time with the slaves necessary for that purpose. The question arises, whether the slave, Stichus, who was the steward, and the other slaves designated for the cultivation of the land, as well as the underslaves of Stichus, were encumbered. The answer was that only those who were brought there with the intention of the master that they should remain permanently, and not such as were employed temporarily, were subject to the pledge.

33. *Tryphoninus, Disputations, Book VIII*.

Where anyone promises to pay either you or Titius, he cannot recover what he has paid to Titius; but if he has given him a pledge, and the latter received it before payment, he can recover it.

34. *Scaevola, Digest, Book XXVII*.

Where a debtor gave a shop in pledge to his creditor, the question arose whether the transaction was void, or whether it should be held that under the designation of "shop" all of the property contained therein was pledged. And if the party should sell the said merchandise, from time to time, and purchase other goods and place them in said shop, and then should die, could the creditor recover by an hypothecary action everything found there, as the merchandise had been changed, and other articles substituted? The answer was that whatever was found in the shop at the time of the death of the debtor was held to have been pledged.

(1) It was also asked, where a letter, such as the following, was sent, namely: "When I borrowed five hundred *denarii* of you, I requested you not to take a surety but to accept a pledge from me, for you know absolutely and with certainty that my shop and my slaves are not encumbered to anyone else but yourself, and that you have confidence in me as an honest man." Is the obligation of a pledge incurred? Or is this letter of no force, because it has no date, and no reference to the consul? The answer was that, as an agreement with reference to pledges seems to have been made, the obligation derived from a pledge is not void, merely for the reason that the date and the name of the consul do not appear, and no seals are attached to the document.

(2) A creditor accepted from a debtor, by way of pledge, all the property which he had or might have subsequently. The question arose whether the money which the said debtor had borrowed from the other party, as it was included in his property, would be bound to the creditor by way of pledge? The answer was that it would.

35. *Labeo, Probabilities of the Epitomes, by Paulus, Book I*.

If a house which you have a right to sell under the terms of a contract of pledge is consumed by fire, and is afterwards rebuilt by your debtor, you will have the right with reference to the new building.

TITLE II.

IN WHAT CASES A PLEDGE OR AN HYPOTHECATION IS TACITLY CONTRACTED.

1. *Papinianus, Opinions, Book X*.

By a decree of the Senate enacted under the Emperor Marcus, the pledge of a house given to a creditor who had lent the money to repair the building, will also extend to him who furnished the money, at the direction of the owner, to the workman who made the repairs.

2. *Marcianus, On the Hypothecary Formula*.

Pomponius, in the Fortieth Book of Various Extracts, said that, "Everything brought into a house by a lessee was pledged, not only for the rent but also for any deterioration of the property caused by neglect of the tenant, on account of which the owner would be entitled to

an action on lease against him."

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

Neratius thinks that where a warehouse is leased, whether the agreement refers to other things or only to the space occupied, a tacit agreement exists with reference to whatever is placed therein, and that the rule also applies in this instance; which is correct.

4. *Neratius, Parchments, Book I.*

It is our practice that whatever is placed on urban estates is considered to be pledged, as it were, by tacit agreement; in rustic estates, however, the contrary rule is observed.

(1) Can it be doubted whether stables which are not joined to other buildings should be considered as being included in these estates? And, indeed, there is no question with respect to urban estates, since they are separated from other buildings. However, with reference to a tacit pledge of this kind, they do not differ greatly from urban estates.

5. *Marcianus, On the Hypothecary Formula.*

Pomponius states, in the Thirteenth Book of Various Extracts, that if a lessee gives me a gratuitous lodging in a house which he has rented, any personal property brought there by me will not be considered to be tacitly pledged to the other of the house.

(1) He also says that it should be considered that a pledge can be brought in by the consent of the owner in such a way that it may be liable for a portion of the indebtedness.

(2) Where anyone becomes a surety, and his property has been given in pledge by the debtor for whom he became responsible, it is certainly understood by this act of giving security that he has, so to speak, directed his property to be liable for the debt. If, however, his property is hypothecated subsequently to his becoming surety, it will not be legally encumbered.

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

Although, in the case of urban estates, it is customary to understand that a tacit agreement was entered into to the effect that the property which is brought or placed in the house is liable, just as if an express contract had been made with reference thereto; it is certain that a pledge of this kind does not affect the freedom of a slave. This opinion Pomponius approves, for he says that it does not, in any way, hinder manumission, where the pledge is liable for the rent.

7. *Pomponius, Various Extracts, Book XIII.*

The crops produced upon rustic estates are understood to be tacitly pledged to the owner of the land which is leased, even if there is no express agreement to that effect.

(1) Let us consider whether everything that has been brought or placed in a house is pledged, or only such property as has been brought to be kept there. The latter is the better opinion.

8. *Paulus, Sentences, Book 11.*

If a debtor uses money lent to him without interest, the creditor can retain for himself the profits of the encumbered property to the amount of the legal rate of interest.

9. *The Same, On the Duties of the Prefect of the Night Watch.*

A difference exists between property tacitly liable for rent and such as is encumbered by agreement on account of a manifest pledge; for we cannot manumit slaves which have been pledged, but we can manumit those residing in a house who are tacitly liable for the rent; provided we do this before they are seized on account of nonpayment of rent, for then we cannot liberate slaves which have been detained by way of pledge. Nerva, the jurist, deserves to be ridiculed for stating that slaves who have been detained as security for rent can be liberated by merely showing them at a window.

10. *Scævola, Digest, Book VI.*

The heir of a guardian entered into an agreement with the heir of the ward, and when he had paid the greater amount of the debt, he gave a pledge for the remainder. The question arose whether the property was legally encumbered under the original contract. The answer was that, in accordance with the facts stated, it was encumbered.

TITLE III.

WHAT PROPERTY CANNOT LEGALLY BE PLEDGED OR HYPOTHECATED.

1. *Marcianus, On the Hypothecary Formula*.

A ward cannot hypothecate property without the authority of his guardian.

(1) Where a son under paternal control, or a slave, encumbers property belonging to his *peculium* for another person, it must be said that the property is not liable even though he may have the free management of his *peculium*, just as such persons are not allowed to give away their *peculium;* for neither of them has unrestricted management of his property. This, however, involves a question of fact, as to how far each of them seems to have been permitted to manage his *peculium*.

(2) The Divine Pius stated in a Rescript addressed to Claudius Saturninus, that any property which a party cannot purchase because it is not an object of commerce, cannot be taken in pledge. But what if any one should receive by way of pledge land, the title to which is in litigation, would he be barred by an exception? Octavenus was of the opinion that an exception would be available even in a case of pledge. Scævola says, in the Third Book of Various Questions, that this is the method of procedure, as an exception is available wherever the property, the title to which is in dispute, is movable.

2. *Gaius, On the Hypothecary Formula*.

If anyone hypothecates property in behalf of a woman who has become surety for another, or in behalf of a son subject to paternal control to whom money has been lent in violation of the Decree of the Senate, the question arises, is he entitled to relief? In the case where he encumbered his own property for the woman, it can readily be said that he is entitled to relief, just as an exception is granted to the surety of such a woman. Where, however, the party hypothecated his property in behalf of a son under paternal control, the same rules must be laid down which apply to the surety of a son under such circumstances.

3. *Paulus, Questions, Book III*.

Aristo wrote to Neratius Priscus that even where a contract was made with a party to whom money was loaned to be paid to another on behalf of the creditor, he would not succeed to the right of pledge, unless he expressly agreed that the same property should be encumbered to him; for the second creditor should not succeed to the rights of the first, who himself made no agreement with reference to a pledge; and, in this instance, the position of the purchaser becomes preferable.

Finally, if the first creditor contracted with the debtor with reference to the sale of the pledge, and the second one neglected to secure the same privilege of sale, not through forgetfulness, but because it was understood that the pledge could not be sold; let us see if the right of the first creditor will pass to the second so as to permit him to sell the pledge. I think that this should be admitted, for it often happens that a person can claim by means of a third party something to which he is not personally entitled.

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

Titius, when he was about to borrow money from Mævius, executed an undertaking and indicated certain property to be given by way of pledge, and then, after he had sold some of the said property, he received the money. The question arose whether the property sold was liable to the creditor? The answer was that, since it was in the power of the debtor, after security had been given, not to receive the money, the obligation appeared to have been

contracted with reference to the pledge at the time when the money was paid; and therefore the property which the debtor had in his possession when the money was paid should be taken into account.

5. *The Same, Sentences, Book V*.

A creditor who knowingly accepts a son under parental control as a pledge from his father shall be sentenced to relegation.

TITLE IV.

WHICH CREDITORS ARE PREFERRED IN CASES OF PLEDGE OR HYPOTHECATION, AND CONCERNING THOSE WHO ARE SUBROGATED TO PRIOR CREDITORS.

1. *Papinianus, Questions, Book VIII*.

A certain man who promised a dowry for a woman accepted a pledge or an hypothecation to secure the restitution of the dowry to himself. Having paid a portion of it, the husband afterwards gave the same property in pledge to another party, and afterwards the remainder of the dowry was paid. A question arose with reference to the pledge. Since the party who promised the dowry is required to pay the entire amount on account of his promise, the times of payment should not be taken into account, but the date when the obligation was contracted. It cannot properly be said that it is in the power of the party not to pay the remainder of the money, because, under these circumstances, the woman would not seem to be endowed.

(1) The case of him who receives a pledge is different, when this is done to secure the payment of a debt within a certain time; where, for instance, the property was pledged to another before the money was paid.

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

He who, in general terms, has received the property of a debtor by way of pledge, is in a better position than he to whom a tract of land forming part of the property of the debtor is subsequently hypothecated. If, however, the agreement was made with the first creditor that other property shall only be liable by way of pledge where his right to that which he has accepted under a general hypothecation is not sufficient to secure the debt, and the second agreement fails, the second creditor will be found to be the sole, rather than the preferred one, so far as the pledge subsequently given is concerned.

3. *The Same, Opinions, Book XI*.

Where a creditor received pledges which had also been received by a second creditor in accordance with the terms of another agreement, and a renewal having afterwards been made, he added other pledges to the former ones, it was held that the advantage of priority remained with the first creditor, as he had practically been subrogated to himself.

(1) Where a tract of land was due to Titius on account of a mandate, and he for whom the business had been transacted pledged it before possession of the same had been delivered to him, and after it had been delivered, he pledged the same land again to another party, the position of the first creditor appears to be preferable, if the second creditor did not pay the price of the land to the party who transacted the business, and it would be held that his position would be preferable, dependent upon the amount that he paid and the interest on the same, unless the first creditor offered to return him the money. If, however, the debtor should pay money derived from some other source, the first creditor should be preferred.

(2) After a division of a tract of land by certain boundaries had been made, it was agreed between two brothers that, if one of them should not release his undivided share of the land, which had been given to a creditor by way of pledge, the other brother could sell half of the share of his brother obtained by the division. I thought that a contract of pledge should be understood to have been concluded, but that the first creditor ought not to be preferred to the

second, since the second pledge seemed to apply to that portion which the brother could not encumber beyond his own share, without the consent of his joint-owner.

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

If a debtor, before redeeming his pledge from his first creditor, should pledge the same property to another for money lent, and, before he pays what is due to either creditor, sells other property to the first creditor for the purpose of setting off the debt against the price of the property sold; it must be held that this has the same effect as if the money had been paid to the first creditor, for it makes no difference whether he discharged the debt by payment, or by set-off, and therefore the position of the second creditor is preferable.

5. *Ulpianus, Disputations, Book III*.

Sometimes the position of the second creditor is preferable to that of the first; for example, where the money which the second creditor borrowed has been spent for the preservation of the property itself; as for instance where a ship was pledged, and I lent money for the purpose of equipping or repairing it.

6. *The Same, On the Edict, Book LXX1II*.

Hence, the money of the second creditor insures the safety of the entire pledge. This is also the case where money is lent for the support of the sailors, without which the ship could not safely arrive at its destination.

(1) Moreover, where anyone has lent money on merchandise pledged to himself either for its preservation or to defray the expenses of transportation, he will be preferred, even though he may be a second creditor; for the expenses of transportation are a prior lien.

(2) The same rule applies where the rent of a warehouse, or of land, or of transportation of merchandise by beasts of burden is due; for, under such circumstances, this creditor will be preferred.

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

The same rule applies to property purchased with the money of a ward. Wherefore, if the property was purchased with the money of two wards, each of them will have a right in the pledge in proportion to the sums expended for the purchase. If, however, the property was not entirely bought with the money of one creditor, each creditor will be entitled to participate, that is, the first creditor and the one with whose money the property was purchased.

(1) If I should encumber to you any property which I may hereafter obtain, and expressly hypothecate to Titius a certain tract of land, provided I should, in time, acquire its ownership, and I subsequently do acquire it; Marcellus holds that both creditors have a right to the pledge. For it is not of much importance whether or not the debtor paid for the land out of his own funds, since, as it was bought with money obtained on pledge, the property is not to be considered pledged merely because the money was obtained from such a source.

8. *The Same, Disputations, Book VII*.

Where the government expressly takes property by way of pledge, it must be said that it will be preferred to the Treasury, if the debtor afterwards becomes bound to the Treasury; because private individuals would, in an instance of this kind, be preferred.

9. *Africanus, Questions, Book VIII*.

A certain man rented a bath from the next *Kalends*, and it was agreed that the slave Eros should be held by the lessor in pledge until the rent was paid. The lessee gave the same Eros in pledge to another person for money loaned before the *Kalends* of July. Advice having been taken as to whether, when this creditor brought suit for the recovery of Eros, the Prætor should protect the lessor, the opinion was that he should; for although the slave was given by way of pledge at a time when no rent was due, because at that time Eros had begun to be in such a position that the right of pledge attaching to him could not be released without the

consent of the lessor, his position should be considered preferable.

(1) The authority goes still farther and holds that, where money is lent under a condition, a creditor should be protected against a subsequent creditor, provided the condition is not one which cannot be complied with without the consent of the debtor.

(2) If, however, an heir should make an agreement pledging his property on account of legacies bequeathed under a condition, and he afterwards pledges the same property already encumbered on account of money borrowed, and the condition upon which the legacies are dependent is subsequently fulfilled; it is held that, in this instance, he to whom the pledge was first given must be protected.

(3) Titia gave a tract of land which was not hers in pledge to Titius, and subsequently pledged it to Mævius, and then, having become the owner of the property, she bestowed it upon her husband as a dowry, after its value had been appraised. It was decided that if the money was paid to Titius, Mævius would have no better claim to the pledge for that reason; for where the right of the first creditor was released, that of the second was confirmed, since the property was found to belong to the debtor. In the case proposed, however, the husband occupies the position of a purchaser, and therefore, since neither when the property was encumbered to Mævius, nor when payment was made to Titius, it was owned by the woman, at no time could the pledge to Mævius be valid. This, however, is only true where the husband accepted the land as dowry after it had been appraised, and did so in good faith; that is to say, if he was not aware that it was hypothecated to Mævius.

10. *Ulpianus, Opinions, Book I.*

If, after sentence has been pronounced, a pledge should be taken in a case by the authority of someone who can order this to be done, the heir of the party to whom the pledge was given will be preferred through the privilege of priority of time.

11. *Gaius, On the Hypothecary Formula*.

In the case of a pledge, the creditor who first lent the money and accepted the hypothecation, is to be preferred; even though the debtor had previously agreed with another that if he borrowed money from him the same property should be bound, even if he subsequently did receive the money from him; for notwithstanding he had previously agreed to do so, he was not obliged to take the money.

(1) Let us see whether the same principle applies where a stipulation is made under a condition, and a mortgage executed; and, while the transaction was pending, another creditor made a loan absolutely, and received the same hypothecated property as security; and then, if the condition of the first stipulation should be fulfilled, will the creditor who afterwards lent money be entitled to the preference? I fear, however, that another view must be taken in this instance; for, when the condition has once been complied with, the result will be that it will have the same effect as if no condition was prescribed at the time the stipulation was entered into. This is the better opinion.

(2) Where a tenant agrees that everything brought upon the land or originating therein shall be pledged, and, before bringing anything there, he hypothecates his property to another, and then brings it upon the land, that creditor will be preferred who absolutely and expressly received the pledge; for the reason that the property is not liable under the first agreement, but under that where it is brought upon the land, which was done in the later transaction.

(3) When a contract is made with reference to the hypothecation of property to come into existence hereafter, as, for instance, with reference to the offspring of a female slave; the question arises whether the slave was included in the property of the debtor at the time of the execution of the contract; and with reference to crops, where it is agreed that they shall be subject to pledge, it also should be ascertained whether the land or the right of usufruct belonged to the debtor when the agreement was entered into.

(4) Where the second creditor is ready to pay the first one what is owing to him, let us see whether he will be entitled to the Hypothecary Action, if the first creditor refuses to accept the money. We hold that the action cannot be brought by the first creditor, since he was responsible for the money not having been paid.

12. *Marcianus, On the Hypothecary Formula*.

Where a first creditor has received property in pledge, or is in possession of the same, and another sues to receive it by means of the Hypothecary Action; the first creditor can lawfully avail himself of the exception: "If the property had not previously been encumbered to me by pledge or hypothecation. Or, where the other party is in possession, the first creditor can bring suit to recover the property by means of the Hypothecary Action, and if he is opposed by the exception," "If the agreement had not been made that the property should be encumbered to him," he can reply in the manner above mentioned.

Where, however, the second creditor proceeds against another party in possession, he can do so legally, and the property hypothecated can be adjudged to him, but in such a way that the first creditor can deprive him of it by an action.

(1) Where a possessor has had judgment rendered against him in the manner previously stated, because he did not return the property pledged, and also has been ordered to pay the damages assessed; the question arises whether he will still be liable to the second creditor, even if the money has been paid to the first? I think that this opinion should be adopted.

(2) Where the first creditor lent money without security, and the second one did the same thing, but took security, and then the first one received the same property in hypothecation for his debt; there is no doubt that the second creditor is entitled to the preference. Wherefore, if a contract was made with reference to the hypothecation of property to the first creditor within a certain time, his claim will undoubtedly be preferred; even though, before the time elapsed, the debtor entered into an absolute agreement hypothecating the same property to the other creditor.

(3) Where the same creditor lends two sums of money at different times, that is to say, before and after the second creditor, he will be preferred to the second creditor, and in the other instance he will be the third.

(4) If a debtor hypothecates property to you and then encumbers the same property to another with your consent, the second creditor will be preferred. The question very properly arises, where the money is paid to the second creditor, is the property still encumbered to you? A question of fact which depends upon the intention of the parties is here involved; for, when the first creditor permitted the property to be encumbered to another, the point is whether it was entirely released from the lien, or whether the usual order should be observed, and the first creditor should take the place of the second.

(5) Papinianus states in the Eleventh Book that if the first creditor, after a renewal of the obligation, takes the same pledges together with others, he is then subrogated to himself; but if the second creditor does not tender him the money, he can sell the pledge in such a way as only to obtain the first money expended, and not what he subsequently lent; and any excess above the first loan which he receives he must pay to the second creditor.

(6) It must be borne in mind that, even if the debtor is unwilling, the property will be liable to the second creditor, not only for his own debt, but also for that of the first creditor, as well as for the interest, and what he has paid to the first creditor; but where the second creditor paid the interest due to the first, he does not recover his own interest, for he was not transacting the business of another, but really his own. Papinianus also states this in the Third Book of Opinions, and it is correct.

(7) Where a simple hypothecation has been agreed upon by the second creditor, he can recover the hypothecated property from any other possessor except the first creditor and anyone who purchases it from him.

(8) A man having borrowed money from Titius, made an agreement with him that his land should be either pledged or hypothecated to him. He afterwards borrowed money from Mævius, and agreed with him that, if the said land should cease to be encumbered to Titius, it should be encumbered to him. Then a third party lends the debtor money on condition that he shall pay Titius, and enters into an agreement with him that the same land shall be either pledged or hypothecated to him, and that he shall be subrogated to Titius. The question arises whether the second creditor is to be preferred to the third, who agreed that, the money having been paid to Titius, the condition should be carried out, and the third creditor should only blame himself for his own negligence. In this instance, the third creditor should be preferred to the second.

(9) Where a third creditor permits property pledged to him to be sold, in order that the proceeds may be paid to the first creditor, and that he may be subrogated to the first with reference to other pledges; Papinianus says, in the Eleventh Book of Opinions, that he will be subrogated to him, and in fact the second creditor has no other right, except to pay the claim of the first, and succeed to his place.

(10) Where property is hypothecated to the first creditor, but nothing has been agreed upon with reference to its sale, and an agreement has been made with a subsequent creditor for the sale of the same; it is the better opinion that the claim of the first creditor should be preferred. For it is settled with reference to a pledge, that where an agreement is made with the first creditor, even though the property should be delivered to the second, the former is entitled to priority.

13. *Paulus, On Plautius, Book V*.

I sold you a house, with the understanding that the rent of the first year should belong to me, and that of the ensuing years should belong to you, and that the right of each of us should be dependent upon the pledges given by the tenant. Nerva and Proculus hold that unless the pledges are sufficient to secure the rent due to both vendor and purchaser, the right to all the pledges first belongs to me, because nothing has been clearly stated as to whether or not the sums shall be divided *pro rata* with reference to all the pledges, and if there is any surplus remaining after the first year it will belong to you.

Paulus says this is a question of fact, but it is probable that the intention of the parties was that the right in the pledges should follow the first rent that is due.

14. *The Same, On Plautius, Book XIV*.

If anyone, who is not the owner, should pledge the same property to two persons at different times, the first one is entitled to the preference; although where we receive a pledge from different parties who are not the owners, the position of the possessor of said property is the better one.

15. *The Same, On the Edict, Book LXVIII*.

A building erected upon the ground of another can be given in pledge, in such a way, however, that the claim of the owner of the ground shall be preferred, if the title to the same has not been transferred by him.

16. *Paulus, Questions, Book III*.

Claudius Felix hypothecated the same tract of land to three different persons, first to Eutychiana, then to Turbo, and finally to a third creditor. Eutychiana having been sued by the third creditor, contended for her rights in court, and having been defeated did not appeal, while Turbo, who also lost his case before another judge, appealed. The question arose whether the third creditor, who had obtained a judgment against the first, should also defeat Turbo, or if she were removed from the case, whether Turbo ought to take preference over the third creditor. It is clear that when the third creditor pays the first one out of his own money, he will be subrogated to him to the amount which he paid. There were some authorities who

held that, in this instance also, the third creditor should be entitled to the preference, but this does not seem to me to be at all just. For, suppose that the first creditor had brought an action against the third, and had been defeated by means of an exception, or in some other way, could the third creditor who had defeated the first avail himself of an exception on the ground of a judgment rendered against Turbo, who had lent the money in the second place?

Or, on the other hand, if, after the first decision by which the first creditor had been defeated by the third, the second creditor should obtain a judgment in his favor against the third, could he avail himself of an exception, on the ground of a decision rendered, against the first creditor? By no means, in my opinion; and therefore the third creditor is not subrogated to the first whom he defeated, for where a matter has been decided between two parties, it can neither benefit nor injure a third, but his entire right remains unimpaired to the second creditor, without any prejudice resulting to the first decree.

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

Where anyone purchases land which has been encumbered by the debtor to another, he should be protected only to the extent to which the proceeds of the sale have come into the hands of the first creditor.

18. *Scævola, Opinions, Book I.*

Lucius Titius lent money at interest and received pledges, and Mævius lent money to the same debtor on the same pledges. I ask whether Titius should not be preferred, not only so far as the principal and the interest which accrued before Mævius made his loan are concerned, but also with respect to that which subsequently accrued. The answer was that Lucius Titius was entitled to the preference with reference to all that was due to him.

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

A woman gave a tract of land, which had been pledged as dowry to her husband, and by her will she appointed, as heirs, her husband and her children by him and by a former husband. The creditor, although he could have brought suit against the heirs, who were solvent, had recourse to the land. I ask whether, if a lawful possessor should tender him the amount of the debt, he would be compelled to transfer to him his rights of action. The answer is that what was asked does not seem to be unjust.

20. *Tryphoninus, Disputations, Book VIII.*

The question arose if, after you had made a contract with a party and before you lent him any more money, Seius should lend the same debtor fifty *aurei*, and the debtor should encumber to him the property to an amount exceeding the value of what had been pledged to you, and then you should lend to the same creditor, for instance, forty *aurei*, which was the excess of the value of the property which you lent in the first place; would the surplus of the pledge be liable to him for the fifty *aurei*, or to you for the forty which you lent? Suppose that Seius was ready to tender you the amount loaned in the first place. I held that the result would be that Seius would be preferred with reference to the surplus value of the pledge, and if the sum lent in the first place, together with the interest, was tendered by him, he would be preferred to the first creditor, so far as the amount which he had subsequently lent to the same debtor is concerned.

21. *Scaevola, Digest, Book XXVII.*

Titius hypothecated to Seia all the property which he possessed or might subsequently acquire, on account of a judgment that had been rendered against him for a sum of money which he owed because of his guardianship. Afterwards, having borrowed money from the Treasury, he encumbered all his property to it, and paid Seia a portion of what was due to her, and promised to pay her the remainder after having renewed the obligation; and as before, an agreement was made concerning pledges. The question arose whether Seia should be preferred to the Treasury both with reference to the property which Titius had at the time of

the first obligation, as well as to that which he had acquired after said obligation was contracted, until his entire indebtedness was discharged. The answer was that there was nothing in what was stated to prevent her from being preferred.

(1) A creditor made a loan to a dealer in marble on a pledge of tombstones, the price of which had been paid to the vendors out of the money furnished by the creditors. The debtor was the lessee of certain warehouses belonging to the Emperor, and, as the rent for the same had not been paid for some years, the officer charged with its collection proceeded to sell the tombstones. The question arose whether the creditor had a right to retain them on account of the pledge. The answer was that, in accordance with the facts stated, he had that right.

TITLE V.

CONCERNING THE SALE OF PROPERTY PLEDGED AND HYPOTHECATED.

1. *Papinianus, Questions, Book XXVI.*

A creditor received certain lands by way of pledge, and afterwards another creditor lent the same debtor money, and entered into an agreement by which the entire property of the debtor was pledged; then the first one made the latter execute a similar obligation with reference to all his property to secure either another, or the same contract. Before the second creditor was paid, the first one sold the other property on the ground of its having been pledged, without having any right to do so; and on this account a personal action would not lie against the debtor in favor of the creditor, nor could an equitable action be granted him to recover his pledges. Nor could he properly be sued in an action of theft, with reference to the personal effects, because the creditor, in instituting proceedings, acted in his own behalf, being mistaken with respect to the order which should be observed in the sale of the article; especially as the other creditor did not lose, by theft, the possession of property which was never in his hands. The second creditor cannot institute proceedings for production, because the first is not in possession, and did not act fraudulently in order to avoid being in possession. It follows, then, that the second creditor must sue those in possession of the property.

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

Where a surety was sued, he obtained an order of court to hold the land hypothecated to the creditor, by the right of purchase. A second creditor who had subsequently made a contract with reference to the same pledge, will, nevertheless, have the privilege of tendering the money which the surety had paid, together with the interest which, in the meantime, had accrued; for a sale of this kind, which is concluded for the purpose of transferring the possession of property pledged, is usually made on account of the requirements of the law.

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

Where the first creditor sells the pledge in compliance with the terms of the agreement, it is settled that the second creditor has no right to tender the money.

(1) Where, however, the debtor sells a pledge without consulting his creditors, and pays the price of the same to the first creditor, the second creditor can offer to the purchaser the amount paid to the first, together with the interest which has accrued in the meantime; for it makes no difference whether the debtor sells the property pledged, or pledges it a second time.

4. *The Same, Opinions, Book XI.*

Where the time for the payment of the money is prolonged by consent, it is held to have been agreed that the power to sell the pledge shall not be exercised before the time has elapsed.

5. *Marcianus, On the Hypothecary Formula.*

Where a second creditor, having paid the claim of the first, is subrogated to him, he can lawfully sell the pledge on account of the money which he has paid and lent.

(1) Where a second creditor, or a surety, having paid the debt, receives the pledges given for the same, the debtor can properly tender him the amount paid, even though the pledges are held under the title of purchase.

6. *Modestinus, Rules, Book VIII.*

Where a second creditor purchases a pledge from the first, he is understood not to have paid him the money for the purpose of acquiring the ownership of the same, but to hold the property in pledge for his own benefit; and therefore the money can be tendered to him by the debtor.

7. *Marcianus, On the Hypothecary Formula.*

Where a creditor sells a pledge, or land which has been hypothecated, under the condition that he shall have a right to refund the money and recover the pledge; can he do this if the debtor is ready to pay the money? Julianus states in the Eleventh Book of the Digest that the pledge, indeed, seems to have been regularly sold, but that the debtor can bring suit against the creditor to compel him to assign to him any rights of action which he may have. What Julianus says with reference to a pledge also applies to hypothecation.

(1) It must be considered whether, where property hypothecated is sold, the debtor should be permitted to recover it by paying the money to the purchaser. If, in fact, it was sold under the condition that the purchase should be rescinded, if the money is refunded by the debtor within a certain time, and it is paid within that time, he can recover the hypothecated property. But if the time has elapsed, and this matter has not been arranged by agreement, the sale cannot be rescinded, unless the debtor is under twenty-five years of age, or is a ward, or is absent on public business, or some other cause exists on account of which relief is granted by the Edict.

(2) The question is asked, where an agreement has been exacted by the creditor that the debtor shall not be permitted to sell property which has been hypothecated or pledged, what the law is, and whether an agreement of this kind is void having been made contrary to law, and therefore the property can be sold. It is certain that the parties must abide by such an agreement, and that a sale made in violation of it will be void.

8. *Modestinus, Rules, Book IV.*

The creditor has a right to sell any of the pledges on which he has a claim that he pleases, in order to obtain what is due to him.

9. *Paulus, Questions, Book III.*

The question arose whether the debtor would be released where the creditor could not obtain the price of the pledge from the purchaser. I think that if the creditor was in no way to blame, the debtor would still remain liable; because a sale does not necessarily release the debtor, unless the purchase-money was received.

(1) Moreover, Pomponius says in the Second Book of Extracts that, where pledges are given it is customary to add, namely, that when a pledge is sold and the price does not satisfy the claim, the debtor must make up the deficiency, is superfluous; because this takes effect by operation of law, and therefore should not be added.

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

Although a person who purchases property subject to the condition of the pledge cannot have recourse to the vendor in case he is deprived of it by a better title; still, the creditor who sold the land should not be heard, if he attempts to institute proceedings on some other ground with reference to the same property.

11. *Scævola, Opinions, Book I.*

An arbitrator appointed for the partition of an estate, in the division of the property belonging to the same assigned certain claims, as a whole, which were due separately by debtors to the estate. The question arose, whether, if the debtors did not pay, each of the heirs could sell the

property pledged in order to obtain the entire price. I answered that he could.

12. *Tryphoninus, Disputations, Book VIII.*

It was stated in a Rescript by the Emperor, in reply to an application made by Papinianus, that a creditor could purchase a pledge from his debtor, because it still belongs to the debtor.

(1) Where property belonging to another has been pledged, and the creditor sells it, let us see whether the price received by the creditor will release the debtor from liability to a personal action on the ground of money loaned. And, indeed, it might be answered that is true if the sale was made on condition that no obligation would be incurred in case of eviction, because the price paid under such circumstances would certainly rather benefit the debtor, and also be a source of profit to the creditor, where this arises out of any contract made, or obligation assumed by the debtor; the debtor will, however, be released only so far as the creditor is concerned, but he will still be liable to the owner of the property where the pledge has not yet been lost through eviction, or he will be liable to the purchaser, after eviction, in an equitable action to prevent his profiting by the loss of another. If, for instance, a creditor, while proceeding against a possessor of the property pledged, deprives him of a greater amount of the crops than he is entitled to, he should receive them by way of satisfaction of what is owing to him. And where, on account of an unjust judicial decision, a creditor has deprived the owner of property which did not belong to the debtor, under the pretense that it was encumbered to him; and the question was asked whether; if the claim was paid it should be restored to the debtor, our Scævola held that it should be restored.

If, however, the creditor who sold the property did not do so in a way that he would be absolutely sure of keeping the price, but would be compelled to return it under certain circumstances, I think that, in the meantime, nothing can be recovered from his debtor, but that his release would remain in abeyance. But if the creditor is sued in an action on sale and must indemnify the purchaser, he can recover the amount of the debt from the debtor, because it is evident that he was not released.

13. *Paulus, Decrees, Book I.*

A creditor who, availing himself of his privilege, sells a pledge, is obliged to assign his rights; and if he is in possession of a pledge he must certainly transfer it.

14. *Scaevola, Digest, Book VI.*

Arbitrators appointed for the partition of an estate among heirs, having divided the property of the same, assigned certain claims in bulk to the heirs individually, which were due to several heirs to the estate. The question arose; where the share of a debtor which had been

assigned to an heir was not paid, whether the said heir could sell the pledge given by the debtor, in order that the price might be credited on the total amount of the claim. I answered that he could do so.

TITLE VI.

IN WHAT WAYS THE LIEN ON PROPERTY PLEDGED OR HYPOTHECATED IS RELEASED.

1. *Papinianus, Opinions, Book XL*

The friend of an absent debtor took charge of his business, and, with his own money, released the pledges without their having been offered for sale. It is held that the owner was restored to his former condition, and therefore the party who transacted his business cannot justly ask that he shall be granted a prætorian action under the *Lex Servia*. If, however, he is in possession of the property which was pledged, he can protect himself by an exception on the ground of bad faith.

(1) Where a vendor sold a tract of land, and received it by way of pledge as security for a portion of the purchase-money, and afterwards presented the remainder of the price to the

purchaser by a letter sent to him, the vendor having died, it was decided that a donation made in this way was void. The Treasury, which succeeded to the vendor, appeared as claimant, but was not permitted to bring suit for the land on the ground that it had been pledged, because it was held that the lien on it had been released by the will of the party who made the donation, as the law makes the donation of money void where there is no ground for the release of a pledge.

(2) A party who appeared in defence of another who was absent, gave an undertaking that he would execute the judgment. The conduct of the case having been afterwards transferred to the principal party himself, the sureties given by him who appeared for the defence to insure the execution of the judgment, will not be liable, nor will the pledges which they gave be liable either.

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

If a creditor should bring suit to recover a pledge from the possessor under the Servian Action, and the possessor should obtain an appraisement of the property in court, and the debtor brings an action against him for the recovery of the property; he will not be permitted to do this, unless he first pays what is owing to the creditor.

3. *Ulpianus, Disputations, Book VIII.*

Where property has been sold under the condition that, unless a better offer is made for it, the sale shall stand, and the property is delivered, and the purchaser, before the time for the offer of a better price has passed, pledges the said property, Marcellus says in the Fifth Book of the Digest that the right to the pledge is extinguished, if better terms should be offered; although where the property is sold on condition that it will please the purchaser, he does not think that the right to the pledge is extinguished.

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

Where a debtor, all of whose property was pledged, restores as unsound a slave that he had purchased; does the Servian Action cease to be available? The better opinion is that it does not, unless this has been done with the consent of the creditor.

(1) Where a creditor consents to the sale of a pledge, or that the debtor may exchange the property, donate it, or give it by way of dowry, it must be said that the pledge is released, unless he consented to the sale, or to other things, with the exception of the property pledged; for many creditors are accustomed to give their consent with this reservation. Where, however, the creditor himself sells the property, with the understanding that he will not release the pledge unless he is satisfied; it must be held that an exception will not prejudice him. But if he does not consent that the pledge shall be sold, but ratifies the sale after it has been made, the same opinion should be adopted.

(2) A nice question arises in the case of a sale of property especially encumbered: whether it is valid, or whether the transaction should prejudice the creditor, because he gave his consent; for instance, where some principle of law prevents the sale. It must be held that the sale will be valid.

5. *Marcianus, On the Hypothecary Formula.*

Property subject to hypothecation is released where the creditor either renounces his right, or agrees that he will not claim the money; unless it is alleged that an agreement has been made that the debt shall not be collected personally from the debtor. But what course should be pursued if another person happens to be in possession of the property hypothecated? Where, however, an agreement gives rise to a perpetual exception, it can also be said in this case that the party has renounced his right to the property hypothecated.

(1) If the creditor should consent not to demand the money within a year, it is understood that the agreement also applies to the property hypothecated.

(2) Where it is agreed between the parties that a surety shall be furnished instead of an hypothecation, and this is done, it will be held that satisfaction is given to the creditor, and that the lien on the property hypothecated is released.

The case is different where the creditor sells his right to the claim and receives the money; for, in this instance, all the obligations remain unimpaired, because the money is received as the price of the claim, and not by way of payment.

(3) It is understood that the creditor has been satisfied if an oath has been tendered, and the party swears that the property was not hypothecated.

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

A pledge is also released where the debt is either paid, or the creditor is satisfied with reference to it. Moreover, we must say that the same rule applies where the pledge is released by lapse of time, or the obligation is extinguished in any manner whatever.

(1) Where the party is ready to pay, there is good reason to assume that the pledge has been released; but the case is different where he is not prepared to pay, but is willing to satisfy his creditors in some other way. It is, therefore, advantageous to the debtor to have satisfied his creditor, because the latter must blame himself if he accepts satisfaction in lieu of payment. He, however, is not to be blamed who declines to accept any other satisfaction, but demands payment.

(2) With reference to security, we do not adopt the opinion of Atilicinus, who held that if a debtor gave anyone security for money loaned, the latter should be considered to have released his pledges.

7. *Gaius, On the Hypothecary Formula.*

Where a creditor consents to the sale of the property hypothecated, the lien on the latter is released. In such instances, however, the consent of a ward should not be considered unless he has given it by the authority of his guardian, who was present, or unless the guardian himself consented; provided the judge thinks that any advantage will be gained, or the claim be satisfied, by the sale of the property.

(1) Let us see if a general agent, or a slave who has the management of his master's affairs, to whom payment can be made and who has been appointed for that purpose, can consent. It must be held that his consent is not sufficient, unless he has been expressly authorized to act.

(2) Again, where an agreement is made with the agent of the debtor that certain property should not be encumbered, it must be held that the debtor can avail himself of an exception on the ground of fraud. But when an agreement of this kind is made with his slave, he can plead an exception based upon the agreement itself.

(3) If it should be agreed between the parties that half of the undivided property pledged shall be alienated, and the property involved is certain, it can be said that proceedings must be instituted with reference to the remaining portion in the beginning, and that an exception cannot be interposed to prevent it.

(4) It must be held that where anyone hypothecates his undivided share of property held in common, and a division of the same is made with his joint-owner, not merely that portion which falls to him who gave it in pledge is encumbered, but half of the share of each joint-owner is subject to the lien.

8. *Marcianus, On the Hypothecary Formula.*

Just as property, as well as its usufruct, ceases to exist, so also is the right of pledge or hypothecation extinguished for the same reason.

(1) A creditor can agree that the property encumbered shall no longer be subject to pledge or hypothecation, and, therefore, if this agreement was made with the heir, it will also benefit him to whom the estate is delivered under the terms of the Trebellian Decree of the

Senate.

(2) Where the agent of the debtor enters into an agreement of this kind with reference to his property, I do not think it can be doubted that the agreement will prejudice the creditor. And, also, if an agent, acting in his own behalf, appears for the creditor, and makes a contract, he will render the hypothecary action void to such an extent that I think it can be rightly held that, in this instance, the exception will prejudice the case of the principal.

(3) If it should be agreed between the parties that the undivided half of the property in question should cease to be liable by way of pledge, and any portion whatever of the land referred to should be claimed in an action against any possessor whomsoever, suit can only be brought for half of the same.

(4) Where several joint-owners of one piece of property pledge their undivided shares in the same, and the creditor agrees with one of them that his share shall not be hypothecated, and he afterwards brings suit for it, even if he with whom he made the agreement is in possession of the entire undivided tract of land, because the creditor made an agreement with reference to a portion of the same, he cannot be excluded from proceeding against the whole of it.

(5) Let us consider whether a son under paternal control or a slave who has the free management of his *peculium* can make an agreement with a debtor that property pledged shall be released, which property they received as being specially hypothecated. Or, since they cannot give away their *peculium*, are they also prohibited from agreeing that property pledged to them shall not be released?

It must be held that they can make such an agreement, provided they received a consideration for doing so, just as if they had sold the property pledged.

(6) If the land which was encumbered is sold with the consent of the creditor, the latter cannot honestly claim that it is still liable for the debt, if the sale is effected; for if it is not concluded, the creditor will not be deprived of his rights, merely because he gave his consent that the property should be sold.

(7) It is superfluous to inquire whether a tract of land specially hypothecated was sold with the consent of the creditor, if the debtor had possession of the property at the time; unless it might happen that the debtor sold it with the permission of the creditor, and then afterwards redeemed it in good faith from the purchaser, or someone else to whom the property had passed by the right of succession; even if the debtor himself should have become the heir of the purchaser. Still, if the money was not paid, a suspicion of bad faith will arise, which will extend to the present time, so that the creditor will have a right to interpose a reply on the ground of fraud.

(8) Let us examine the following case. If Titius, who was a debtor, should sell property which was pledged to Mævius, with the consent of his creditor, or to someone else from whom Mævius purchased it, and afterwards Mævius should become the heir of Titius, and the creditor should proceed to collect the debt from him, what is the law? It would be unjust for the purchaser to be deprived of the property by the creditor, as he obtained it, not by the right of succession, but in another way. It can, however, be said that as Titius was guilty of bad faith in the matter, by preventing the creditor from collecting the money from the possessor, it is very unjust that he should be made game of in this manner.

(9) If, however, the land in the possession of Mævius should be encumbered by him to anyone whose claim had not yet been satisfied, an exception can then be properly interposed on the ground that the property was not sold with the consent of the creditor; for although the debtor was guilty of bad faith in not making payment, still, the second creditor, who received the property in pledge, should be preferred.

(10) It is the safer plan, however, where a debtor requests his creditor to permit him to sell the pledge in order that he may the more readily pay him, to compel the prospective purchaser to give an undertaking to pay the creditor the price of the property sold, to the amount of the

debt.

(11) We should understand the term "sale," in a general sense, so that if the creditor permits the debtor to bequeath the property pledged, what he has granted may be valid; and this must be understood in such a way that if the legacy should be rejected, the pledge will still remain in force.

(12) Where a debtor sells property, but has not yet delivered it, shall the creditor be prevented from bringing an action on the ground that the property still forms part of the possessions of the debtor; or, indeed, since he is liable to an action on purchase, is the right to the pledge extinguished? The latter is the better opinion. But what if the vendor has not received the price, and the purchaser is not ready to pay it? In this instance the same can be said.

(13) If, however, the creditor permitted the property to be sold, but the debtor gave it away; will he be barred by an exception? Or is this rather a question of fact, he having consented that the property should be sold, in order that the price having been paid, the transaction would be an advantage to him? In this instance, his consent should not prejudice him. But, if he gave the property by way of dowry, he will very properly be held to have sold it on account of the burdens of matrimony.

On the other hand, if the creditor permitted him to give away the property, and the debtor sells it, the creditor will be barred from prosecuting his claim; unless it may be said that he permitted a gift to be made because the party to whom the property was given was a friend of the creditor.

(14) If the creditor gave his consent for the property to be sold for ten *aurei*, and the debtor should sell it for fifteen, it must be held that the creditor is not prevented from prosecuting his claim. On the other hand, there is no question that he sold it legally, if he obtained more by the transaction than the creditor permitted him to sell it for.

(15) The creditor will not be held to have given his consent if the debtor should sell the property with his knowledge; as he only suffered him to do so because he was aware that his right to the pledge would be preserved under all circumstances. If, however, he signed the bill of sale, he will be held to have given his consent, unless it is perfectly evident that he was deceived.

This rule should also be observed where he gave his consent without signing any document.

(16) Where permission to sell was granted the debtor, and his heir sold the property, a question of fact may arise as to what was the intention of the creditor. It must be said that the sale was properly made, for these subtleties are not considered by the courts.

(17) Where a debtor having obtained permission to sell the property pledged ceases to be in possession of the same, and a new possessor sells it, will the right to the pledge continue to exist, just as if the creditor had personally given permission to the debtor? This is the better opinion, for if the creditor had given permission to the new possessor to sell the property, and had not given it to the debtor by whom it was hypothecated to him, it must be held that he will be barred by an exception.

(18) If, however, the creditor should consent for the property to be sold within a year, or within two years, and it should be sold after that time; the creditor will not be deprived of his right to the pledge.

(19) Where a creditor has availed himself of the hypothecary action, and has recovered damages from the possessor, and afterwards claims the debt from the debtor; I think that he can be barred by an exception on the ground of fraud.

9. *Modestinus, Opinions, Book IV*.

Titius pledged a tract of land to Sempronius, and afterwards pledged it to Gaius Seius; and then Titius sold the identical land to the said Sempronius and Gaius Seius in its entirety, to

each of whom he had formerly pledged it as a whole. I ask whether the right of pledge was extinguished through the sale having taken place, or if, on this account, only title by purchase remains in both creditors? Modestinus answered that, by the right of purchase, the ownership vests in the parties mentioned; since, according to the facts stated, both of them had consented to the sale, but that they would not have the right of action on pledge against one another.

(1) Titius loaned money to Seius on a pledge of land, the said land having been previously encumbered to the State; the second creditor paid the money due to the State, but Mævius appeared and asserted that the land had been mortgaged to him before it had been encumbered to the State. It was, however, ascertained that Mævius had been present and had signed the undertaking executed by Seius to the government, by which instrument Seius guaranteed that the land was not encumbered to anyone else.

I ask whether any action with reference to the property can be brought by Mævius. Modestinus answered that he could, by no means, retain any right to the pledge in question, after he had consented to the above mentioned transaction.

10. *Paulus, Questions, Book III*.

A debtor sold a pledge with the consent of his creditor, and afterwards it was agreed between him and the purchaser that the sale should be rescinded. The right to the pledge remained unimpaired with the creditor, for just as the former rights were restored to the debtor, so also were they restored to the creditor. For the creditor did not absolutely release his claim to the pledge, but only to the extent that the purchaser should retain the property, and not return it to the vendor. Therefore, if in the course of judicial proceedings, the vendor should be discharged, or if judgment should be rendered against him to the amount of the purchaser's interest, because he did not deliver the property, it must be held that the right of the creditor to the pledge will remain unimpaired; for this may happen even where the property was not sold with the consent of the creditor.

(1) Where, also, a creditor sells a pledge, and the sale is rescinded, or the slave which was the object of it is returned as unsound, the ownership reverts to the debtor.

The same rule applies in all cases in which permission is given to sell property belonging to another, for the parties do not receive their rights from the hands of the purchaser, merely because they have transferred the ownership, but the property returns to its former condition, when the sale is rescinded.

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

Lucius Titius was indebted to his wife, Gaia Seia, for money loaned on a pledge, or on land which was hypothecated; and, together with his wife, he gave the same land by way of dowry to Sempronius, who was about to marry Seia Septitia, their daughter. Lucius Titius, having died, his daughter, Septitia, declined to accept the estate of her father, and I ask whether her mother could claim the property which was hypothecated to her? Paulus answered that Gaia Seia was held to have released the obligation of the pledged land which she had consented that her husband should give as dowry to their daughter, when the said property was given in behalf of the said daughter, but that the personal liability continued to exist; the action, however, could not be granted against her who had refused to accept her father's estate.

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

Paulus gave it as his opinion that where Sempronius, a first creditor, consented that the debtor should encumber the same property pledged to him to a third creditor, he is held to have released his right to the pledge, but that the third creditor was not subrogated to him, and therefore the position of the second creditor was improved.

The same rule should be observed where the Government lends money as a third creditor.

(1) Where anyone prosecutes his claim to property by the right of pledge, it is usual for him to be barred from an action for the recovery of the property pledged, where the possessor makes

him a tender of the amount of his claim; for no inquiry should be made with reference to the title of the possessor, when the right of the plaintiff is extinguished by the release of the pledge.

13. *Tryphoninus, Disputations, Book VIII.*

Where a debtor, after the oath has been tendered by his creditor, swears that he should not be obliged to pay, the pledge is released, because this proceeding has the same effect as if the debtor had been discharged from liability in court, for if he has been discharged by the judge, even though this was done unjustly, the pledge will, nevertheless, be released.

14. *Labeo, Later Epitomes by Javolenus, Book V.*

Where it is agreed upon between you and your tenant that whatever property he brings upon your land shall be considered pledged until the rent is paid to you, or you are satisfied in some other way, and you then accept a surety from the tenant for the payment of the rent, I think that you are satisfied, and therefore that the personal property brought on your land by the tenant ceases to be encumbered.

15. *Scævola, Digest, Book VI.*

The estate of a first creditor who had received certain land by way of security, and those of a second one to whom also some of the land had been mortgaged, passed by inheritance to the same person. The debtor offered to pay to the said heir the amount which he had borrowed from the second creditor. The opinion was given that he should be compelled to accept the money, his right to the pledge under the first contract remaining unimpaired.

THE DIGEST OR PANDECTS.

BOOK XXI.

TITLE I.

CONCERNING THE EDICT OF THE AEDILES, AND THE ACTIONS TO COMPEL THE VENDOR TO TAKE BACK THE PROPERTY WHERE HE HAS RECEIVED MORE THAN IT WAS WORTH.

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

Labeo states that the Edict of the CuruleÆdiles has reference to sales of property, whether it consists of land, portable articles, or of such as moves itself.

(1) The Ædiles say: "Those who sell slaves should notify the purchasers if they have any diseases or defects, if they have the habit of running away, or wandering, or have not been released from liability for damage which they have committed. All of these things must be publicly stated at the time that the slaves are sold. If a slave should be sold in violation of this provision, or contrary to what has been said and promised at the time the sale took place, on account of which it may be held that the purchaser and all the parties interested should be indemnified, we will grant an action to compel the vendor to take back the said slave.

"If, however, after the sale and delivery, the value of said slave shall have been diminished by the act of the slaves of the purchaser, or of his agent; or where a female slave has had a child after the sale; or, if any accession has been made to the property growing out of the sale; or if the purchaser has obtained any profit from said property, he must restore the whole of it. Moreover, if he himself made any additions to the property, he can recover the same from the vendor.

"Again, if the slave has committed an unlawful act punishable with death, if he has been guilty of any act against the life of some one, or if he has been introduced into the arena for the purpose of fighting wild beasts; all these things must be stated at the time of the sale; for in these instances we will grant an action for the return of the slave. Further, we will also grant an action where a party is proved to have knowingly, and in bad faith, sold a slave in violation of these provisions."

(2) The reason for the promulgation of this Edict was to prevent the frauds of vendors, and to provide relief for such purchasers as have been deceived by vendors. We must, however, understand that the vendor, even if he was ignorant of those things which the Ædiles ordered to be observed, will still be liable; and this is not unjust, for a vendor can readily obtain knowledge of these matters, nor does it make any difference to the purchaser why he is deceived, whether through the ignorance, or the cunning of the vendor.

(3) It must be remembered that this Edict does not have reference to sales made by the Treasury.

(4) Where, however, the Government makes the sale, this Edict will apply.

(5) It is also applicable to the sale of property belonging to wards.

(6) Where the defect, or the disease of a slave is apparent, as is very frequently the case, where defects are manifest from certain indications, it can be said that the Edict does not apply. Provision should only be made to prevent the purchaser from being deceived.

(7) It should be noted that disease is defined by Sabinus to be some condition of the body which renders it less able to perform the functions for which Nature has bestowed upon us corporeal health. In some cases, disease affects the entire body, in others only a portion of the same, for instance consumption, that is to say, a wasting; a fever is a malady of the entire body; blindness, for example, is the malady of a part, although a man may be born in this condition.

There is a great difference between a defect and a disease, as where someone is a stammerer,

for this is rather a blemish than a state of ill-health. I think that it is for the sake of removing all doubt on this subject, that the Ædiles have made use of the term "the same," in order that no uncertainty may remain.

(8) Hence, if the defect or disease is such as to interfere with the use and services of the slave, it will afford ground for the action to compel him to be taken back; but we must remember that any very trifling affection or fault cannot cause the slave to be considered sickly or unsound. Therefore, a slight feverishness, or an old quartan fever, which at the time is about to disappear, or a trifling wound will not cause the vendor to be considered at fault, because he did not call attention to it; for things of this kind can be passed over. We will now give some examples of slaves who are diseased and unsound.

(9) It is asked by Vivianus, whether a slave who did not always manifest signs of insanity, and sometimes spoke rationally, should still be considered sane. Vivianus says that he is sane, nevertheless; for we should understand that some persons are of sound mind although they may sometimes exhibit mental defects; otherwise, he states that the result would be that we would deny an infinite number of persons to be sane in accordance with this principle, as, for instance, those who are giddy, superstitious, irascible, and insolent, as well as others who have similar mental defects. More, however, is guaranteed with reference to soundness of body than respecting mental defects. For he asserts that a corporeal defect will sometimes extend to and vitiate the mind, for example, where a man is said to have his mind affected as the result of fever.

What must be done in a case of this kind? If the mental defect is such that attention should have been called to it by the vendor, and he did not do so when he was aware that it existed, he will be liable to an action on purchase.

(10) Vivianus also holds that although a slave may have run around temples in a distracted manner, and given oracular answers; still, if he was not accustomed to act in this manner at the time when he was sold, this is no defect; nor will an action lie because he occasionally conducted himself in this way; just as none will lie where he formerly had had a fever. But if he continues to be addicted to this vicious habit, and is accustomed to run distractedly around temples, and give oracular answers, as if demented; even if he does this through sport, it is a defect, but a defect of the mind, and not of the body, and therefore he cannot be returned; as the Ædiles only mention corporeal blemishes; nevertheless, an action on purchase can be brought against the vendor.

(11) He also says that the same rule applies with reference to slaves who are beyond measure timid, greedy, avaricious, or irascible,

2. *Paulus, On the Edict of the Curule Ædiles, Book I.* Or melancholy,

3. *Gaius, On the Edict of the Curule Ædiles, Book I.*

Or insolent, humpbacked, crooked, or affected with some skin disease, or with the itch, or dumb or deaf:

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

And he denies that a slave can be returned on account of these defects, but he grants an action on purchase.

(1) If, however, a bodily defect influences the mind, for instance where a slave speaks disconnectedly on account of fever, or makes ridiculous speeches in public, like an insane person, where the mental defect is caused by a corporeal one, he can be returned.

(2) Pomponius says that certain authorities held that slaves who are gamblers and given to wine are not included in the Edict, just as those who are gluttons, impostors, liars, or quarrelsome, are not included.

(3) Pomponius also says that although the vendor is not compelled to guarantee that his slave

is very intelligent, still, if when he sells him he is so stupid or foolish that no use can be made of him, this will be considered a defect. We see that the rule is adopted that the terms "defect" and "disease" are only applicable to the body, but the vendor is not required to guarantee a slave to be free from a mental defect, unless he specially stated the fact, otherwise, he will not be liable; and hence an express exception was made with reference to slaves who are wanderers, and accustomed to run away, for these are mental and not bodily defects. Wherefore, some authorities hold that animals that are timorous and in the habit of kicking should not be classed with such as are unsound, for these are mental and not physical defects.

(4) In a word, no matter how serious the mental defect may be, it will not afford ground for a return of the property, unless it was represented not to exist, when in fact it did. An action on sale, however, can be brought where the vendor knowingly concealed the mental defect, but where the defect is a corporeal one alone, or affects both the body and the mind, the property can be returned on this account.

(5) It should be noted that mention is made in general terms of disease, and not of any dangerous ailment. Pomponius says that this should not seem extraordinary, for nothing there has reference to matters to which a disease of this kind is a hindrance.

(6) He also says that it is not every disease which affords a ground for the return of property, as, for instance, an insignificant running of the eyes, or a trifling pain in the teeth or the ear, or a small sore, nor, in fact, does any slight fever come within the scope of this Edict.

5. *Paulus, On Sabinus, Book XL*

There is as much difference between these blemishes which the Greeks call "defectiveness" and disorders, or diseases, or illness, as there is between such corporeal imperfections and ailments which render a slave incapable of service.

6. *Ulpianus, On the Edict of the Curule Ædiles, Book I.* Pomponius very properly says that this Edict has reference not only to chronic diseases, but also to such as are temporary in their character.

(1) Trebatius says that tetter is not a disease, if the slave can make use of the limb upon which it appears as well as he can of the other. This opinion of Trebatius appears to me to be correct.

(2) A slave who has been castrated is not, I think, diseased or defective, but sound; just as one who has but one testicle, who is still capable of reproduction.

7. *Ulpianus, On Sabinus, Book XL*

Where, however, a slave has been castrated in such a way that any part of his body required for the purpose of generation is absolutely absent, he is considered to be diseased.

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

It has been asked whether a slave whose tongue has been cut off is to be considered sound. This inquiry is put by Ofilius with reference to a horse, and he says that the horse should not be held to be sound.

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

Sabinus says that a dumb person is diseased, for it is evident that to be deprived of speech is a disease. A person who speaks with difficulty, however, is not diseased, any more than one is whom it is hard to understand; and it is clear that one whose words are without any meaning is diseased.

10. *The Same, On the Edict of the Curule Ædiles, Book I.* Ofilius also says that where a finger of the slave has been cut off, or any portion of one of his members lacerated, even though he should recover from the injury, still, if his services are less available on this account, he is not held to be sound.

(1) I read also that Cato said that: "Where a finger has been cut off from the hand, or a toe

from the foot of a slave, he is diseased." This is correct, according to the distinction above mentioned.

(2) Moreover, where a slave has more than the ordinary number of fingers or toes, and his movements are not impeded in any way by their number, there is no ground for his return; because the number of his fingers or toes should not be taken into account, but whether he is able to make use of a larger or smaller number without any difficulty.

(3) The question has been asked whether a near-sighted slave is sound, and I think that he should be returned.

(4) Partial blindness is held to be a disease, that is to say, where a slave cannot see either in the morning or evening, which species of ailment the Greeks call weakness of eyesight. Some persons think that this affection is the same as that where a man sees nothing when a light is brought near him.

(5) It has been asked whether a stammerer, one who lisps or speaks inarticulately, or very slowly, or who is knock-kneed or bow-legged is sound, and I think that he is.

11. *Paulus, On Sabinus, Book XL*

He who has lost a tooth is not diseased, for the greater portion of mankind have lost some teeth, and are not for that reason considered diseased, especially since we are born without teeth, and are not less sound on that account, until we have them; otherwise no old man would be considered healthy.

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

Anyone who has a tumor is diseased, as well as one who has a polypus,

(1) Pedius says that a slave who has one eye or one cheek larger than the other, if he can use them just as well, is considered sound; for he states that any inequality of the cheeks, eyes, or arms, if they detract nothing from the services of the slave, do not afford ground for his return. But where one side is smaller, or one leg shorter, it may offer some impediment, and therefore, in this instance, the slave can be returned.

(2) Where a slave is born with a goiter, or has prominent eyes, he is considered sound.

(3) It also should be remembered that a left-handed slave is not diseased or defective, unless he uses his left hand more frequently on account of the weakness of his right, but he is then not left-handed, but crippled.

(4) The question arose whether a slave who has a bad breath is sound. Trebatius says that a person whose breath smells is not diseased any more than one who smells like a goat, or who squints; for this may happen to anyone on account of a filthy mouth. But, however, where this occurs through some bodily defect, for example, from the liver or the lungs, or from any other similar cause, the slave is diseased.

13. *Gaius, On the Edict of the Curule Ædiles, Book I.* A slave who is lame is also considered diseased.

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

The question was asked whether a female slave was diseased who always brought forth dead children. Sabinus says that if this was caused by an uterine affection, she must be so considered.

(1) Where a female slave, who is pregnant, is sold, it is held by all the authorities that she is sound, for it is the greatest and most important function of a woman to conceive and preserve a child.

(2) A woman in child-birth is also sound, provided nothing else happens which would cause her some bodily illness.

(3) Cælius says Trebatius makes a distinction in a case of sterility, for if a woman is sterile by nature, she is healthy, but if this occurs through some defect of the body she is not.

(4) The question also arises with reference to one who suffers from incontinence of urine, and Pedius says that a man is not less healthy on this account if he passes urine in bed, while overcome with sleep or wine, or where this occurs through sluggishness in rising. Where, however, he cannot hold back the collected fluid through some defect of his bladder, a slave can be returned, not because he passed his urine in bed, but for the reason that he has a defective bladder; and this opinion is correct.

(5) Pedius also says that if the uvula of anyone is amputated, it prevents rather than calls for the return of a slave, because the morbid condition is diminished. I think that if the morbid condition disappears, there will be no ground for the return, but if the defect remains, there will be ground for it.

(6) Where anyone is born with fingers that are united, he is not considered to be sound, if he is prevented from using his hands.

(7) Where the vagina of a female slave is so narrow that she cannot become a woman, it is settled that she should not be considered sound.

(8) Where a slave has enlarged tonsils, the question arises whether he can be returned as being unsound. If this is understood in the sense in which I think it is, that is, if the condition has existed for so long a time that the tumors of the throat which have been formed cannot now be removed, the slave is unsound.

(9) Where a vendor expressly states that the slave has a certain disease but is sound in other respects, the parties must abide by what was agreed upon, for where their rights of action have been relinquished they cannot be permitted to resume them, unless the vendor knowingly and deliberately concealed the disease; for, in this instance, a reply should be granted on the ground of fraud.

(10) Where the existence of a blemish was not expressly mentioned by the vendor, but it was of such a character that it would be apparent to everyone; for example, if the slave was blind, or had a manifest and dangerous scar on his head, or on some other part of his body, Cæcilius says that the vendor will not be liable on this account, any more than if he had expressly mentioned the defect, for it is held that the Edict of the Ædiles has only reference to such diseases and defects as the purchaser was, or could be ignorant of.

15. *Paulus, On Sabinus, Book XL*

A female slave who has her periods twice a month is not healthy. The same rule applies to one who has no such discharge, unless this is due to age.

16. *Pomponius, On Sabinus, Book XXIII.*

Where a slave is thoroughly cured, so that he is restored to his former condition, he must be considered as having never been diseased.

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

Ofilius defines a fugitive slave to be one who remains outside the house of his master for the purpose of taking to flight, or to conceal himself.

(1) Cælius says that a fugitive slave is one who leaves his master with the intention of not returning to him, even though, having changed his mind, he does return; for he says that in an offence of this kind repentance does not remove guilt.

(2) Cassius, also, states that a fugitive slave is one who leaves his master with a deliberate intention not to return.

(3) It is also stated by Vivianus that a slave is understood to be a fugitive more on account of his intention than through the fact of his flight, for a slave who runs away to escape from an

enemy or a robber, or to avoid a fire or the destruction of a house, although it is true that he is taken to flight, still he is not a fugitive.

Again, a slave who has fled from a teacher to whom he has been delivered for the purpose of instruction is not a fugitive, if, perchance, he took to flight because he was badly treated by him. He holds the same opinion where a slave runs away from a party to whom he was lent, if he did so for the same reason. Vivianus holds the same opinion if the slave runs away because he has been treated with too much severity. This, however, only applies where he runs away from those persons and returns to his master, but if he does not return to his master he says that there is no doubt that he should be considered a fugitive.

(4) Proculus, having been interrogated with reference to a slave who had concealed himself in the house of his master for the purpose of finding an opportunity to escape, says that although one who remains in the house cannot be held to have run away, he is, nevertheless, a fugitive. If, however, he concealed himself only for the purpose of waiting until his master's anger had subsided, he is not a fugitive; just as where one whom his master intends to whip betakes himself to a friend in order to induce him to intercede for him. Nor is he to be considered a fugitive who went away for the purpose of committing suicide; otherwise anyone could call a slave a fugitive who ascended to the top of the house for the purpose of throwing himself down therefrom, since he should rather be classed with those intending to commit suicide; for he says that the opinion held by many unreasoning persons, namely, that he is a fugitive slave who remains away for a night without his master's consent, is not correct; as the offence must be determined by the intention of the slave.

(5) Vivianus also says that, where a young slave left the house of his master and returned to his mother, and the question is asked whether or not he is a fugitive; he is one if he went away for the purpose of concealing himself to avoid returning to his master; but if he did so in order the more readily to obtain pardon for some offence by means of his mother, he is not a fugitive.

(6) Cælius also stated that if you purchase a slave who had thrown himself into the Tiber, and who had only left his master with the intention of committing suicide, he is not a fugitive. If, however, he had the intention to run away in the first place, and afterwards, having changed his mind, he threw himself into the Tiber, he is a fugitive. He holds the same opinion in the case of a slave who hurled himself down from a bridge. All these opinions given by Cælius are correct.

(7) He also says that if your slave should run away and take with him his sub-slave, and the latter unwillingly, or being ignorant of his design, accompanies him, and having obtained an opportunity to return to you, neglects to do so, he is not considered to be a fugitive. Where, however, he understood what was taking place at the time he took to flight, or subsequently learned the intention of the slave, and could have returned to you, and was unwilling to do so, it is another thing. He also holds that the same rule should apply to the case of a slave stolen by a thief.

(8) Cælius also says that if a slave who was on the land of his master abandons the house with the intention of running away, and someone seizes him before he leaves your land, he is to be considered a fugitive; for it is the intention which renders a slave a fugitive.

(9) He also says that a slave who has only taken one or two steps in attempting to escape, or has even begun to run, is not a fugitive, if he cannot in his flight escape from his master who is in pursuit of him.

(10) He also very properly says that flight is a species of liberty, in other words, that, for the time, he is free from the power of his master.

(11) Where a slave is given in pledge, he still has the debtor as his master; but if, after the creditor has exercised his right to obtain possession of him, he runs away from him, he can be considered a fugitive.

(12) It is asked by Labeo and Cælius, if the slave flees to a place of asylum, or betakes himself to one where slaves are accustomed to be sold or exposed for sale, whether he is a fugitive. I think that one who acts in this way is not a fugitive, because it is held to be lawful to do so publicly. Nor, indeed, do I think that he is a fugitive who betakes himself to the statue of the Emperor for refuge, for he does not do this with the intention of running away.

I also hold the same opinion with reference to one who takes refuge in some asylum or other place, because he does not do this with the intention of running away. If, however, he ran away in the beginning, and afterwards betook himself to the asylum, he is none the less a fugitive on this account.

(13) Cælius also says that it is settled that he is a fugitive who withdraws to some place from whence his master will not be able to recover him, and that he is still more a fugitive who betakes himself to some place from which he cannot be removed.

(14) Labeo defines a wandering slave as a little vagabond; and, oh the other hand, a fugitive as a great wanderer. We correctly define a wandering slave as one who, in fact, does not run away, but frequently roams about, without any reason, and, after having wasted his time in trifling matters, returns home late.

(15) It was stated by Cælius that a freedman lived with his patron, the entire house being occupied by both. The slave of the freedman went away with the intention of not returning to him, but remained concealed during the entire night in the lodging of the patron, and Cælius says that he is a fugitive.

Cælius says it is evident that if the entire house was not in charge of both persons, and the freedman lived in an apartment which was used as a common and promiscuous passage for all the rooms, the contrary opinion should be held; and Labeo approves this.

(16) Cælius also states that where a slave was sent into a province by his master, and having heard that the latter was dead, and that he had been liberated by his will, remained in the same employment, and began to conduct himself as a freedman, he is not a fugitive; for he says he did not become a fugitive by falsely stating that he was free, because he did this without the intention of taking to flight.

(17) Where the Ædiles say: "When the slave has not been released from liability for damage committed," this should be understood to mean that the vendor is not obliged to state that he has committed no damage, but merely that he is free from liability for damage committed; that is to say, that he is not subject to a noxal action. Hence, if the slave committed some damage which has been made good, he is held to have been released from liability for the same.

(18) We should understand that damages committed against individuals are such as result from offences which are not public crimes, and are those from which noxal actions arise, since provision is especially made for capital crimes by the Edict; but private injuries give rise to pecuniary damages, where a party refuses to surrender the slave by way of reparation, and prefers to pay the damages assessed by the court.

(19) Where the slave is one who cannot be manumitted in accordance with the Imperial Constitutions; or if he has been sold by his master under the condition that he shall be kept in chains; or where he has been condemned by someone in authority; or if he is to be sent out of the country; it is perfectly just that this should be stated at the time when he is sold.

(20) Where anyone asserts that a slave has some good traits which in fact he has not, or that he is free from bad habits and this is not the case; as, for instance, if he should say that he was not a thief, and he is one, or if he should say that he is a skilled workman, and he is not; for parties of this kind who do not furnish what they agree to do, are held to have acted contrary to their statements and promises.

18. *Gaius, On the Edict of the Curule Ædiles, Book I.*

Where a vendor asserts that a slave has some good quality, and the purchaser complains that this is not true, he will be entitled to an action for the return or the appraisement of the slave, in order to recover the deficiency in his value; for example, if he should say that the slave is steady and industrious, swift of foot, or vigilant, or that he had increased his *peculium* on account of his frugality; and he, on the contrary, is ascertained to be changeable, insolent, lazy, given to sleep, and a glutton. All these things are considered to signify that what the vendor had asserted cannot be rigorously exacted from him, but that he must be treated with some degree of moderation; so that, for instance, if he declared that the slave was steady, such gravity and constancy as would be shown by a philosopher ought not to be expected from him; and if he asserted that he was industrious and vigilant, constant labor by day and night should not be required of him; but all these qualities he should be expected to possess to a certain extent, according to what is proper and just.

We understand the same rule to apply to any other statements which the vendor may make.

(1) Where the vendor says that the slave is an excellent cook, he must furnish one of the very best belonging to that calling. If, however, he should merely say that he was a cook, he is held to have complied with his statement if he furnishes a cook of moderate ability. The same rule applies to other skilled laborers.

(2) Again, if anyone should merely assert that the slave has a *peculium*, it is sufficient if he has only a very small *peculium*.

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

It must, however, be remembered that there are certain things that the vendor is not obliged to furnish, even though he may state that they exist, for example, such as relate to the mere commendation of the slave; for instance, if he should say that he is frugal, honest, and attentive; for, as Pedius says, there is a good deal of difference where the vendor makes a statement in praise of the slave, and where he promises that he will furnish what he said he would.

(1) It is evident that if he should say that the slave was not a gambler or a thief, and had never fled for refuge to the statue of the Emperor, he must make good these statements.

(2) There is this difference between a statement and a promise, for we understand a statement to be merely what is uttered in speech and terminated by the words themselves; a promise, however, may be either a bare assurance that something will be done, or one that can be exacted, or one based on an agreement. In accordance with this, he who promised anything to a party stipulating for it in a case of this kind can either be sued in an action on stipulation, or in one for the return of the property, which is not unusual; since a party who can be sued in an action on purchase can also be proceeded against by means of an action to recover the property.

(3) Those things are only to be considered as stated or promised which are spoken in order to form the basis of an obligation, and not by way of praise.

(4) It must be noted that where a party promises a slave who is a skilled workman, or states that the slave is such, he is by no means required to furnish one who is perfect, but one who is, to a certain extent dexterous; so that you will not be led to believe that he is either highly accomplished, or, on the other hand, that he has no knowledge of his trade. Therefore, it will be sufficient if the slave belongs to the class commonly called artisans.

(5) The Ædiles further say, "We will grant an action to the purchaser and to all those whom this matter concerns." Thus they promise an action to the purchaser and to his successors who are entitled to all his rights. We should consider the purchaser to be the party who buys the property for a price; where, however, anyone makes an exchange, it must be said that he occupies the position of both purchaser and vendor, and both can proceed under this Edict.

(6) The time fixed for the return of the property is six available months. If, however, the slave

is not returned, but an action is brought for the deficiency in his value, this can be done within a year. Moreover, the time allowed for the return begins to run from the day of the sale, or, where anything has been stated or promised, from the day on which the statement or promise was made.

20. *Gaius, On the Edict of the Curule Ædiles, Book I.*

If, however, the statement was made some time before the sale, and then a stipulation was entered into several days afterwards, Cælius Sabinus says that the purchaser can institute proceedings on this ground from the day when the slave was sold.

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

To return property is to cause the vendor to take back what he had in the first place, and because this is effected by giving it up, this is called a surrender, or restitution of the property, so to speak.

(1) Pomponius says that where a slave is returned to the vendor by the purchaser, the latter must promise to make good any loss resulting from his bad faith; and therefore security is necessary to provide against the slave having been given in pledge by the purchaser, or his having been ordered to commit theft from, or cause some injury to, him to whom he was given up.

(2) Pomponius also says that security should sometimes be given on both sides, not only for the past but also for the future; as, for example, where the purchaser, or his agent, joins issue on behalf of the slave who is returned; or where proceedings are instituted against the slave; or where he himself brings suit in his own name.

He says, moreover, that security must be given where the purchaser has judgment rendered against him without any bad faith on his part, or makes payment, as, in these instances, it is no more than proper for him to furnish a guarantee; or where he acquires anything from the legal proceedings which he instituted; or where he has been guilty of fraud or negligence to prevent property from coming into his hands, this should be delivered to the vendor at the same time.

(3) He also says that the purchaser should give security for the future to him who knowingly sold him a slave who was accustomed to run away, if the slave took to flight without the fault of the purchaser, and the vendor, notwithstanding, had judgment rendered against him, for the purchaser must then give security that he will pursue the slave, and, if he recovers him, return him to the vendor:

22. *Gaius, On the Edict of the Curule Ædiles, Book I.*

And that neither he nor his heir will do anything to prevent the vendor from recovering his slave.

23. *Ulpianus, On the Edict of the Curule Ædiles, Book I.* Moreover, when the return is made of the slave, if the latter has

been injured in mind or body by the purchaser, he must make good the damage to the vendor; as, for example, if the slave has been corrupted, or has become a fugitive through the cruel treatment of the purchaser. Therefore, as Pomponius says, it must be determined by the judge to what extent the slave has been depreciated in value, and the amount must be made good to the vendor. If, however, the slave was returned without resorting to judicial proceedings, and the purchaser refuses to give up the other property which we have mentioned, an action on sale will be sufficient to secure the rights of the vendor.

(1) The Ædiles direct all accessions to the sale also to be returned, and any additions which the vendor himself has furnished must likewise be made good; so that neither party, if the sale is rescinded, will obtain anything more than he would have had if the sale had not been made.

(2) Where a slave has committed a capital crime, this also must be mentioned. To commit a capital crime is to be guilty of an offence which is punishable with death, for the ancients

were accustomed to put the crime for the penalty. We understand a capital crime to be one perpetrated through fraud and malicious intent, but where anyone commits an offence by mistake or accident, the Edict does not apply. Wherefore, Pomponius says that a person who has not reached puberty, or one who is insane, cannot be held to have committed a capital crime.

(3) Where a slave has made an attempt to put an end to his own life, this also must be mentioned. He is considered a bad slave who has committed some act for the purpose of terminating his existence; as, for example, one who has made a noose out of a rope, or taken some poisonous drug, or thrown himself down from a high place, or does something else by which he expects his death will be caused; since he is one who will probably try to do to another what he attempted against himself.

(4) Where the party who sold an unsound slave is either himself a slave, or a son under paternal control, an action *de peculio*, based upon the Edict of the Ædiles, will lie against the master or the father, for although these actions seem to be penal ones, still, as they arise out of a contract, it must be said that they can be brought in the name of those who are under the control of others. Hence, where a son subject to paternal authority, or a female slave, made the sale, it must also be held that the actions established by the Edict of the Ædiles will be available.

(5) The actions arising from this Edict can also be brought against all kinds of heirs.

(6) Although men who are free may be serving us in good faith as slaves, or slaves belonging to another may have made the sale, it can be stated that they also are included in this Edict.

(7) Julianus says that the judgment in a case involving the return of property restores both parties, that is to say the vendor, as well as the purchaser, completely to their former condition.

(8) Wherefore, where the slave steals something either from the purchaser or from someone else on account of which theft the purchaser may be compelled to make restitution, he will not be ordered to return the slave to the vendor unless the latter indemnifies him. But what, said Julianus, if the vendor should refuse to receive the slave? He holds that he would not be forced to indemnify him to any extent, any more than to have judgment rendered against him for the price; and that the purchaser must suffer this loss through his own negligence, because when he could have delivered up the slave by way of reparation, he preferred to pay the damages assessed by the court.

It seems to me that the opinion of Julianus is the more equitable one.

(9) If, where the slave is returned, anything has come into the hands of the purchaser by means of said slave, or did not come into his hands through his own fault, it must be returned; and this includes not only profits which he may have obtained, or any wages he may have received from the slave, or from anyone to whom the latter has been hired, but also whatever he may have acquired from the vendor himself, because he was slow in delivering him the slave; but also if the purchaser has received any profits from any other possessor whatsoever he must surrender them all.

Moreover, he must give up what he may have obtained by way of profit, as well as any legacy or estate which may have fallen to the slave; and it is not taken into account whether the vendor could or could not have acquired these things if he had not sold the slave; for if we suppose that the vendor was such a person as could not receive anything by will, this fact will in no way prejudice him. Pedius, indeed, thinks that it should not be considered whether the testator, when he appointed the slave his heir or bequeathed him a legacy, had this fact in view; because the sale itself will stand, and this fact will not benefit the purchaser. On the other hand, he says that if the heir had been appointed in consideration of the vendor, we will still hold that the purchaser should not restore the estate to the latter, if he was unwilling to return the slave.

24. *Gaius, On the Edict of the Curule Ædiles, Book I.* Generally speaking, it must be held that whatever the slave has acquired from the purchaser otherwise than in managing his property, it seems to be just should be returned.

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

The Ædiles also desire that the purchaser should indemnify the vendor for any depreciation of the value of the slave, but only where this took place after sale and delivery. But if it happened before this, it would not come under this proceeding.

(1) Therefore, if the purchaser himself, or a member of his household, or his agent, was responsible for the deterioration, he will be liable to the action.

(2) All who are in servitude are embraced in the term "household," not only freemen who are serving in good faith as slaves, but also the slaves of others; those persons who are under the control of the purchaser we understand also to be included in this definition.

(3) Mention is made in this action of an agent. Neratius, however, says that in this instance not every kind of an agent is to be understood, but one who has charge of the entire business of the purchaser, or who has the management of that branch of it through which the deterioration of the slave was caused.

(4) Pedius states that it is but just that the purchaser should be responsible for the act of his agent and household only where the slave could not have suffered the damage if he had not been sold to him. But where he would have suffered it even if he had not been sold, in this instance the purchaser had the right to deliver up the slave by way of reparation for the damage committed, and he says that, with reference to the injury committed by the agent, the purchaser is only compelled to assign to the vendor the rights of action which he has against his agent.

(5) But what if the slave had been deteriorated through the negligence, but not through the fraud of the purchaser? He will have judgment rendered against him also in this case.

(6) The deterioration sustained by the slave has reference not only to his body but also to the debasement of his mind; as, for instance, where he has become corrupted by the example of his fellow-slaves of the household of the purchaser, and has become a gambler, a drunkard, or a vagabond.

(7) It must, however, be noted that the purchaser is not permitted for reasons of this kind to surrender the slave by way of reparation, for he is not personally liable for the acts of his slave or for those of his agent.

(8) It also should be remembered that he must make good all those things which are mentioned in the Edict of the Ædiles, if they have taken place before issue has been joined, for it is necessary for them to be enumerated, in order that they may be taken into account, if any of them occurred before issue was joined in the case. After issue has been joined, however, the entire question of the restitution of the slave must be determined in court, and any profits which have accrued, as well as the fact of the deterioration of the slave, and all other matters, will be included. For just as soon as the judge obtains jurisdiction of the case it becomes his duty to decide everything relating to it. Those questions, however, which have arisen before issue was joined do not properly come under his jurisdiction, unless they were expressly assigned to him for his decision.

(9) It is also added in the Edict: "The money paid for the slave to the vendor and whatever was surrendered on the ground of accessories shall not be returned, and the party who is liable for the payment of said money shall not be released."

(10) The Ædiles established the regulation that the purchaser should deliver to the vendor all those things which have been mentioned above, and that then he must refund him the purchase-money.

26. *Gaius, On the Edict of the Curule Ædiles, Book I.*

Let us see whether it is not unjust for the purchaser to be compelled to surrender the property, and have recourse to the action on judgment, if he could not recover anything on account of the property of the vendor; and should not matters be so arranged that the purchaser can give security to restore the slave if the purchase-money is refunded to him within a certain time?

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

The purchaser should receive the money which he paid for the slave, as well as everything else under the head of accessories. We should understand by this not only the price which was paid to the vendor, as, for instance, the purchase-money and the interest on the same, but also whatever has been expended on account of the sale. This, however, should only be paid where the expense was incurred with the consent of the vendor, but where anything was given voluntarily, the purchaser will not be entitled to credit for it, for he should not exact from the vendor what he gave of his own free will. But what if money had been paid by way of tax, which in fact follows the purchaser? We hold that this also should be returned, for the purchaser should depart indemnified.

28. *Gaius, On the Edict of the Curule Ædiles, Book I.*

Where a vendor does not furnish security with reference to the matters mentioned in the Edict of the Ædiles, they promise an action against him for the return of the property within two months; or one to the extent of the interest of the purchaser, within six months.

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

It must be understood that if the purchaser does not furnish the vendor with all that is required by this action, he cannot have judgment rendered against the vendor in his favor. If, however, the vendor does not furnish the purchaser with what is required, judgment shall be rendered against him.

(1) Again, the purchaser must be released from liability for the money which was due to him, whether he was responsible to the vendor himself or to someone else.

(2) Moreover, judgment is rendered against the vendor to the extent of the interest of the purchaser. Therefore, let us see whether this may exceed the price or not. And, in fact, the judgment includes the purchase-money as well as the accessories; but should the purchaser also recover the interest on the price on the ground that he is entitled to it as a portion of what is due to him, especially as he restores any profits which he may have acquired? It is settled that he is entitled to it.

(3) Where the purchaser has sustained any damage, or has expended any money on account of the slave, he can recover it by the decision of the court in such a way, however (as Julianus says), that the vendor shall not have judgment rendered against him on account of these things; but the purchaser shall not be compelled to surrender the slave to the vendor, unless he indemnifies him.

30. *Paulus, On the Edict of the Curule Ædiles, Book I.* Moreover, if the purchaser, in an action for the return of a slave,

joins issue, or he himself brings suit in his own name, security must be furnished by both parties that the vendor will pay the amount of the judgment rendered against him, where there is no bad faith on his part, and that the purchaser will deliver to the vendor anything that comes into his hands or which on account of his bad faith he has been unable to obtain by means of the action which he has brought in behalf of the slave.

(1) The purchaser shall be entitled to any necessary expenses incurred by him on account of the illness of the slave after issue has been joined, and Pedius says that expenses previously incurred should be specifically mentioned; but Aristo holds that food for the slave should not be taken into account, for the reason that nothing is demanded for the time that the slave was

in service.

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

If the vendor refuses to take back the slave, he should not have judgment rendered against him for a larger amount than the price; hence, with reference to the damage which the purchaser has sustained on account of the slave, we only grant the right to retain his person, and the vendor will be able to avoid liability for this if he refuses to accept the slave, but by doing so he will not escape liability for the purchase-money, as well as the accessories of the same.

(1) Where the vendor either stated or guaranteed that the slave was not a thief, he will be liable on his guarantee if the slave commits a theft; for, in this case, he must be understood to be a thief, not only if he steals from a stranger, but also if he appropriates the property of his master.

(2) If a female slave is returned, any children which have been born to her after the sale must also be given up, whether there is one, or more of them.

(3) Where, however, the usufruct has been added to the mere ownership of the property, it undoubtedly must also be returned.

(4) Where the slave has acquired a *peculium* while in the possession of the purchaser, what shall we say with reference to it? If, indeed, it was obtained by managing the property of the purchaser, it must be held that it shall remain with the latter, but if it was obtained from some other source, it must be surrendered to the vendor.

(5) Where the purchaser leaves several heirs, let us see whether all of them must consent to the return of the slave. Pomponius says that the consent of all is not required, and that they can appoint an agent to act for them, in order that the vendor may not sustain any injury if he receives the share of the slave owned by one party, and have judgment rendered against him for the shares of the others to the amount of the deficiency in value of the slave.

(6) He also says that if the slave is dead, or has been taken back by the vendor, each one of the heirs can properly bring an action for his respective share. Moreover, they will receive their proportionate shares of the purchase-money and accessories as well as the profits of the crops and their accessories; and in case the slave should be deteriorated, each one of them will be liable *pro rata* unless it may happen that a division cannot be made; as, for instance, in the case of the offspring of a female slave; for then the same rule will be observed which applies where the mother herself is sold, since we have denied that she herself can be partially returned.

(7) Marcellus also states that if a slave held in common himself purchases a slave, and, in case he is to be returned, one of his masters can not bring suit to compel the vendor to take back his share of the slave, any more than where a purchaser leaves several heirs, and all of them do not give their consent for the return of a slave.

(8) Marcellus also says that one of two joint-owners of a slave cannot bring an action on purchase to compel the vendor to surrender to him his half of the slave, if he pays him his share of the price; and he adds this rule must be observed in the case of purchasers, for the vendor who sells property which is pledged has a right to retain the same until the buyer pays for it.

(9) Pomponius holds that if an heir of the purchaser, or his family, or his agent, either through neglect or malicious intent, commits any act which diminishes the value of the property, it is but just that he should be liable for the entire amount by a decision of court.

Moreover, it is more advantageous for all the heirs to appoint a single agent to bring suit for them; for if the slave is deteriorated by the fault of one of said heirs, this will be made good by all, and the others will be entitled to an action in partition against him, because they sustained the loss on his account, and were prevented from returning the slave.

(10) Where the vendor leaves several heirs, the slave can be returned to each one, in proportion to his share in the estate. The same rule applies where the slave is sold to several parties. For if an individual has purchased a slave from several owners or several have purchased from one, or several slaves have been bought from a single owner, the better opinion is that if there are several vendors, each one of them is absolutely bound to take back the slave; but where different shares in the slave are purchased from the individual holders, it may properly be held that one of them can be compelled to take back his share, and an action can be brought against another to recover the excess of value paid for the slave. Again, where several persons purchase a slave from one vendor, then each one of them can institute proceedings for his respective share; but if they purchase the slave conjointly, each can bring an action for the return of the slave as a whole.

(11) If the slave who is to be returned should die, the question arises whether he lost his life through the fault of the purchaser, or his family, or his agent; as, if this was the case, he is considered to be still alive, and everything must be transferred to the vendor which would have been required if the slave had lived.

(12) We understand negligence to mean not only that which is gross, but also that on account of which it must be held that the purchaser was responsible for having, in any way, occasioned the death of the slave; as, for instance, if he did not provide a physician in order that the slave might be cured, or if, through his own fault, he provided one who was incompetent.

(13) We hold this rule to be applicable where the slave dies before issue has been joined, but if his decease took place after issue had been joined, then the judge must decide how the slave died; for, in the opinion of Pedius, everything that happens after issue has been joined in an action must be determined by the wisdom of the judge.

(14) What we have stated with reference to an agent also applies to the case of guardians, curators, and others whose duty it is to appear for others. This is also the opinion of Pedius, and he adds that it is not unjust to make the principal responsible for the negligence of those to whom the management of his business has been entrusted.

(15) Pedius also says that children subject to paternal control are also included in the term "household," since the action for the return of property renders all members of the household responsible for their acts.

(16) Where anyone brings an action to recover damages for the diminished value of a slave, on account of his having taken to flight, and afterwards sues because the slave is unsound; for what amount should judgment be rendered? There is no doubt that the action for damages because of the flight of the slave can be brought several times. Julianus, however, says that care must be taken to prevent the purchaser from making a profit, and recovering the appraisement of the same property twice.

(17) An action *in factum* for the recovery of the price will lie in case the slave is returned; in which instance inquiry is not made whether there was good reason for the return of the slave, but merely where he has been returned. This is not unreasonable, as it would be unjust, after the vendor by taking back the slave had acknowledged that there was cause for doing so, for the question to be asked is whether he should or should not have been returned, nor is any inquiry made as to whether the return took place within the time established by law.

(18) It is evident that this action requires the slave to be taken back. Otherwise, if he was not taken back, the action would fail, even though it was agreed by the mere consent of the parties that he should be returned. Hence, it is not the agreement to take him back which establishes the ground for this proceeding, but the return itself.

(19) Everything which went with the slave at the time of the sale should also be restored by means of this action.

(20) As the stipulation for double damages is perpetual, it is therefore held that an action on

sale can be brought, even if the vendor has not given security for double the value of the slave; for matters of usage and custom should always be included in *bona fide* actions.

(21) Persons who sell slaves should always state their nationality, at the time of the sale, for very frequently the place of the nativity of a slave either attracts or deters the purchaser, and hence it is to our interest to know in what country he was born; for it is presumed that some slaves are good because they are sprung from a nation which has not an evil reputation, and others are considered to be bad because they are derived from a nation which is rather disreputable than otherwise. If the origin of the slave was not mentioned, an action on this ground will be granted to the purchaser and to all those interested in the matter, by means of which the purchaser can compel a slave to be taken back.

(22) Where property is sold with the understanding that if it does not suit it may be returned within a specified time, this agreement is held to be valid. Where, however, nothing was agreed upon with reference to the time, an action *in factum* will be granted to the purchaser within sixty available days, to compel the property to be taken back; but not beyond that period. But, if it should be agreed that the property can be returned without reference to time, I think that this contract will be valid. Again where the period of sixty days fixed for the return of the article has elapsed, an action will be granted to the purchaser if proper cause be shown.

(23) In this investigation of cause it should be ascertained whether the vendor was responsible for the delay, or whether he was not present, so that the slave could be returned to him; or whether there was any other good reason for not delivering the slave within the time designated because he was not satisfactory.

(24) The same rule must be observed in these actions as in the case of the offspring of a female slave, as well as in that of profits, and other accessories which have been mentioned where a slave to be returned dies before this is done.

(25) It is held by those learned in the law that any accession to the purchase is a part of the sale.

32. *Gaius, On the Edict of the Curule Ædiles, Book II*.

Therefore, as has been stated above, the vendor is required to notify the purchaser of any disease, defect, or other fault, included in the Edict; and as it is therein set forth that he must guarantee that the slave has none of these defects, so also, when a slave is transferred to another party as an accessory to property, the vendor is compelled to make the same declaration and guarantee. This should be understood to be necessary, not only where it has been expressly stated that the slave Stichus is an accessory to the land conveyed, but also where, in general terms, all the slaves on the land constitute an accessory to the sale.

33. *Ulpianus, On the Edict of the Curule Ædiles, Book I.* Hence Pomponius says that it is but just that where anything is alleged to be accessory to a sale, it must be furnished in as perfect a condition as should have been done if it had been the principal object sold; for, according to the Civil Law, an action on purchase will lie to compel property said to be accessory to be furnished in good condition; for example, where certain casks are mentioned as accessory to land.

This rule, however, only applies where anything is expressly set forth as being accessory; for if a slave is sold together with his *peculium,* the vendor will not be compelled to guarantee the soundness of the slaves forming part of said *peculium*, because he did not specify any certain property as being accessory, and it was only necessary to furnish the *peculium* in whatever condition it might be; and just as he was not obliged to furnish a certain amount of *peculium*, so likewise, he was not compelled to give this guarantee.

Pomponius says that the same rule should be observed where either an estate or the *peculium* of a slave is sold; for the Edict of the Ædiles does not apply to property belonging to an estate or a *peculium*. He is of the same opinion where a tract of land is sold with all the means of

cultivating it, and slaves are included in this designation.

I think that this opinion is correct, unless it is stated that the parties had some other express intention.

(1) Where property which has been sold is returned, a slave who is an accessory to the same must also be returned; even though he had no defect.

34. *Africanus, Questions, Book VI.*

Where several things of the same kind are sold at the same time, as, for instance, slaves, comedians, or singers, it is held that it must be ascertained whether one price was paid for all of them, or whether payment was made for each individually, since sometimes one sale, and then again, several, are understood to have been made. It is important for this to be asked, so that if any of said slaves happens to be diseased or unsound, it may be determined whether all of them should be returned at the same time.

(1) Sometimes, although prices have been fixed for each head, there is still but one purchase, so that all of them can be, or should be returned on account of the defect of a single one; for instance, where it is evident that the intention was to purchase or to sell them all together, as frequently occurs where slaves are actors; or where four-horse teams, or a pair of mules, are sold; so that it may be advantageous for the parties to have all, or none of them.

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

It frequently happens that slaves who are sound are returned with others that are diseased, where they cannot be separated without being inconvenienced, or without doing violence to natural affection; for what if the purchaser preferred to retain a son and return his parents, or *vice versa?* It is necessary to observe the same rule with reference to brothers, and to slaves united in marriage.

36. *Pomponius, On Sabinus, Book XXIII.*

Where several slaves are sold for one price, and we bring the action under the Edict of the Ædiles with reference to one of them, an estimate of the value of said slave is only made where the price was fixed for the entire number indiscriminately. But if, after the price had been fixed for each one of the slaves, all of them were sold for an amount equal to the combined prices of the different individuals, we must then adopt the combined price made for each slave, whether he is worth more or less.

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

The Ædiles direct that a slave who has grown old in service shall not be sold as one unaccustomed to servitude. This provision of the Edict was framed to avoid the tricks of vendors, for, in every instance, they take care that purchasers shall not be deceived by vendors. For example, as many vendors are accustomed to sell slaves as novices, who are not such, in order that they may dispose of them for more money, since it is presumed that slaves who are inexperienced will be more straightforward, better adapted to service, more tractable and skillful for every kind of work, while those that are experienced and have grown old in servitude are hard to change, and adapt to one's customs. Hence, because slave-dealers know that persons are rather inclined to the purchase of slaves who are novices, they, for this reason, mingle those who are experienced with them and sell them all for the novices. The Ædiles provide by this Edict that this shall not be done; and, therefore, where a slave is sold in this manner to a purchaser who is ignorant of the facts, he can be returned.

38. *The Same, On the Edict of the Curule Ædiles, Book II.*

The Ædiles say: "Those who sell beasts of burden shall state openly and fairly if they have any disease or defect; and if they have been splendidly caparisoned for the purpose of selling them, they shall be delivered to the purchasers in this condition. If this has not been done, we will grant an action for the return of the ornaments, or for the return of the animals on account

of the ornaments, within sixty days; or where the sale should be rescinded by reason of any disease or defect, within six months; or for the return of the purchase-money where the animals were worth less than they were sold for within a year. If a pair of beasts of burden are sold at the time, and one of them is in such a condition that he should be returned, we will grant an action to enable both of them to be returned."

(1) The Ædiles mention the return of beasts of burden in this Edict.

(2) The reason for the promulgation of this Edict is the same as the one which prompted that for the return of slaves.

(3) Substantially the same rules are to be observed with reference to them as with respect to slaves, so far as diseases and defects are concerned. Therefore what we have already said on this point is also applicable here, and if the animal should die, he can be returned in the same way as is done in the case of a slave.

(4) But let us see whether all kinds of cattle are included under the head of beasts of burden. It is difficult to include them all, for the term "beasts of burden" means one thing, and that of cattle means another.

(5) Hence a clause has been added to this Edict, the words of which are as follows: "In the case of all kinds of cattle, vendors must observe the same rules which we have laid down with reference to the soundness of beasts of burden."

(6) Wherefore a doubt can no longer exist whether oxen are included in the terms of this Edict, for although they are not embraced in the designation of beasts of burden, it is certain that they are included in the term cattle.

(7) There are certain things which are classed as diseases in men which are not considered such in animals; as, for example, where a horse is castrated, it is neither considered a disease nor a defect; because this does not detract either from his strength or his usefulness, although he will never be fit for reproduction. Cælius also stated that all animals which have been castrated are not defective on this account, unless they have become weaker through the operation, and therefore a mule is not unsound. He says that Ofilius entertained the same opinion, namely, that a castrated horse is sound, just as an eunuch is also sound; but if the buyer was ignorant of this and the vendor knew it, an action on purchase will lie. What Ofilius states is correct.

(8) The question arose, if a mule is such that it cannot be changed when harnessed, whether it is sound. Pomponius says that it is, for very many carriage animals are such that their position in harness cannot be changed.

(9) He also says that if an animal is born with such a disposition or form of body that it cannot be harnessed with another, it is not sound.

(10) An animal can be returned not only on account of some disease, but also where there is ground for doing so because it does not conform to the representations or guarantee of the vendor; just as in the case of slaves.

(11) Cælius says that the rule with reference to the adornment of horses for the purpose of making a better sale does not apply where this has been done before the time of the sale, that is to say, two days before; but at the very time the sale was made, or, when offered for sale, it is exhibited caparisoned in this manner to those to whom it is expected to sell it. And every time that such decoration takes place, it is stated both in the action and in the Edict that the animals have been produced, caparisoned for the purpose of selling them, as an animal can be produced, caparisoned for the purpose of making a journey, and afterwards be sold.

(12) Where several animals have been sold, all of them will not be subject to return on account of the trappings of one of them; for although one team may be defective, the other should not be returned on this account.

(13) Where a pair of mules is disposed of, one of which is unsound, the value of the latter is not to be taken into consideration in estimating the difference; but the value of the team should be taken into account; for where both were sold for the same price this must not be divided in two, but the loss of value of both of them together must be considered, and not merely the deterioration of the one which is blemished.

(14) Where a pair of match-horses is sold, it is stated in the Edict that if there is cause for the return of one of them both should be returned; in which instance the interest of the purchaser as well as that of the vendor should be considered, since the animals are not separated. Likewise, where a team of three horses, or one of four is sold, all of them should be returned. Where, however, there are two pairs of mules, and one mule is unsound, only the pair to which it belongs shall be returned, and not the others. But if they are not divided into pairs, but four mules are merely sold for one price, there will be the return of one mule, and not of all, as, where a number of horses are sold for breeding purposes, we hold that if one of them should be unsound, it is not necessary for all of them to be returned. We hold the same opinion where several slaves are sold for one price, unless they cannot be separated; as, for instance, where they are actors, or buffoons.

39. *Paulus, On the Edict of the Curule Ædiles, Book I.* Or brothers;

40. *Ultpianus, On the Edict of the Curule Ædiles, Book II.* For these should not be separated.

(1) Next, the Ædiles say, "That a dog, a hog, a small wild boar, a wolf, a bear, a panther, a lion,"

41. *Paulus, On the Edict of the Curule Ædiles, Book II.*

And, generally speaking, "Or any other animal likely to commit injury, whether it be at large or tied, but incapable of being restrained so as not to cause damage,"

42. *Ulpianus, On the Edict of the Curule Ædiles, Book II.*

Cannot be kept in a place where people are constantly passing, and where the said animal may injure anyone, or cause any damage. If these provisions should be violated, and a freeman lose his life in consequence, two hundred *solidi* shall be paid; and if a freeman should be injured, the party responsible shall have judgment rendered against him for a sum which may seem in the wisdom and justice of the judge to be proper; and where any other person or any property is injured, the said party shall be compelled to pay double the amount of the damage caused.

43. *Paulus, On the Edict of the Curule Ædiles, Book I.*

Most authorities say that an ox which strikes with its horns is vicious, just as is the case with mules that kick. Horses, also, which are frightened without any cause and run away, are also said to be vicious.

(1) A slave who takes refuge with a friend of his master, in order to obtain his intercession with the latter, is not a fugitive; not even if he has the intention of not returning home if he does not obtain pardon. He is not yet a fugitive, for the reason that the term "flight" does not merely apply to design but also to the act itself.

(2) Where a slave, through being instigated by another to leave his master, takes to flight, he is a fugitive; even though he would not have run away if it had not been for the advice of the person who persuaded him.

(3) If a slave of mine who was serving you in good faith runs away, he is a fugitive, whether he knows that he belongs to me or is ignorant of the fact, unless he did so with the intention of returning to me.

(4) A slave attempts suicide who does so on account of wickedness, bad habits, or some crime which he has committed; but not where he takes such a step because he is unable to endure bodily suffering.

(5) Where anyone purchases a slave, and is deprived of him by force, he can recover fourfold damages on the ground of robbery, and he can afterwards return the slave, and the vendor must refund the price which he received. Where, however, he suffered injury through his slave, and has instituted proceedings on that account, he cannot return him to the vendor, unless the purchaser should bring an action against the party who has beaten the slave with a whip, or subjected him to torture.

(6) A slave should sometimes be returned, even though we may have brought an action for his appraisement, that is to say, the estimate of the excess of the price above his true value. For if he is worthless, so that it is not to the advantage of his master to have such a slave, as, for instance, where he is subject to fits of rage, or is insane, even though an action for his appraisement may have been instituted, it is, nevertheless, the duty of the judge to cause the purchase-money to be repaid after the slave has been returned.

(7) If anyone should cause the return of a slave with the intention of defrauding his creditors, and would not have returned him unless he had intended to defraud them; the vendor will be liable to the creditors for the value of the slave.

(8) When a slave is pledged, he will remain bound even though he be returned; just as where he, or the usufruct in him, has been disposed of, he cannot lawfully be returned unless he is redeemed and restored free from the liability contracted under the pledge.

(9) Where a slave is purchased under a condition, and proceedings with a view to his return are instituted before the condition has been fulfilled, they will be void, because the purchase is not yet complete, and cannot be set aside by the decision of a judge; and therefore if an action on purchase or sale, or one for the return of property is filed before the condition has been fulfilled, suit can afterwards be brought a second time.

(10) In some instances even where an absolute sale has taken place, it remains in abeyance on account of a condition of law; as for example, where a slave in whom one party has the usufruct and the other the ownership, buys something; for as long as it is uncertain out of whose property he pays the price, the title to the property will be in suspense, and therefore neither of the parties can bring an action for the return of the slave.

44. *The Same, On the Edict of the Curule Ædiles, Book II.*

The Ædiles, with great justice, refuse to permit a slave to be accessory to property of less value than himself, in order to avoid fraud being committed either against the Edict or against the Civil Law, and also, as Pedius says, against the dignity of mankind; otherwise the same rule would apply as in the other matters, since it would be ridiculous for a tract of land to be considered accessory to a tunic. Anything, however, may be permitted to be accessory to the sale of a slave, for very frequently the *peculium* is more valuable than the slave himself, and sometimes a sub-slave, classed as an accessory, is worth more than the principal slave who is sold.

(1) An action is granted under this Edict against the party who had the greatest interest in the sale of the slave, because dealers in slaves generally form partnerships, so that whatever they do is held to be transacted in common; for it seemed just to the Ædiles that the actions which they established should be brought either against the party who owned the greater share of the property — or at least who did not own less than the others — in order that the buyer might not be compelled to engage in litigation with many persons; although an action on purchase can be brought against each individual partner in proportion to his share; for this kind of men are much inclined to gain, as well as to the commission of dishonorable acts.

(2) In an action for the return of property, or for its appraisement, a doubt arises whether a party who has sold a slave belonging to another will be liable, at the same time, on the ground of eviction, or because of unsoundness, or on account of the flight of the slave. For it may be said that the purchaser has no further interest where he has been deprived of the possession of the slave by a better title, whether he is sound or a fugitive; but it is to the interest of the

purchaser that he should have been sound when he possessed him on account of his services, and the obligation does not increase because of what may have subsequently happened, for just as soon as the slave is delivered, the stipulation relating to the interest of the purchaser becomes operative.

45. *Gaius, On the Edict of the Curule Ædiles, Book I.*

An action for the return of a slave has a twofold effect, for sometimes the vendor will have judgment rendered against him for double damages, and sometimes merely for simple damages. For if he refuses to refund either the price of the slave or any accessories attaching to him, and will not release him from the liability incurred on his account, he will be ordered to pay double the amount of the price and the accessories. Where, however, he returns the price and the accessories or releases the slave from the obligation incurred for his benefit, judgment for simple damages should be rendered against him.

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

When you return a slave to me, you are not obliged to guarantee that he is not liable for any thefts or damages, except where he has committed them by your order, or by that of the party to whom you may have sold him.

47. *Paulus, On Sabinus, Book XI.*

If you manumit a slave whom you have purchased, Labeo says that you will neither be granted an action to return him, nor one to recover the amount of the excess of his value which you have paid; just as the right of action for double damages is extinguished. Therefore the right of action founded on something which has been represented or guaranteed will also be lost.

(1) The actions arising from the Edict of the Ædiles continue to exist even after the death of the slave;

48. *Pomponius, On Sabinus, Book XXIII.*

Provided the slave dies without the fault of the purchaser, or of his family, or of his agent.

(1) He who complains of unsoundness or disease in a slave that he has purchased, and wishes to retain him until satisfaction is given him, should be heard.

(2) The rights of the purchaser shall not be prejudiced where, having been barred from bringing an action for the return of the slave within six months, he desires to institute proceedings for the appraisement of his value within a year.

(3) It is just that the Edict of the Ædiles should not apply to anyone who has sold a slave in chains, for it is far more effective to do this than merely to state that he has been in chains.

(4) In actions founded on the Edict of the Ædiles, it is no more than proper that the vendor should be permitted to plead an exception if the purchaser was aware that the slave was in the habit of running away, or had been in chains, or had any other similar faults which would entitle the vendor to be released.

(5) The action founded on the Edict of the Ædiles will lie both in favor of an heir and against him; but inquiry should, nevertheless, be made as to any acts subsequently committed by the heirs, and as to whether they had a right to institute such proceedings.

(6) These actions can be brought not only with reference to slaves, but also concerning every kind of animals, so that they will lie against me, even if I had only purchased the usufruct of a slave.

(7) When suit for the return of a slave because of his soundness is brought, it is permitted to proceed and make allegations as to one defect, and if any other should afterwards appear, a second action with reference to it can be instituted.

(8) It is not customary, in the case of simple sales, to make use of the action for the return of

property.

49. *Ulpiamis, Disputations, Book VIII*.

There is no doubt that proceedings for the return of property can also be brought in the case of the sale of a tract of land, as, for example, where land is sold which is injurious to health; for it should be returned. And it is but equitable to hold that the purchaser is not liable for the taxes at any time after the return of the property.

50. *Julianus, On Minicius, Book IV*.

A slave with varicose veins is not sound.

51. *Africanus, Questions, Book VIII*.

Where one slave buys another who is diseased or unsound, and his master brings an action on purchase, or one for the return of the slave; it should be ascertained, not whether the master, but whether the slave was aware of these defects, so that it makes no difference whether he purchased the slave to be added to his *peculium*, or acquired him in the name of his master; or whether he purchased any particular slave, or one in general, by the order of his master; for then it becomes a question of good faith, whether the slave has not been deceived by the party with whom he transacted the business; and, on the other hand, whether the offence which the slave committed in making the contract should prejudice his master. If, however, the slave purchased the sub-slave by the order of his master, and the latter knew that he was unsound, the vendor will not be liable.

(1) Where such a transaction is made with an agent, there is no doubt that if the latter knew the slave to be diseased or unsound, he cannot bring an action on this account; although he himself will, nevertheless, be liable to an action based on voluntary agency. Where, however, the agent himself did not know that the slave was unsound, and purchased him by the direction of his principal, who was aware of it; and he brings an action before the return of the slave in the name of his principal, it is held that a valid exception cannot be interposed against him.

52. *Marcianus, Rules, Book IV*.

If a slave should commit a theft against his master, it is not necessary to state this at the time of the sale of the slave, for a return will not be granted for this reason. But if he said that this slave was not a thief, he will be liable on the ground of making such a representation and guarantee.

53. *Javolenus, On the Last Works of Labeo, Book I*.

Where a slave has tertian or quartan fever, or gout or epilepsy, he it not held to be legally sound, even on days when he is free from these diseases.

54. *Papinianus, Opinions, Book IV*.

There is no ground for an action for the return of a slave where one has been purchased for a good consideration, and runs away, if he had not done so previously.

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

Six available months from the time that proceedings should have been instituted are granted in which to file an action for the return of a slave, and the power to proceed will not be held to have existed where the party was ignorant that he was in the habit of running away, and this fault had been concealed. Still, the gross ignorance of the purchaser on this point must not be excused.

56. *Paulus, Questions, Book I*.

Latinus Largus: "I ask whether a slave can be returned to a surety of the vendor." I answered that if the surety was taken with reference to everything connected with the sale, Marcellus thinks that the slave can be returned to the surety.

57. *The Same, Questions, Book V*.

Where one slave purchases another, and his master brings an action for his return, the vendor is not obliged to pay him, unless he delivers to him everything included in this action, the whole amount in fact, and not merely what has reference to the *peculium;* for if the master brings an action on sale, unless he pays the entire purchase-money, he will not accomplish anything.

(1) Where, however, a slave or a son makes a sale, an action for the return of the slave will involve his *peculium*, and the ground for the return is also included in the *peculium*. Nor does it concern us that the slave was not part of the *peculium* before he was returned, for a slave cannot belong to the *peculium* who is still the property of the purchaser, but the ground for the return itself is considered to be part of the *peculium*. Therefore, if a slave purchased for ten thousand sesterces is only worth five thousand, we say that the latter sum belongs to the *peculium*. This is the case if he owes his master nothing, or has not been deprived of the *peculium*. If, however, he owes his master more, the result will be that he must surrender the slave, and will not recover anything.

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

I ask, if a slave has fled from the purchaser, and it has been decided that good cause for his return exists, whether the vendor should not pay the appraised value of the property carried away by the slave, before the latter is returned to him. Paulus answered that the vendor should be compelled not only to pay the price of the slave, but also the appraised value of what was stolen by him, unless he is ready to deliver up the slave by way of reparation for the property taken.

(1) I also ask if the vendor refuses to pay the appraised value of the property and the purchase-money, whether the slave should be retained, and an action on the *peculium* granted, or whether double the price of the slave sought to be returned should be demanded on the ground of a stipulation. Paulus answered that an action will lie for the recovery of the price of the slave, and also for double his value on account of the stipulation. An opinion has already been given with reference to the property stolen by the slave.

(2) I purchased a slave under the stipulation of double his value if he was returned, and he then ran away with some of my property. Having afterwards been found, and interrogated in the presence of respectable men as to whether he had previously run away from the house of the vendor, he answered that he had. I ask whether this answer of the slave is entitled to consideration. Paulus replied that if other proofs of his former flight are not lacking, then the answer of the slave should be believed.

59. *Ulpianus, On the Edict, Book LXXIV*.

Where a slave is sold in such a condition that he should be returned, it is unjust that the vendor should receive his price.

(1) Where anyone purchases two slaves for one price, and one of them is in such a condition that he ought to be returned, and the vendor then brings an action for the entire amount, an exception should be filed by way of defence. Where, however, suit is brought for a portion of the price, the better opinion is that an exception will not be a bar, unless the facts are such that both slaves should be returned on account of the unsoundness of one of them.

60. *Paulus, On the Edict, Book LXIX*.

After the return of the slave has been made, everything should be placed in its former condition just as if there had been no sale.

61. *Ulpianus, On the Edict, Book LXXX*.

Whenever a servitude is in question, and the vendor is defeated, he should refund to the purchaser the amount of the excess paid by the latter, if he was aware that the said servitude

had been imposed upon the property.

62. *Modestinus, Differences, Book VIII.*

It must be held that the Edict of the Curule Ædiles has no reference to property which is donated. For why should the donor bind himself to take back anything when no price is involved in the transaction? But what if the property has been improved by the party to whom it was given? Can the donor be sued for the value of the improvements? It must be said that this is by no means the case, for the donor should not suffer a penalty on account of his liberality. Therefore, where anything is given away, it will not be necessary for those guarantees to be given which the Ædiles require where property is sold. It is clear that the donor ought to bind himself (and he usually does so) with reference to fraud, in order that he may not, with fraudulent intent, revoke what he bestowed by way of kindness.

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

It should be noted that this Edict has reference solely to sales, not only those of slaves, but also those of every other kind of property. It seems strange that nothing was stated with reference to leases. The reason given for this is that they were never included in the jurisdiction of the Ædiles, or because leases and sales are not contracted under the same circumstances.

64. *Pomponius, Epistles, Book XVII.*

Labeo says that if you purchase several slaves for one price, and you wish to bring an action with reference to one of them, an appraisement of all the slaves should be made, just as is done in appraising land when suit is brought because of the loss of a portion of said land by eviction.

(1) He also says that if you sold several slaves for one price, and guaranteed them to be sound, and only a part of them are sound, an action can properly be brought with reference to all, because of the representation and guarantee.

(2) He also says that a beast of burden can wander away and escape, but proceedings cannot be instituted on the ground that it is a wanderer or a fugitive.

65. *Venuleius, Actions, Book V.*

It is a mental rather than a physical defect, for a slave to wish to constantly be present at exhibitions, or to carefully examine paintings, or even to be untruthful, or to have similar faults.

(1) Whenever a chronic disease is mentioned, Cassius says this means one which is harmful. The word, however, should be understood to signify an affection which is constant, and not ended by time. A chronic disease is held to be one which attacks a man after his birth, for the word chronic means continuous.

(2) A slave can be styled experienced, or a novice. Cælius says that an experienced slave should be valued, not on account of the time he has been in servitude, but because of his ability and qualifications; for where anyone, at a sale, purchases a slave who is a novice and employs him in some service, he is immediately included in the number of those who are experienced, since inexperience is understood to be dependent, not upon the undeveloped state of the mind, but upon the condition of servitude. It makes no difference whether he understands Latin or not, for a slave is not held to be experienced merely because he happens to be learned in the liberal arts and sciences.

TITLE II.

CONCERNING EVICTIONS, AND THE STIPULATION FOR DOUBLE DAMAGES.

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

Where a purchaser loses the entire property which he bought or only a part of it, on account of

a better title, he has recourse to the vendor. Where he loses a portion of it, or an undivided part of land, he has recourse for the amount which he has lost. If, however, he loses a certain portion of the tract, and not an undivided share of the same, he is entitled to recourse according to the quality of the land of which he has been deprived. But what if he should be deprived of either the best, or the worst part of the land? The quality of the land should be ascertained, and he will be entitled to recourse in proportion to its value.

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

If double damages are not promised, and an action is brought on the ground of eviction; judgment for double damages should be rendered against the defendant.

3. *The Same, On Sabinus, Book X*.

In the sale of a slave, his *peculium* is always understood to be reserved. Where a slave who was sold took away with him a certain portion of his *peculium*, and an action of theft is brought against the purchaser on this account, the latter cannot have recourse to the vendor for double damages on the ground of a stipulation, because the vendor, at the time of the sale, should guarantee the slave to be free from liability for theft, or damage. This right of action, however, only originates after the sale has taken place.

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

The question arises whether he who sold the slave should give a surety against eviction, who is commonly called a second surety. It has been settled that he need not do so, unless it has been agreed upon.

(1) Where a guardian makes a sale in the name of a minor, and eviction follows, Papinianus says in the Third Book of Opinions that an equitable action will be granted against him for whose benefit the guardianship is being administered. He adds, however, that this only applies to what was included in his property at the time. Let us see whether the ward will be liable for the entire amount if the guardian should not be solvent. This I think to be the better opinion, for a contract made with a guardian is not void.

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

The vendor of a slave stated that his *peculium* was an accessory. If a sub-slave was taken away by eviction, Labeo says that the vendor will not be liable on this account, for if the slave did not form part of the *peculium* he would not constitute an accessory, but if he did, the purchaser sustained an injury through the decision of the judge; but the case is different if the vendor had expressly stated that the slave was an accessory, for, in this instance, he would be obliged to guarantee that the slave borrowed part of the *peculium*.

6. *Gaius, On the Provincial Edict, Book X*.

Where a tract of land is sold, it is necessary to furnish security against eviction, according to the custom of that part of the country where the transaction took place.

7. *Julianus, Digest, Book XIII*.

Where a party buys from a ward a slave who was substituted for him, he can bring an action on purchase against the substitute, as well as one under the stipulation on the ground of eviction; but he will be entitled to neither of these actions against the ward himself.

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

The vendor of a slave must guarantee the purchaser to the amount of the interest that the latter had that the slave should belong to the vendor. Wherefore, if the purchaser should lose, by eviction, the offspring of a female slave or an estate which the slave had entered upon by his order, he can bring an action on purchase. And just as the vendor is bound to deliver to him the slave which he sold him, so he is bound to make good to the purchaser everything that he could have acquired through the slave, if he had not been deprived of him.

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

If you should sell me a slave belonging to Titius, and Titius should afterwards appoint me his heir; Sabinus says that, in case of eviction, the right of action is lost, since the slave cannot be taken from me, but that recourse must be had to an action on purchase.

10. *Celsus, Digest, Book XXVII.*

If anyone should sell and transfer to me a right of way which he has in common with another, as if he were the sole owner of the same, he will be liable to me on the ground of eviction, if the other party refuses to transfer to me his right.

11. *Paulus, Opinions, Book VI.*

Lucius Titius bought lands in Germany, beyond the Rhine, and paid a portion of the purchase-money. When suit was brought against the heir of the purchaser for the remainder, the latter set up a counterclaim alleging that these possessions had been partially sold by order of the Emperor, and partly distributed as rewards among veteran soldiers. I ask whether this risk must be assumed by the vendor? Paulus answered that future cases of eviction, which occur after the sale has been contracted, do not affect the vendor; and, therefore, according to the facts stated, suit could be brought for the remainder of the price of the land.

(1) The vendor cannot be sued for either double or simple damages, on account of such offences as are usually punished by public prosecution, where the following words are inserted in a stipulation, namely: "The slave in question is free from liability for damage committed."

12. *Scævola, Opinions, Book II.*

A certain individual having been appointed heir to half an estate sold all the land belonging to the same, and his co-heirs accepted the price. The land having been lost by eviction, I ask whether the coheirs will be liable to an action on purchase. I answer that if the coheirs were present, and did not dissent, each one of them was held to have sold his share.

13. *Paulus, On Sabinus, Book V.*

Proculus very justly held that where part of a tract of land is lost by eviction, an estimate of its quality should be made at the time when it was sold, and not when the purchaser was deprived of it;

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

And that half of the amount of the price should not merely be taken into consideration.

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

If, however, the land subsequently received any accession by way of alluvial deposit, the time when this took place should be taken into account.

(1) Where an usufruct is lost by eviction, an estimate should be made of the value of the crops.

(2) Where, however, a slave is lost to the purchaser by eviction, the extent to which the land is diminished in value on this account must be estimated in court.

16. *Pomponius, On Sabinus, Book IX.*

Where the property sold has been recovered by anyone having a better title, an action on purchase can be brought with reference to anything which has been added to it, just as where those things which are expressly stated to be accessories to land which is purchased must simply be made good by the vendor if they are lost by eviction.

(1) A stipulation for double damages is said to be operative at the time the property is restored to the claimant; or where he has judgment rendered against him for the value of the property; or when the possessor, having been sued by the purchaser, is released.

(2) Where a slave, on account of whom we have stipulated for the payment of double damages is lost by us because of his being a fugitive, or not being sound; the question arises can we, nevertheless, institute proceedings? Proculus says that it should be considered whether a difference does not exist where he was not mine at the time eviction took place, and where he had become mine at that time; for, in the case where he became my property, I immediately acquired an interest in the amount to which he was deteriorated, for this reason; and I at once acquired a right of action on the stipulation, which I cannot lose either by eviction, or by the death, manumission, or flight of the slave, or for any other similar reason. But if he had not become part of my property, I am none the poorer, because the slave is a fugitive; since he was not included in my estate.

If, however, I stipulated that he was sound, and not accustomed to wander about, my interest only has reference to the present use, although it may be undetermined; just as if it was unknown how long I should have him, and whether anyone would recover him by eviction either from me, or from the person to whom I sold him and to whom I likewise gave a guarantee.

The conclusion of Proculus is that I could only be sued on the stipulation after it had become operative, to the extent of my interest that the said slave should not be in the habit of running away.

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

No one doubts that a vendor who attempts to recover property which he himself has sold can be barred by an exception on the ground of fraud, even though he may have obtained ownership of it under another title; for he is dishonorably attempting to obtain property which has been disposed of by him.

Moreover, the vendor should determine whether he prefers to retain the property by arresting the proceedings by means of an exception; or, if he has been deprived of the property, bring an action for double damages under the stipulation.

18. *Paulus, On Sabinus, Book V.*

Even though an exception may not have been pleaded, or if, having been successfully opposed, the purchaser is, nevertheless, evicted; the vendor can still be sued for double damages under the stipulation, for an action on purchase can be brought against him.

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

Where, however, no stipulation was entered into, we hold the same opinion with reference to an action on purchase.

(1) Where a freeman, who was serving Titius in good faith as a slave, is sold to me, and Titius makes him his heir, as if he was free, and he joins issue with me on this account; I will be entitled to hold him liable as the heir of Titius.

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

I encumbered a tract of land belonging to me, and afterwards sold it to you under the condition that you would not encumber it. If I should afterwards purchase the said land from you, and you execute a bond to me providing against eviction, it should be stated in the bond that the land was encumbered on my account, because if this is not done, and I bring an action against you on this ground I can be barred by an exception based on fraud.

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

Where a slave, who has been sold, dies before he is recovered by someone having a better title, the stipulation does not become operative, because no one recovered him, and what occurred is but the fate of mankind. Still, if any fraud existed, the purchaser can bring an action on that ground.

(1) Hence Julianus very properly lays down in the Forty-third Book that the stipulation for

double damages becomes operative whenever the property is lost in such a way that the purchaser will not be entitled to it on account of the eviction itself.

(2) Therefore, he says where a controversy arises with reference to the ownership of a slave, and the purchaser appoints the vendor his agent, and the latter having been defeated, becomes liable for damages; the stipulation for double the amount does not become operative, because the vendor, who is at the same time an agent of the purchaser, has no right of action on mandate to enable him to recover the amount of the damages from the purchaser. Hence, since the purchaser has lost neither property nor money, there is no necessity for the stipulation to be enforced; although, if he had been defeated after issue had been joined, and had paid the damages assessed, it is held that the stipulation would become operative; and this Julianus himself stated in the same book, for the buyer is not considered to have in his possession a slave of whom he would have been deprived by his adversary if he had not paid the price. For the buyer acquires the right to the slave rather through the second purchase, that is to say, through the payment of his estimated value in court, than by the first transaction.

Julianus also says in the same book, that if, where issue has been joined in a case, and the slave escapes through the negligence of the possessor, the latter should have judgment rendered against him; but he cannot immediately have recourse to the vendor, and must proceed under the stipulation for double damages, because, in the meantime, he was not entitled to the slave through having security against eviction, but on account of his flight. It is evident, he says, that when he obtained possession of the fugitive, the stipulation became operative. For if the slave had escaped without the fault of the possessor, he would then be released, if security was given, and the stipulation would not become operative, unless he should restore the slave after he had been caught. Therefore, where he tenders the amount of damages, this will be sufficient to enable him to hold the slave, but where he gives security, this cannot be done before he returns him.

22. *Pomponius, On Plautius, Book I.*

Where a guardian pays damages assessed on account of property purchased for his ward, not out of the money belonging to the latter, but out of his own property; a stipulation against eviction becomes operative in favor of the ward as against the vendor.

(1) Where a woman takes security against eviction from a tract of land which she purchased, and gives the same land by way of dowry, and someone afterwards deprives her husband of it by means of an action; the woman can immediately proceed against the surety on the ground of purchase, as having reduced the amount of her dowry, or rendered it worthless; provided the husband tendered to the claimant the value of the said property.

23. *Ulpianus, On Sabinus, Book XXIX.*

Where, however, the land is lost by eviction after the death of the woman, recourse must be had to the stipulation for double damages, because the husband can bring an action based on the promise of the dowry, against the heirs of the woman, and they themselves can proceed on the ground of the stipulation.

24. *Africanus, Questions, Book VI.*

Still, we cannot say that the result will be that the stipulation becomes operative if the woman is about to marry the true owner of the slave, and gives him as dowry, even though she will, in this instance, not have any dowry; since, indeed, while it is true that she has no right to the slave, yet it is not a fact that she has been deprived of him by a judicial proceeding; and she will, nevertheless, be entitled to an action on purchase against the vendor.

25. *Ulpianus, On Sabinus, Book XXIX.*

If you manumit a slave on whose account you have stipulated for double damages, you can recover nothing on account of the stipulation; because you are not deprived of anything to which you are entitled, since you yourself have voluntarily relinquished it.

26. *Paulus, On Sabinus, Book V*.

The purchaser will be entitled to an action on sale, on the ground that he did not make him his freedman, if the vendor was aware that he was selling a slave belonging to another. Where, however, the purchaser was compelled to manumit the slave on account of a trust, he will be entitled to an action on purchase.

27. *Pomponius, On Sabinus, Book XL*

We adopt the rule that where exceptions are interposed against the purchaser, and they prevail, the vendor will not be liable; but where they have reference to the act of the vendor, the contrary rule applies. For it is certain that the purchaser will have no right to an action either on purchase, or under the stipulation for double, or even simple damages, where an exception based on his own act is successfully pleaded.

28. *Ulpianus, On the Edict, Book LXXXI*.

But if exceptions based on the acts of both vendor and purchaser are pleaded, it is a matter of importance to ascertain on account of which exception the judge will render his decision, and hence whether the stipulation is operative or not.

29. *Pomponius, On Sabinus, Book XI*.

If you should sell me property belonging to another, and I should repurchase it from the true owner; Celsus, the son, says that the opinion of Nerva is not correct; namely, that you, in bringing an action on sale, can recover the price from me; because I was, as it were, entitled to the property, since it is not agreeable to good faith that I should hold property under a title belonging to someone else.

(1) Where a stipulator for double damages instead of being the possessor becomes the claimant and loses his case, if he had been in possession of the property he could have retained it, but he cannot legally bring suit to recover it, as the promisor of double damages will be secure by operation of law, or he can undoubtedly protect himself by an exception on the ground of fraud. This, however, is the case only where possession was lost through the negligence, or with the consent of the stipulator for double damages.

(2) The vendor can be notified to appear at any time whatsoever when the matter is brought up in court, because a certain date is not fixed by this stipulation; provided, however, this is not done before the time that judgment is rendered.

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

Where he who stipulated with the purchaser that the slave was free from liability for theft or damages, and he from whom the slave stole the property becomes the heir of the purchaser, he will immediately be entitled to an action under the stipulation, just as if he himself had made good the amount of a theft committed against someone else.

31. *Ulpianus, On Sabinus, Book XLII*.

Where anyone makes a promise to the stipulating party "That the slave is sound, is not a thief, is not a violator of graves, etc.," the stipulation seems to some authorities to be void, because if the slave is of this character what is promised is impossible, and if he is not, the promise is without effect.

I think that the following stipulation is more correct, namely: "That the slave is not a thief, is not a violator of graves, and is sound," and this is in conformity with law, for it contains what it is for the interest of the purchaser of the slave to have and not to have. But if a guarantee is added to any of these statements the stipulation will be still more valid; otherwise the stipulation introduced by the Ædiles will be void, because no rational man would approve of it.

32. *The Same, On Sabinus, Book XLVI*.

For the reason that it is held that, where several matters are set forth in one stipulation, there are several stipulations; let us see whether this applies to one calling for double damages, for example, where anyone stipulates that the slave is not in the habit of running away, and is not a wanderer, and the other things which are mentioned in the Edict of the Curule Ædiles; is there one stipulation, or several, in this instance? It is reasonable to hold that there are several.

(1) Hence what Julianus states in the Fifteenth Book of the Digest is correct. For he says that, where a purchaser brings an action for the depreciation in value of a slave because he was in the habit of running away, and then brings another on account of some disease with which he was afflicted; care must be taken to prevent the purchaser from obtaining a profit, and recovering damages twice for the same defect.

Let us suppose that a slave was purchased for ten *aurei*, and that the buyer could have acquired him for at least two less, if he had only known that he was in the habit of running away; and, after recovering this sum because of said habit, he afterwards discovers that he is not sound, and that he could have purchased him for two *aurei* less, if he had been aware that he was diseased. He should, therefore, again recover two *aurei*, for if he had brought suit at the same time on both causes of action, he could have recovered four, since he could have purchased the slave who was not sound, and who was in the habit of running away, for only six *aurei*. In accordance to principle, he can proceed frequently under the stipulation, for he does not do so merely on account of one stipulation, but on account of several.

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

If I purchase a slave and sell him, and afterwards have judgment rendered against me in favor of the purchaser, because I could not deliver the slave on account of eviction, the stipulation becomes operative.

34. *Pomponius, On Sabinus, Book XXVII.*

If you buy a female slave on condition that she shall not be prostituted, and if she is she shall become free, and you violate the condition of the sale, the slave will obtain her freedom, and you will be in the same position as if you had manumitted her, and therefore you will have no recourse against the vendor.

(1) Where proceedings have been instituted against me for the partition of property in a slave, and the latter is adjudged to my adversary for the reason that he proved that the said slave was held in common, I will be entitled to an action for double damages under the stipulation, because it makes no difference by what kind of a judgment eviction is obtained, if I have no right to the property.

(2) A stipulation for double damages does not merely include eviction where anyone claims and recovers the ownership of property, but also applies where proceedings are instituted under the Servian Action.

35. *Paulus, On the Edict of the Curule Ædiles, Book II.*

Property is held to have been obtained by a creditor through eviction, where the expectation of holding it has been almost lost by the purchaser. Therefore, where eviction took place under the Servian Action, the stipulation in fact becomes operative; but as, where the money is paid by the debtor, the purchaser can hold the slave when the pledge is released, if the vendor is sued, he can avail himself of an exception on the ground of bad faith.

36. *The Same, On the Edict, Book XXIX.*

Where a ship or a house has been purchased, the stones of the foundation and the different planks are not understood to have been separately bought; and therefore the vendor will not be liable on the ground of eviction, as he would be in case a portion of the ship or of the house had been recovered through proof of a better title.

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

Double the amount of the price must be promised by the vendor to the purchaser, unless some other arrangement is made, still, it is not necessary for him to give security, unless a special agreement is entered into to that effect, but the vendor will only be liable.

(1) Moreover, where he stated that double damages must be promised, it should be understood that this does not apply to every kind of transaction, but only to such where the articles sold are of great value; as, for instance, jewels, or precious ornaments, or silken garments, or anything else which is not sold at a low price. By the Curule Edict the vendor is also ordered to furnish security in the case of the sale of a slave.

(2) Where the buyer through mistake stipulates for simple instead of double damages, and he is deprived of the property by eviction, Neratius says that he can recover the deficiency in the stipulation by means of an action on purchase, provided the buyer does everything required by the stipulation. For if he does not do so, he can, only in an action on purchase, compel the vendor to promise him what was omitted in the stipulation in the first place.

38. *The Same, Disputations, Book II*.

Where a creditor has sold a pledge it may be considered whether, in case of eviction, the vendor can in a suit based on the sale, be compelled to assign the right of action which he has against the debtor. He is, however, entitled to a counter-action on pledge, and the better opinion is that he must make the assignment, for does it not seem more just to him that the purchaser should at least obtain this advantage, which he can do without causing any expense to the creditor?

39. *Julianus, Digest, Book LVII*.

A minor under twenty-five years of age sold a tract of land to Titius, and Titius sold it to Seius. The minor alleged that he had been overreached in the sale, and obtained a judicial inquiry, not only against Titius, but against Seius as well. Seius asked the Prætor to grant him an equitable action on the stipulation, against Titius, on account of the eviction. I thought it should be granted, and gave it as my opinion that Seius only demanded what was proper, for if the land should be taken away from him by a decision of the Prætor, it would be but just for restitution to be given him in case of eviction by the same Prætor.

(1) If your slave should buy another, and then sell him to Titius, after promising double his value in case of eviction, and you also should stipulate with the vendor of the slave, and Titius should claim the slave, and having brought suit is defeated on the ground that your slave could not transfer property in another slave without your consent, Titius would be entitled to the Publician Action, and on this account a stipulation for double damages would not become operative as far as he was concerned. Wherefore, if you bring suit under the stipulation, you can be barred by an exception, on the ground of bad faith, interposed by your vendor.

The case would be different, however, if the said slave purchased another, and, after stipulating for double damages, sold him; for if the purchaser was deprived of him by eviction, the owner will be entitled to an action against the vendor to recover the entire sum, but he will only have a right of action against the purchaser to the extent of the *peculium*. Moreover, the purchaser should notify the slave and not his master, of the eviction, for where he is deprived of the slave through a better title, he can lawfully bring an action on the *peculium*. If, however, the slave should die, then his master must be notified.

(2) If you purchase two-thirds of a tract of land from me, and one-third from Titius, and then someone claims half of the land from you, if the half which is claimed from you is included in the two-thirds which you have received from me, Titius will not be liable. Where, however, the claim is for the third which Titius has sold you, and the sixth is included in the two-thirds which you have received from me, Titius will be liable to you for a third, and I for a sixth, in case of eviction.

(3) A father, aware of his responsibility, sold his son whom he had under his control to a purchaser who was ignorant of the fact, and the question arose whether he was liable in case

of eviction. The answer was where anyone knowingly or ignorantly sells a freeman as a slave, he is liable in case of eviction. Hence the father who sold his son as a slave is liable on the ground of eviction.

(4) Where a party sells and delivers a slave who is to become free under some condition, and does not state that this is the case, he will be liable in case of eviction, without reference to lapse of time.

(5) Where anyone sells and delivers a slave, and states that the usufruct in him belongs to Seius, while, in fact, it belongs to Sempronius, and Sempronius claims the usufruct; he will be liable just as if in delivering the property he had stated that he was not liable to Seius on account of the usufruct, and if the usufruct actually should belong to Seius, but was bequeathed in such a way that when it ceased to belong to him, it would become the property of Sempronius, and Sempronius should sue for it, he will be liable; but if Seius should bring the action he could legally escape responsibility.

40. *The Same, Digest, Book LVIII.*

Where a party who has taken security from me against eviction bequeaths the land to me as heir, the sureties will be immediately released, because even though he to whom it was bequeathed has to a certain extent been evicted, still, no action against the sureties will lie.

41. *Paulus, On the Edict of the Curule Ædiles, Book II.*

Where I sold a slave and promised double his value to the purchaser in case of eviction, and he had already bound himself to me by the same stipulation; and I afterwards become his heir, and the slave is lost through a superior title, the stipulation in no respect becomes operative. I am not held to have been deprived of him by eviction, since I sold him, nor was he evicted from the party to whom I made the guarantee, since I could, with very little propriety, be said to be liable to pay myself double damages.

(1) Again, if the purchaser should become the heir of the owner of the slave, as the slave cannot be evicted from him, nor can he be held to evict him from himself, the stipulation for double the amount of his value will not become operative. Therefore, in these cases an action on sale should be brought.

(2) Where anyone purchases a tract of land, and takes security against eviction, and sells the said land to a purchaser who becomes his heir; or, on the other hand, the purchaser becomes the heir of the vendor, in case the land is lost by eviction, the question arises whether suit can be brought against the sureties. I think that, in either case, the sureties will be liable, since when a debtor becomes the heir of his creditor, a kind of an account is opened between the heir and the estate, and the estate is understood to have become larger for the debtor, since the money which was owing to the estate has been paid and the property of the heir is diminished to that extent.

On the other hand, when a creditor becomes the heir of his debtor, the assets of the estate are held to be diminished, just as if the estate itself had paid the creditor. Therefore, whether he who had taken security against eviction himself made the sale to the purchaser, or whether the latter becomes the heir of the vendor, the sureties will be liable; and if the estates of the vendor and the purchaser should pass into the hands of the same person, he can bring an action against the sureties.

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

Where a female slave, who is pregnant, is sold and delivered, and her offspring is evicted, the vendor cannot be sued on the ground of eviction because the offspring was sold.

43. *Julianus, Digest, Book LVIII.*

The purchaser of a cow, whose calf born after the sale was evicted, cannot bring an action for double damages under the stipulation, because neither the property itself, nor the usufruct in

the same, was evicted; for where we say that a calf is the fruit of the cow, we mean, not the right, but the thing itself, just as we rightly designate grain and wine as the fruit of land, since it is settled that these things are not properly called usufruct.

44. *Alfenus, Epitomes of the Digest by Paulus, Book II.*

It is held that a boat is no part of a ship and has no connection with it, for a boat is itself a little vessel; but everything which is attached to a ship, as, for instance, the rudder, the mast, the yards and the sails, are, as it were, the members of the ship.

45. *The Same, Epitomes of the Digest by Paulus, Book IV.*

Where a person sold and delivered a tract of land containing a hundred *jugera*, he showed a tract of much greater extent to the purchaser, if the latter should, in consequence, be evicted from a part of the land, the vendor will be obliged to make good the amount in proportion to the quality of the soil; even though the remaining portion may include a hundred *jugera*.

46. *Africanus, Questions, Book VI.*

You sold me a tract of land the usufruct of which belonged to Attius, but you did not mention that he was entitled to the usufruct. I sold the said tract to Mævius, after having reserved the usufruct. Attius was deprived of his civil rights, and it was held that the usufruct reverted to the property, for it could not vest in me at a time when it belonged to someone else. I could, however, bring suit against you, as vendor, on the ground of eviction, because it is just that I should be in the position in which I had a right to be, if the usufruct was then separated from the land.

(1) If you should grant me a right of way through the premises of another, it is held that you are liable in case of eviction; for wherever a right of way is granted through property belonging to the party who gives it, or whether it is granted through the land of another, he assumes liability for eviction.

(2) If I should sell you Stichus, and state that he is to be free on a certain condition, and that his manumission was dependent on the arrival of a ship from Asia, while the condition really was that if Titius should become consul he should be manumitted; the question arises if the ship should first come from Asia, and Titius should afterwards become consul, and the ownership of the slave should be lost through his obtaining his freedom; would I be liable on the ground of eviction? The answer was that I would not be liable, because the purchaser was guilty of bad faith, as the condition was fulfilled before he lost the property by eviction.

(3) Moreover, if I stated that a slave would be free after two years, while, in fact, he ought to become free at the end of a year, and after the lapse of two years he obtains his freedom; or if I should say that he was entitled to his freedom on the payment of five *aurei*, while, in reality, he had been ordered to pay ten, and, the ten having been paid, he gains his freedom; the better opinion is that in these instances I will not be liable.

47. *The Same, Questions, Book VIII.*

If I purchase two slaves from you, each for five *aurei*, and one of them is evicted, there is no doubt that I can lawfully proceed against you in an action of purchase, on the ground of eviction, even though the remaining slave is worth ten *aurei;* nor does it make any difference whether I purchase them separately, or both at once.

48. *Neratius, Parchments, Book VI.*

Where a tract of land is bought as being absolutely unincumbered, and the purchaser obtains anything from the vendor on account of some servitude to which the land was subject, and afterwards the entire tract is evicted, the vendor should refund the amount remaining from the double damages, on account of said eviction. For, if we do not observe this rule, the vendor can recover more than double the sum paid for the land, in case of eviction; in the first place, on account of certain servitudes, and afterwards on the ground of ownership.

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

Where an usufruct is demanded from the purchaser, he ought to notify the vendor of it; just as he should do from whom a portion of the property is sought to be recovered.

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

Where pledges are sold by officers of the Prætor, in consequence of extraordinary judgments, no one has ever said that an action should be granted against them on the ground of eviction. If, however, they fraudulently permitted the property to be sold for an insignificant sum, then an action will be granted against them in favor of the owner of the property, on the ground of fraud.

51. *The Same, On the Edict, Book LXXX*.

Where the purchaser of property loses his case through the ignorance or mistake of the judge, we deny that the vendor shall suffer the loss, as what difference does it make whether the property was lost through the baseness or folly of the judge? For the vendor should not suffer the injury done to the purchaser.

(1) If Titius should sell Stichus, who was to be free after his death, and Stichus obtains his freedom in consequence, will a stipulation made with reference to eviction be valid? Julianus says that the stipulation becomes operative, and even if the purchaser was unable in this instance to notify Titius of the eviction, he can still notify his heir.

(2) Where anyone sells a tract of land, and the vendor himself is buried there by his heir, with the consent of the purchaser, an action on eviction cannot be brought; for under these circumstances the purchaser will lose the property.

(3) It is not strange, however, that, where a slave is evicted, the heir should be liable on account of the eviction, although the deceased may not have been called to account in this way; for, in some instances, a greater obligation will arise either against or in favor of the heir than would have affected the deceased; as, for example, where a slave was appointed heir after the death of the purchaser, and entered upon the estate by order of the heir of the latter, for he must surrender the estate in an action on purchase, although a prætorian action could only have been brought against the deceased in order to compel the slave to be delivered.

(4) Where several parties are liable to me for the entire amount in case of eviction, and then, after eviction has taken place, I proceed against one of them, Labeo says that, if I sue the others, I should be barred by an exception.

52. *The Same, On the Edict, Book LXXXI*.

It must be remembered that where a stipulation for double damages has been entered into, it makes no difference whether it can become operative on account of the sale, or because of any other transaction.

53. *Paulus, On the Edict, Book LXXVII*.

If any portion of land which has been transferred should be evicted, and each *jugerum* of the same has been sold for a certain price, then whatever has been evicted should be made good, not with reference to its quality, but in proportion to the amount for which it was sold, even if the parts which have been evicted are better than the remainder.

(1) If when the purchaser could have notified the vendor, he did not do so, and he should be defeated in court because he did not obtain information which he required, he will be held to have been guilty of bad faith on this account, and he cannot proceed under the stipulation.

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

Where anyone sells property belonging to another after title by prescription or usucaption has been acquired through lapse of time, he ceases to be liable to the purchaser for eviction.

(1) If an heir should sell a slave who was ordered to be free under the condition of paying a

certain sum of money, and he states that the amount mentioned in the condition is greater than he was directed to pay, he will be liable to an action on purchase, provided the condition is such that it would have passed to the purchaser, that is to say, if the slave was directed to pay the heir; for if he was directed to pay anyone else, even though he may have stated the amount of money correctly, still, if he did not notify the purchaser that he was directed to make payment to another, he will be liable on the ground of eviction.

55. *Ulpianus, On the Edict of the Curule Ædiles, Book II.*

Where judgment was rendered against a purchaser because he failed to appear, the stipulation does not become operative, and he is held to have been defeated rather on account of his absence, than because he had a bad case. But what if he against whom judgment was rendered was not present at the trial, but another party was present and conducted his case? What shall we decide? For example, where issue has been joined with a ward who was granted authority by his guardian, but the ward being absent, the guardian conducted the suit, . and judgment was rendered against him; why should we not in this instance hold that the stipulation was operative, for it is evident that the case was tried? It is sufficient if the case was tried by the party who had the right to do so.

(1) The vendor should be notified if he is present, but if he is absent, or if, being present, he does something to prevent his being notified, the stipulation will become operative.

56. *Paulus, On the Edict of the Curule Ædiles, Book II.*

Where it was stated to the vendor that he must bind himself to pay either simple, triple, or quadruple damages, he can be sued in an action on purchase without reference to lapse of time; for he who pays double damages is not compelled to give security, as is generally supposed, but the mere promise is sufficient, unless something else should be agreed upon.

(1) If I submit a question to arbitration, and an award is rendered against me, an action on the ground of eviction should not be granted me against the vendor, for I have not acted from necessity.

(2) Where a slave is sold under a stipulation for double damages, if he should be evicted, an addition with reference to the eviction of a share of said slave will be necessary, for a slave cannot be held to be evicted where only a share in him is involved.

(3) If the purchaser was able to acquire title by usucaption and does not do so, he is considered to have done this through his own fault, and hence, if the slave is evicted, the vendor will not be liable.

(4) If notice is given to the agent of the promisor (and the latter is present at the time), and has bound himself with reference to eviction, and is not ignorant of the fact, the promisor will still be liable.

(5) He also will be liable who took measures to avoid being notified.

(6) Where, however, the purchaser was not able to ascertain the whereabouts of the vendor, although the latter did nothing to conceal himself, the stipulation will, nevertheless, become operative.

(7) Trebatius says that it has been established as equitable that, in case of a stipulation for double damages, a ward can be notified without the authority of his guardian, if the latter does not appear.

57. *Gaius, On the Edict of the Curule Ædiles, Book II.*

A purchaser is held to have a right to possession of the property where the party who deprived him of the same by eviction dies without leaving a successor, before the property is taken away or removed, provided it does not belong to the Treasury, or is not liable to be sold by private creditors; for then the purchaser would not be entitled to any action under the stipulation, because he has a right to hold the property.

(1) Since this is the case, let us see whether it must also be held that an action does not arise on account of the stipulation, where the property was donated or bequeathed to the purchaser by the party who defeated him. This is certainly the case where he donated or bequeathed the property before he removed it; otherwise, when the stipulation has once become operative it cannot be annulled.

58. *Javolenus, On Plautius, Book I*.

An heir delivered a slave who was not expressly bequeathed, and gave a guarantee against fraud and the slave was afterwards evicted. The legatee could bring an action on the will against the heir, even though the latter was ignorant that the slave was the property of another.

59. *Pomponius, On Plautius, Book II*.

Where property which I purchased from Titius is bequeathed by me, and the legatee is sued by the owner of the same, he cannot notify my vendor of the eviction, unless the rights of action should be assigned to him, or where he has the property secured by hypothecation.

60. *Javolenus, On Plautius, Book II*.

Where it is not stated at the time of the sale to what extent the vendor should be liable in case of eviction, he will not be liable on this ground for more than simple damages, and for the amount of the interest of the purchaser dependent upon the nature of the action of sale.

61. *Marcellus, Digest, Book VIII*.

Where I purchased something from you, and sold it to Titius, and you deliver it to Titius with my consent, it is settled that you will be liable to me in case of eviction, just as if I had received the property and had delivered it myself.

62. *Celsus, Digest, Book XXVII*.

If I should sell you any property which is in your possession, it is settled that I will be liable on the ground of eviction, for the reason that it is considered the same as delivered.

(1) Where several heirs are left by a party who sold me property, the obligation with reference to eviction applies to all of them and all of them should be notified, and all ought to defend the suit. If they purposely do not appear in court, or one of them appears for all in the case, all of them will be successful, or will be defeated on account of the effect of the notice, and the absence above mentioned, and I can legally proceed against the others, because they were defeated on the ground of eviction.

(2) If you should sell me a tract of land with the reservation of the usufruct in the same, and the said usufruct belonged to Titius, to whom it had been left during his lifetime, and I am ignorant of the fact, and Titius should forfeit his civil rights, but afterwards having recovered them, should bring suit claiming that he was entitled to the right of the use and enjoyment of the property, an action under the stipulation, on the ground of eviction, will lie in my favor against you; although if what you stated to me at the time of the sale were true, I could very properly deny that Titius was entitled to the use and enjoyment of said property.

63. *Modestinus, Digest, Book V*.

Herennius Modestinus was of the opinion that the purchaser, in bringing an action on sale, would not be barred because notice of the eviction had not been served upon him, if the necessity for notifying him had been released by the agreement.

(1) Gaia Seia purchased a tract of land from Lucius Titius, and proceedings having been instituted against her in the name of the Treasury, she had recourse to the vendor, and eviction having taken place, she was deprived of the land which was adjudged to the Treasury, the vendor being present at the time. The question arises, as the purchaser did not appeal, whether she can sue the vendor? Herennius Modestinus answered that if the land belonged to another when it was sold, or if it was hypothecated at the time it was evicted, there is no reason why the purchaser should not be entitled to an action against the vendor.

(2) Herennius Modestinus gave it as his opinion that if the purchaser appealed, and lost a good case through prescription by his own fault, he cannot have recourse to the vendor.

64. *Papinianus, Questions, Book VII.*

A river swept away two hundred *jugera* from a tract of land which contained a thousand when it was transferred. If two hundred *jugera* of the undivided remainder should afterwards be evicted, the stipulation for double damages will apply to the fifth, and not to the fourth part of said land; for the loss of what was swept away must be borne by the purchaser, and not by the vendor. Where the entire tract which was diminished by the river is evicted, the obligation providing for eviction will not be lessened by law, any more than if a tract of land or a slave should become depreciated in value through neglect; as, on the other hand, the amount for which the vendor is liable, in case of eviction, will not be increased if the property should have been improved.

(1) Where the amount of land which was transferred remains unimpaired, and two hundred *jugera* are added to the same by alluvion, and afterwards a fifth part of the entire undivided tract is evicted, the fifth part alone must be made good by the vendor; just as would be the case if two hundred *jugera* of the thousand which had been delivered were evicted, because the vendor does not guarantee any loss due to alluvial deposit.

(2) Where two hundred *jugera* were lost out of a thousand which have been conveyed, and afterwards two hundred more were added by alluvium to another part of the tract, and then an undivided fifth part of the entire tract should be evicted; the question arose for what proportion will the vendor be liable. I stated that, according to what has been previously laid down, the vendor will not be liable either for the fifth part, or the fourth part of the thousand *jugera*, on the ground of eviction; but will only be liable if merely a hundred and sixty out of the eight hundred *jugera* should be evicted, for the remaining forty which have been taken away from the entire tract should be understood to belong to the addition to the land, *pro rata*.

(3) Again, where a certain part of a tract of land, which is separate, is evicted, although a certain number of *jugera* were conveyed, still, the amount evicted must be made good, not in proportion to the quantity of the land, but with reference to its quality.

(4) Where a party who owned a half interest in an undivided *jugerum* of land, sold and delivered it, he did not, according to the opinion of the authorities, convey the entire ownership, but only the undivided half of the same; just as if he had transferred a certain tract of land or a field in this way.

65. *The Same, Questions, Book VIII.*

Certain heirs sold property belonging to the estate, which had been pledged, and bound themselves to the extent of their respective shares in case of eviction. One of them released the pledge so far as his share was concerned, and the creditor acquired the property by eviction; the question then arose whether suit could be brought against both heirs. This was held to be the case, on account of the indivisible nature of the pledge, and there did not seem to be any remedy which could be applied, in order that, by interposing an exception on the ground of fraud, the rights of action might be assigned to the heir who paid the money to the creditor; because it could be asserted that both the parties had become liable for the entire indebtedness, but they would be entitled to an action for partition of the estate on this account. For what difference does it make if one of heirs should entirely release the pledge, or whether he should only do so with reference to his share, since the negligence of one heir should not be injurious to his co-heir?

66. *The Same, Questions, Book XXVIII.*

If the vendor should notify the purchaser to institute proceedings under the Publician Action, or under the action which has been framed with reference to land subject to tax, and the purchaser has neglected to do this, his bad faith will only injure himself, and the stipulation will not become operative.

This rule does not apply to the Servian Action, for although it is a real action, still, it deprives the party of the bare possession, and after the money has been paid to the vendor it will be disposed of; wherefore, the result is that the purchaser cannot bring it in his own name.

(1) Where anyone who is absent on public business brings suit to recover a tract of land, the possessor can avail himself of an equitable action in case of eviction. This principle also applies where a party who has been deprived of his property by a soldier brings suit, for the same equity demands that the action for restitution, in case of eviction, should be granted to the purchaser.

(2) If the second purchaser of a slave should appoint the vendor, who was himself the first purchaser, his attorney to conduct the case, and the slave was not given up, and a decision was rendered against him; whatever the said attorney may have paid on the judgment, just as if he was acting in his own behalf, cannot be recovered under the stipulation, but, for the reason that the loss resulting from eviction must be personally borne by the purchaser, who could recover nothing in an action on mandate, he can legally bring an action on sale for the recovery of the amount of damages assessed by the court.

(3) Where partition has been effected among co-heirs and the agent of one who is absent appears for him, and the principal of the latter ratifies his act; the same action will be granted against the principal, in case the land is evicted, which would have been granted against him who transacted his business while he was absent, and the plaintiff can recover the amount of his interest, that is to say, the amount by which the property was diminished or increased, based upon what it was worth at the time the partition was made, according as the land was rendered more or less valuable.

67. *The Same, Opinions, Book X.*

After the eviction of a slave whom the real owner took away from the purchaser, the vendor cannot properly make a defence by afterwards offering the same slave to avoid indemnifying the purchaser for his interest.

68. *The Same, Opinions, Book XL*

Where a pledge is sold under the condition that the creditor will not be liable for anything in case of eviction, even though the purchaser should not pay the price, but gives security to the vendor; if eviction takes place, the purchaser will not be entitled to an exception to avoid paying the price of the property.

(1) Where a creditor has preferred to take a claim owned by the debtor by way of substitution for the money due, and the pledges taken by the former creditor are evicted; he will be entitled to no action against the debtor whom he released.

69. *Scævola, Questions, Book II.*

Where the vendor reserves the question of freedom in the sale of a slave, he will not be liable on the ground of eviction, if at the time that the slave was delivered he should become free, or should obtain his liberty when a condition prescribed by will is fulfilled.

(1) Where a vendor, in delivering a slave, states that he is to be free on a certain condition, it is understood that only the kind of freedom is referred to which can result from the fulfillment of a condition already prescribed by a will, and therefore if freedom was conferred at once by the will, and the vendor says that the slave will be liberated under a condition, he will be liable in case of eviction.

(2) On the other hand, where anyone sells a slave who has the prospect of freedom, and states the condition under which he will be entitled to be free, and in doing so causes his condition to be considered worse, because he would not be held to have excepted every condition under which the slave would be free, but only that which he indicated; as, for instance, if anyone should say that the slave was ordered to pay ten *aurei* to become free, and he should obtain his liberty after the lapse of a year, because his freedom had been granted in the following

terms: "Let Stichus be free after a year," the vendor will be liable in case of eviction.

(3) But what if a slave whom the vendor had declared would be free on the payment of twenty *aurei* had been, in fact, ordered to pay ten; would the vendor be considered to have told a falsehood with reference to the condition? It is true that he made a false statement with reference to the condition, and therefore certain jurists have held that, in this instance also, the stipulation would become operative in case of eviction. The authority of Servius, however, prevailed, who thought that under these circumstances an action on purchase would lie; because it was his opinion that he who stated that the slave had been ordered to pay twenty *aurei* had excepted the condition which depended upon the payment.

(4) A slave was ordered to be free after his accounts had been rendered; the heir sold and delivered him, and stated that he had been directed to pay a hundred *aurei* for his freedom. If nothing remained which the slave was obliged to pay when he rendered his accounts, he therefore became free as soon as the estate was entered upon, and liability for eviction was contracted for the reason that a man who was free was sold as one whose liberty was dependent on a condition. If the slave was a defaulter to the amount of a hundred *aurei*, it may be held that the heir did not tell a falsehood; and as the slave was ordered to render his accounts, it is understood that he was directed to make good the amount of money collected which remained unpaid. The result of this is, that, if he was in default for less than a hundred *aurei*, for example, only fifty, so that he would obtain his freedom when he paid this sum, the purchaser will be entitled to an action on sale to recover the remaining fifty *aurei*.

(5) Where anyone, at the time of the sale, states indefinitely that a slave will be conditionally free, but conceals the condition of his freedom, he will be liable to an action on sale if the purchaser is not aware of the fact; for, in this instance, it is settled that he who says that a slave has a prospect of freedom, and does not mention any condition, will indeed not be liable on the ground of eviction, if the condition is fulfilled, and the slave obtains his freedom; but he will be liable to an action on sale provided he concealed the condition which he knew had been prescribed; just as where a party sells a tract of land, and being aware that a certain servitude was due from it, stated indefinitely, "that all rights of way of every description would continue to be enjoyed by those entitled to them," is properly held to have released himself from liability for eviction, but, because he deceived the purchaser, he will be liable to an action on sale.

(6) Where the amount stated to be included in a tract of land which is sold falls short, a part of the price is deducted in proportion to the value of all the *jugera* which the land was alleged to contain.

70. *Paulus, Questions, Book V.*

Where property is evicted an action on purchase will not only lie for the recovery of the price, but also for the amount of the interest of the buyer. Hence, if the property has become less valuable, the loss must be sustained by the buyer.

71. *The Same, Questions, Book XVI.*

A father gave a tract of land to his daughter by way of dowry. This having been evicted, a doubt arises (and not without reason) as to whether an action on purchase will lie, or one for double damages based on the stipulation; just as if the father himself had suffered loss. For as the dowry belongs to the woman, it cannot be said to be the property of the father, nor can she be compelled, during the continuation of the marriage, to share with her brothers the dowry which is derived from him.

Let us see, however, whether it can not be said with greater probability that under these circumstances the stipulation becomes operative; for it is to the interest of the father that his daughter should be endowed, and if she remains under his control, he may have the expectation of sometime recovering the dowry.

But if she has been emancipated, it can hardly be maintained that the stipulation immediately

becomes operative, because in one instance the dowry may revert to him. Therefore, can he bring an action against the vendor, since, if his daughter should die during marriage, he will be able to recover the dowry in case the land should not be evicted?

Or, in this case, has the father an interest in having his daughter endowed, so that he can at once bring suit against the promisor? This opinion is the better one, as paternal affection is involved in the matter.

72. *Callistratus, Questions, Book II.*

Where several tracts of land are sold and expressly and specifically described in one and the same instrument of sale, each of these is not held to be a part of any other, but all the tracts are included in a single purchase. And, just as if anyone should sell several slaves by a single bill of sale, the action for eviction will include each head of said slaves individually; and just as also where a single purchase is made of several other articles, and only one bill of sale is drawn up, there are, however, as many actions for eviction as there are different kinds of property included in the purchase; so, in the case stated, the purchaser certainly will not be prohibited from bringing suit against the vendor if one of said tracts is evicted, because the transaction included several pieces of land conveyed by one instrument of sale.

73. *Paulus, Opinions, Book VII.*

Seia gave, by way of dowry, the Mævian and Seian estates, together with others. Her husband, Titius, during the life of Seia, kept possession of said tracts without any dispute arising, but after the death of Seia, Sempronia, who was her heir, raised a question as to the ownership of the land. I ask, as Sempronia herself was the heir of Seia, whether she could legally make such a claim? Paulus answered that she could do so in her own right, but could not, as the heir of Seia, claim the property in question; but if the land was evicted, the heir of Seia could sue Sempronia, or she could be barred by an exception on the ground of bad faith.

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

If it should be agreed that more or less than the price should be paid, in case of eviction, the parties must abide by this agreement.

(1) If, by order of court, a pledge taken to secure the execution of a judgment is sold, and it is afterwards evicted, an action on purchase will be granted against the defendant who was released by payment of the price, not for the amount of the interest of the buyer, but for the price alone and the interest on the same to be paid out of the profits, provided the buyer was not required to refund this money to him who obtained the property by eviction.

(2) Where a claim is formally made, the vendor can be sued, not for the recovery of the purchase-money, but to force him to defend the action.

(3) Where anyone sells a claim without a guarantee, he can only be compelled to show that it exists, and not that anything can be collected on it, but he will be responsible for fraud.

75. *Venuleius, Stipulations, Book XVI.*

With reference to rural servitudes, where they tacitly follow the land, and are recovered by a third party, Quintus Mucius and Sabinus hold that the vendor cannot be held liable for eviction, for no one is liable on this ground in cases where there is a tacit accession to property; unless the land is conveyed as absolutely and entirely unincumbered, for then it should be warranted to be free from all servitudes. If, however, the purchaser demands a right of way or a driveway, the vendor cannot be held liable, unless he expressly stated that a right of way of some description was accessory to the property, for then he who made the statement will be liable.

The opinion of Quintus Mucius, who stated that a party who conveys land as absolutely and entirely unincumbered warrants it to be free from every servitude, is correct; for other servitudes are not due unless it has been expressly stated by the vendor that they are

accessories.

76. *The Same, Stipulations, Book XVII.*

If you sell me property belonging to another, and I abandon the same, it is settled that my power to act, that is to say, my right to bring suit on account of eviction, is lost.

TITLE III.

CONCERNING THE EXCEPTION ON THE GROUND OF PROPERTY SOLD AND DELIVERED.

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

Marcellus says that if you sell a tract of land belonging to another, and afterwards, it having become yours, you bring suit against the purchaser for its recovery, you will very properly be barred by this exception.

(1) The same rule must be held to apply to the owner of the land, if he becomes the heir of the vendor.

(2) Where anyone sells property of mine under my direction, and I bring an action to recover the same, I will be barred by this exception; unless it is proved that I directed that the property should not be delivered before the purchase-money was paid.

(3) Celsus says if anyone should dispose of my property for a smaller sum than I directed it should be sold for, it is held not to be alienated, and if I bring suit to recover it, I cannot be barred by this exception, and this is correct.

(4) If a slave purchases merchandise with money belonging to his *peculium*, and his master orders him to become free by his will before he obtains the ownership of the property, and bequeaths to him his *peculium,* and the vendor brings suit to recover the merchandise from the slave; an exception *in factum* can be pleaded, on the ground that he was a slave at the time he made the contract.

(5) Where anyone purchases property which was not delivered to him, but of which he obtained possession without fraud, he will be entitled to an exception against the vendor, unless the latter should have good reason for bringing suit to recover the property; for even if he had delivered possession, and he had just cause of action for recovery, he could avail himself of a reply to the exception.

2. *Pomponius, On Plautius, Book II.*

If you purchase a tract of land from Titius, which in fact belonged to Sempronius, and after the price was paid he delivers it to you, and Titius then becomes the heir of Sempronius, and sells and delivers the same land to Mævius; Julianus says that it is more equitable, for you have the prior lien, because if Titius himself had attempted to recover the land from you, he would have been barred by an exception; and if Titius himself had held possession of it, you could have recourse to the Publician Action.

3. *Hermogenianus, Epitomes of Law, Book VI.*

The exception on the ground of property sold and delivered is available, not only by him to whom it was delivered, but also by his successors, as well as by a second purchaser, even if it was not delivered to him, for it is to the interest of the first purchaser that the second should not be deprived of the property by eviction.

(1) On the same principle, the successors of a vendor can be barred, whether they have succeeded to all his rights, or merely to that which has reference to the property involved.

THE DIGEST OR PANDECTS.

BOOK XXII.

TITLE I.

CONCERNING INTERESTS, PROFITS, ADDITIONS, AND ALL ACCESSORIES AND DEFAULT.

1. *Papinianus, Questions, Book III.*

Where a judgment is rendered in good faith, the rate of interest is determined by the decision of the court, according to the custom of the place where the contract was made, provided the amount does not exceed that fixed by law.

(1) If a partner should have judgment rendered against him on account of his having misappropriated the funds of the partnership, and converted them to his own use, he must, by all means, pay interest on the same, even if he was not in default.

(2) However, a judge who is to preside in a *bona fide* action cannot properly order security to be given by the defendant that, if he loses the case, he will pay interest until the judgment is satisfied, since it is in the power of the plaintiff to cause execution to be issued. Paulus states in a note that it is not part of the duty of the judge to concern himself with what takes place after a decision has been rendered.

(3) Papinianus says a broader interpretation should be given with reference to restitution made by a guardian in favor of his ward. For no one now doubts that when a guardian renders his account he must pay interest up to the time that he makes restitution, whether the judge receives it up to the day that the decision was rendered, or whether this is done out of court. It is clear that where the ward declines to institute proceedings in an action on guardianship, and the guardian voluntarily enters into an agreement with him, tenders him the money, and deposits it in a sealed bag, he will not be liable for interest from that time.

2. *The Same, Questions, Book VI.*

It is generally settled that although a personal action may be brought after issue has been joined, liability attaches to all the accessories to the property. The reason for this opinion is, that the property ought to be delivered in the same condition in which it was when suit was brought for its recovery, and therefore, that all crops that have been obtained, and any offspring born of slaves must be surrendered.

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

In the case of a demand made upon a surety where an heir was in default after a judicial decision had been rendered, the Emperor Marcus Antoninus ordered that where the time established by law in favor of parties who had lost their cases had elapsed, the surety could recover everything which had been acquired by his principal up to the time of the judgment. This decree must be understood to apply where the party had not been in default before the decision of the judge, although it cannot readily happen that recourse may be had to the court where default has not previously taken place; for instance, where the principle of the *Lex Falcidia* becomes applicable. If, however, the heir is in default before application is made to the judge, he being liable for the delivery of the profits from that time; for which reason, as he has already lost the case, will he be released from liability for the profits after the lapse of the time fixed by law, since that period is granted him for the purpose of satisfying the judgment, and not for obtaining any advantage for himself?

(1) In proceedings of this kind which are not subject to arbitration, and are not *bona fide* actions, after issue has been joined, everything connected with the property for which suit is brought must be delivered to the plaintiff, up to the time of the judgment. It is certain that the party will be free from liability for the profits after a decision has been rendered.

(2) It sometimes happens that although the profits of an estate or the interest on money is not

expressly bequeathed, it is, nevertheless due; as, for example, where anyone requests that any of his property should be left after his death, it shall be delivered to Titius; for as diminutions made in good faith are not included in this trust, if proportionate diminutions of other property should have taken place, any remaining profits must be given up in accordance with the will of the testator.

(3) Pollidius, having been appointed heir to one of his female relatives, was asked by her to deliver to the daughter of the woman, when she had reached a certain age, any property belonging to her estate which might come into his hands; and the mother stated in her will that she had decided upon this step to prevent the property from being placed under the control of guardians, and that she preferred that a near relative should have charge of it. She directed the said Pollidius to retain a certain tract of land for himself, and I stated to the *Præ*torian Prefect that all the profits which had been acquired in good faith from the property of the deceased by Pollidius should be delivered, not only because the mother had left to him the tract of land, but also for the reason that she had preferred this method of creating a trust to the less reliable one of guardianship.

(4) Where manufactured gold or silver is left in trust, and default takes place, a discussion usually arises as to whether an estimate of interest should be made. It is evident that if the testator left the metal of which the articles were composed with the intention that it should be sold, and the trust discharged by means of the money obtained, or that maintenance should be furnished; it must be held that any fraudulent conduct of the heir should not go unpunished. If, however, the testator left the vases to be used by his heir, it would be improper for interest to be demanded, and therefore it can not be exacted.

4. *The Same, Questions, Book XXVII.*

If you make a stipulation, "For property to be given to you, and complete possession of the same to be delivered," reason suggests that you should afterwards obtain the profits of said property which have been collected by having recourse to a general action on stipulation, on account of the last words of the clause.

It should be considered whether the same rule will apply to the offspring of a female slave in a case of this kind; for, with reference to the first words of the clause, whether they relate to the fact of the property being promised, or to the effect of the delivery by the transfer of ownership, offspring is not included. But if the purchaser, with the intention of renewing the obligation, stipulated with the vendor in this way, the fact of the delivery was understood to be agreed upon, for the reason that it is not probable that the vendor promised more than he would be compelled to furnish in an action on purchase. Still, on account of the words, "And complete possession to be delivered," it can be held that the accounting for the offspring becomes operative on account of the stipulation being general in its character; for after the female slave has been delivered, the party to the stipulation would be entitled to include any child subsequently born on his premises.

(1) Where a child is born to a female slave after the sale has been contracted, but before the stipulation has been entered into, or any property is acquired by the vendor through the agency of the slave, he can recover it by means of an action on purchase; but he cannot do so by means of an action based on the stipulation, for whatever is not transferred to a new obligation can be recovered under the former right.

5. *The Same, Questions, Book XXVIII.*

It is proper to generally state that, in a *bona fide* action, no guarantee which is contrary to good morals will be accepted.

6. *The Same, Questions, Book XXIX.*

Where a controversy arose with an heir, which had reference to a transaction involving the property of a father or master, and the question of interest was discussed, the Emperor Antoninus decided that interest should be paid, for the reason that the master himself or the

father had paid it for a long time.

(1) Our Emperor Severus also ordered that the sum of ten thousand sesterces should be paid out of the Treasury by way of dowry, to the daughter of Flavius Athenagoras, whose property had been confiscated, because she alleged that her father had paid her interest on her dowry.

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

A debtor, who owed a sum of money bearing interest, tendered the amount to his creditor, and when the latter refused to accept it, he placed it in a bag, and sealed and deposited it. Reason demands that from this day there should be no interest due. If, however, suit should afterwards be brought to compel the debtor to pay, and he should fail to do so, the money will not be idle from that time.

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

Where horses have been left in trust, after default, the first foal must be furnished as profit, but a second one as accessory, just as in the case of the offspring of a female slave.

9. *The Same, Opinions, Book XL*

Where money was lent at interest, and double the amount was contracted for if it should not be paid within a certain time; I gave the opinion that the debtor is not liable for anything more than the legal rate of interest; hence the stipulation will be operative in proportion to the time which has elapsed after a deduction has been made of the surplus interest.

(1) The stipulation for interest becomes operative even though the debtor may not be sued; nor is a stipulation for legal interest held to be void where it is made under the condition that it will be due if interest at a lower rate should not be paid at the appointed time, for it is not a penalty, but a higher rate of interest that is promised for a lawful reason. Where, however, there was no one to whom the money could be paid after the death of the creditor, it is established that the debtor is not in default during that time. Therefore, if a higher rate of interest is demanded, and was agreed upon in the first place, an exception on the ground of bad faith can properly be interposed.

10. *Paulus, Questions, Book II*.

The possessor should surrender a child born to a female slave after issue has been joined, but he is not obliged to give it up if it was born before proceedings were instituted for the recovery of the mother, unless the plaintiff expressly brought the suit for said child.

11. *The Same, Questions, Book XXV*.

Gaius Seius, who was in the habit of transacting public business, lent money belonging to the Government at the ordinary rate of interest, but the custom existed to exact a higher rate where the interest was not paid within a certain time. Some of the debtors were in default in paying their interest, others paid more than they owed, and the result was that everything due by way of interest was made up, even that of those who had failed to pay anything.

The question arose whether the surplus interest which was collected from some of the debtors, by way of penalty, according to the prevalent custom, should profit Seius himself, or should enure to the benefit of the Government? I answered that if Gaius Seius stipulated for interest from the debtors, that alone must be paid to the Government which, according to the rule, it was customary to collect from them, even though all the claims were good.

(1) What if a public slave should have obtained an obligation bearing interest for the benefit of the Government? It is just that, although by law this interest should be due to the Government, still, on account of certain claims which are bad, a set-off of the surplus interest should be made, if the Government was not prepared to seize the property of all the debtors. Marcellus states almost the same opinion with reference to guardians.

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

Seia borrowed money from Septitius, and it was agreed with reference to the interest: "That unless the above-mentioned interest was paid at the different times specified, or within three months, Seia would then be liable for a higher rate, and afterwards, at each payment, if the interest was not forthcoming in accordance with the prescribed condition, the said condition should be observed until the entire sum due was paid." I ask whether the following words, "And afterwards, at each payment, if the interest is not forthcoming, in accordance with the prescribed condition, the said condition shall be observed," mean that even though the first stipulation may become operative, still, the debtor cannot be sued for a larger amount of interest than was due at the time appointed for the first payment, when she was in default. Paulus answered that the stipulation contains several conditions, and that it is subject to the payment of a higher rate of interest; that is to say, that the condition should be considered with reference to each payment of a lower rate of interest which should have been, but was not made at the proper time, and therefore that the penalty for subsequent payment could be avoided.

13. *Scævola, Opinions, Book I.*

Where a debtor promised to pay interest at six per cent, and for many years paid interest at a lower rate, and the heir of the creditor brought suit for six per cent, although the debtor had done nothing to avoid payment at the lower rate, I ask whether an exception on the ground of bad faith, or one based on the contract can be interposed? I answered that, if the debtor had not been in default in paying the lower rate of interest, according to his custom, for so long a time, an exception could be interposed in accordance with the facts stated.

(1) The question arose whether an agent should pay interest on idle money, if his principal was not in a habit of lending money at interest, where an action has been brought on the ground of voluntary agency, or on that of mandate? The answer was that, if he had held the money on deposit and had done this in accordance with the custom of the mandator, he would not be obliged to pay anything by way of interest.

14. *Paulus, Opinions, Book XIV.*

Paulus gave it as his opinion that where a party is in default in discharging a trust, the offspring of female slaves must be given up.

(1) An heir was requested to surrender the estate to someone without the income from the same after his death. The question arose whether the offspring of female slaves, even if born during the lifetime of the heir, should be given up, on account of the words of the will by which the testator intended to indicate that the income alone of the estate should be reserved. Paulus answered that any children born to female slaves before the trust became operative, were not included therein. Neratius also says in the First Book that where an heir was requested to deliver a female slave he is not required to deliver her offspring, unless the child was born while he was in default in discharging the trust. Nor do I think that it makes any difference whether the female slave was the special object of the trust, or whether she was merely a part of the estate left in trust.

15. *The Same, Opinions, Book XVI.*

Paulus holds that it is not necessary to pay interest on any profits acquired after issue has been joined, and which the judge, in the discharge of his duty, directs to be turned over, nor on those which have been collected before that time, and which are stated to have been fraudulently obtained by the possessor.

16. *The Same, Decrees, Book I.*

Interest is not exacted on money given to the Government by way of liberality.

(1) When interest on the price of a tract of land was demanded of a party who had purchased it from the Treasury, and the purchaser denied that possession had been delivered to him; the Emperor ruled that it was unjust for interest to be exacted of one who had not gathered the

crops.

17. *The Same, On Interest*.

Where a man bound himself to pay interest at the rate of five per cent per annum, and if he failed to do so for any one year, he would then pay six per cent on the entire sum of money from the day on which he borrowed it, and after paying the interest for some years the stipulation finally became operative; the Divine Marcus stated in a Rescript addressed to Fortunatus: "Go to the Governor of the province who will reduce to the measure of its just requirements the stipulation whose injustice you complain of."

This Constitution far exceeds the proper limit. What course should then be pursued? The matter must be adjusted so that, in the future, the interest will only increase from the day of default.

(1) The Divine Pius stated in a Rescript: "You are claiming accrued interest due with very little justice, as the interval of a long time indicates that you have neglected to collect it, for the reason that you intended, by not demanding it from your debtor, to render yourself more agreeable to him."

(2) In the case of an implied trust, the Divine Pius stated in a Rescript that the heir should be deprived of all profits, and that they should be turned over to the debtor; and therefore that the heir should be deprived of the benefit of the interest.

(3) Where a trust cannot be executed for the benefit of a ward because he has no guardian, the Divine Pius stated in a Rescript that the heir is not considered to be in default. Therefore, nothing is due to him who has been absent on public business, or has been prevented by any other just cause from bringing an action for restitution. For how can a party be to blame who cannot pay, even if he wishes to do so?

The same principle does not apply in this case as in that where relief is given to minors who have failed to obtain an advantage, for interest is not imposed on account of the gain to the plaintiff, but because of the delay of those who should make payment.

(4) Where a party makes a contract with reference to a lease, unless it is agreed that interest shall be due on rent which is not promptly paid, the lessee will not be obliged to pay interest except in case of default.

(5) The Treasury does not pay interest on account of any contract entered into by it, but collects it; as is customary in the case of the keepers of public privies who are slow in paying their rent; and also in the case of those from whom taxes are due. But where the Treasury takes the place of a private individual, it is the custom for it also to pay interest.

06) Where debtors pay interest under six per cent, and they then become debtors to the Treasury, after their obligations have been transferred to the Treasury, they will be compelled to pay six per cent.

(7) It is very well known that those who are sued on account of their mismanagement of public funds are liable to the payment of interest. The same rule is observed where persons have charge of public works, if money remains in their hands; but with reference to what they have paid to contractors, even though they paid it negligently, the interest will be remitted to them. This is the case, however, where no fraud exists, otherwise interest will also be due.

(8) Where no definite time has been specified by persons who have bequeathed statues or paintings to be erected or hung in some public place, the time shall be fixed by the Governor; and if the heirs do not comply, they must pay to the Government interest at the rate of one-third of one per cent a month.

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

If it was agreed in the beginning that, in case of the eviction of certain lands, the vendor shall refund the price, interest must also be paid after eviction, even though the purchaser may have

paid to his adversary all the profits collected after the action for the ownership of the property was begun; as any inconvenience sustained during the intermediate time must be borne by the purchaser.

(1) Where the vendor dies after possession has been delivered, and it is uncertain who his successor will be, the interest on the price must be paid if it was not placed on deposit.

19. *Gaius, On the Law of the Twelve Tables, Book VI.*

Let us see whether judgment will also be rendered against the possessor in every case where suit is brought for the profits. For what if he should bring an action for silver, clothing, or anything else of this kind, or for the usufruct, or for the mere ownership of the property where the usufruct belongs to another? For no profit, to which this term can rightly be applied, can be understood to be derived from the mere ownership; nor, on the other hand can the usufruct properly be considered as profit. But what if an action is brought to recover the mere property? The profits will be included in the claim from the day that the usufructuary lost his usufruct. Moreover, if suit is brought for the usufruct, Proculus says that the defendant will have judgment rendered against him for all the profits which have been collected. Again, Gallus Ælius holds that if suit is brought for clothing, or a cup, whatever could be collected by way of rent, if the articles were leased, should be classed as profit.

(1) Where suit is brought to recover a right of way, it will be difficult for any profits resulting therefrom to be estimated, unless some advantage which the plaintiff could have enjoyed from the servitude should be classed as profits, if he was not prevented from doing so at the time that he brought the action; and this should be admitted as correct.

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

It is settled that, where illegal interest is united with the principal, the said interest will not be due, but this does not affect the principal.

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

It must be remembered that not everything which is done for a good reason in order to postpone payment should be considered as default. For what if the debtor desires his friends to be present, or his sureties to be summoned at the time that the debt is paid, or intends to offer some exception? It is not held that he is guilty of default;

22. *Paulus, On the Edict, Book XXXVII.*

Provided this is not done deceitfully for the purpose of committing fraud.

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

Where a debtor is suddenly compelled to be absent on public business, and cannot entrust his defence to anyone, he is not held to be in default; and this is the case where he is in the power of the enemy.

(1) Sometimes it is customary for a party to be considered to be in default where there is no one against whom suit can be brought.

24. *Paulus, On the Edict, Book XXXVII.*

Where anyone delays in making payment, but is ready to join issue in the suit, he is not held to be in default, at least if he has just cause for applying to the court.

(1) Where the principal debtor is in default, the surety is also liable.

(2) A debtor is in default to his creditor where he does not make payment either to the creditor himself or to someone whom he has directed to receive the money, or to him who is in the habit of transacting his business. In this instance it is not held that he acquires, anything through a free person, because these parties are only discharging their duties; just as where anyone arrests a thief in the act of stealing from me, he is transacting my business, and acquires for me a right of action for manifest theft. Again, where an agent makes a demand

for a slave upon a promisor, he renders the stipulation perpetual.

25. *Julianus, Digest, Book VII.*

A party who is aware that a tract of land is jointly owned by himself and another, and who gathers the crops from the same without the knowledge or consent of his fellow-owner, does not acquire a right to any greater portion of them than his interest in the land entitles him to.

Nor does it make any difference whether he or his fellow-owner, or both of them, sow the seed, for the ownership of every kind of crop is acquired, not through the right to the seed, but through that to the soil; and just as where a party who knowingly has possession of a tract of land belonging to another, cannot acquire the ownership of any part of the crop, no matter in what way the land has been sown; so also, he who has possession of land belonging to himself and another, will acquire no right to the crop on that portion of the land which belongs to his fellow-owner.

(1) I sowed wheat on land belonging to another which Titius had bought in good faith; will Titius, the *bona fide* purchaser, have a right to the crop after it has been harvested? I answered that the profits obtained from a tract of land should be understood to closely resemble those which slaves acquire by their labor; for in gathering crops more consideration is paid to what produces them than to the seed from which they are derived, and therefore no one can ever doubt that if I should sow your wheat on my own ground, the crop and whatever may be collected from the harvest will belong to me.

Again, a possessor in good faith has the same right to harvest the crop which is granted to the actual owner of the land. Besides, since crops of every kind, no matter by whom they have been sowed, belong to the usufructuary, much more does this apply to *bona fide* possessors who have a still better right to the crops, since they do not belong to the usufructuary until they have been gathered by him, but they belong to the *bona fide* possessor, without reference to how they may have been separated from the soil; just as in the case of a party who holds land on the condition of paying a tax, the crops become his as soon as they are separated from the soil.

(2) A *bona fide* purchaser sowed land of which he was in possession, and, before he harvested the crop, ascertained that the land belonged to someone else. The question arises, will he be entitled to the crop after it is harvested? I answered that a *bona fide* purchaser should be understood to have a right to harvest the crop, provided the land has not been evicted, for whatever a slave belonging to another, and whom I purchased in good faith, acquires for me by means of my property or by his own labor, is mine, so long as he is not evicted.

26. *The Same, On Minicius, Book VI.*

Julianus denies that game constitutes the profit of land, unless the profit of the land consists of game.

27. *Africanus, Questions, Book VIII.*

Where a debtor is in default to the head of a household, no inquiry is made as to whether he is in default to his heir; because the right passes to the next heir by inheritance, and is therefore also transmitted to all others in succession.

28. *Gaius, Daily Occurrences, Book II.*

The yield of flocks, such as milk, hair, and wool, is also considered profit. Therefore lambs, kids, and calves, at birth, immediately become the absolute property of a *bona fide* possessor, or an usufructuary.

(1) The offspring of a female slave is not, however, considered to be profit, and therefore belongs to the owner of the property. For it would seem absurd for a man to be classed under the term "profit," when Nature has prepared the fruits of everything for the benefit of the human race.

29. *Marcianus, Institutes, Book XIV*.

It is settled that where anyone has stipulated for interest above the legal rate, or for compound interest, what is unlawfully added is not held to be added at all, and legal interest can be collected.

30. *Paulus, Rules*.

The interest on money lent by municipalities will be due to them, even under a contract without consideration.

31. *Ulpianus, Opinions, Book I.*

Where the following has been added to a stipulation, "and interest, if any is due," it will be void if the rate of interest is not mentioned.

32. *Marcianus, Rules, Book IV*.

Default is understood to apply, not to the property, but to the person; that is to say, where the party, after having been notified at the proper place, does not make payment; and this should be investigated by the court, for, as Pomponius says in the Twelfth Book of Epistles, the definition of this term is difficult.

The Divine Pius stated in a Rescript addressed to Tullius Balbus, that the meaning of the word "default" cannot be determined by reference to any Constitution, nor by inquiry of legal authorities, since it is rather a question of fact than of law.

(1) Proof of default is not sufficient where notice is served upon a slave of the absent debtor by the creditor, or the agent of the latter; since it is held that the master himself must be notified. But, if subsequently, when the creditor has the power to do so, he should neglect to prosecute the action instituted for the recovery of the debt, the debtor will not be understood to be in default from that time forward.

(2) In *bona fide* contracts, interest becomes due through default.

(3) But what if a son under paternal control and his father, to whom the liability of the former has passed, owe a debt which has been contracted by order of the father; or if the money has been expended for his benefit; or if it has become a part of the *peculium* of the son; which one of the parties must be considered to be in default? If only the father is sued on account of being in default, he cannot be held liable; still, an action will be granted against the son for the benefit of the creditor, to compel him to pay what the creditor has failed to collect from the father. Where, however, the son is in default, the creditor then can sue him for the entire sum, or he can sue his father only for the amount of the *peculium*.

(4) But where two debtors have bound themselves jointly, the default of one does not prejudice the rights of the other.

(5) Moreover, if a surety alone is in default, he will not be liable; just as if he had killed his slave Stichus, whom he had promised to deliver, but a prætorian action will be granted against him.

33. *Ulpianus, On the Duties of the Curator of the Government*.

Where the money of the Government has been well placed, the debtor should not be uneasy on account of the principal, and especially is this the case where the money bears interest; or if it does not do so, the Governor of the province should provide for the security of the Government, only he must not show himself to be a harsh and insulting collector, but he must act with moderation, and be kind and efficient, and humane and firm; for there is a great deal of difference between disdainful insolence and diligence which is not prompted by ambition.

(1) Again, he should take care that the public money is not lent without good pledges or security.

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

Interest takes the place of produce, and therefore should not be separated from it; hence in legacies and trusts, in actions on guardianship, and in all other *bona fide* actions, this rule is observed. Wherefore we say that the same principle applies to all other accessions.

35. *Paulus, On the Edict, Book LVII.*

Interest runs after issue has been joined in a case.

36. *Ulpianus, On the Edict, Book LXI.*

The rents of urban estates are considered to be profits.

37. *The Same, On the Edict, Book X.*

Interest is included in the counter-action based on the ground of voluntary agency, where I borrow money in order to pay your creditor, because he was either to be placed in possession of your property, or about to sell your pledges. But what if, having the money at home, I paid the debt for one of the above-mentioned reasons? I think that it is true that interest should be paid where I have freed you from such a great inconvenience, but only such as is customary in that part of the country should be considered due; that is, such as has been established in the case of *bona fide* actions.

But if I should pay money after borrowing it, the interest which I myself have paid can be collected; provided that, by doing so, I have been of greater benefit to you than the value of this interest.

38. *Paulus, On Plautius, Book VI.*

Let us consider, in a general way, where the produce of property is included in a personal action.

(1) And, in fact, where a tract of land is transferred for some consideration or other, as, for instance, by way of dowry, or that a marriage may be renounced, the crops should also be given up, that is to say those which have been gathered during the time that the marriage contract lasted; but, so far as those which have been gathered afterwards are concerned, if there was any default with reference to the property on the part of him whose duty it was to surrender it, they should by all means be included. Even if it was the woman's fault that the marriage was not solemnized, the better opinion is that the crops should be given up. The reason for this is that if the woman's betrothed was not compelled to surrender the crops, he would have been able to neglect the land.

(2) Moreover, if I have paid money which was not due for land, and I bring suit to recover it, I ought also to recover the crops.

(3) The same rule applies where land is given *mortis causa*, and the party who gave it regains his health, and therefore a right to a personal action for its recovery arises.

(4) In both the Fabian and Paulian Actions, by means of which property which has been disposed of for the purpose of defrauding creditors, is recovered, the produce of said property must also be returned; for the Prætor uses his authority to place everything in the same condition as if nothing had been alienated; and this is not unjust, for the words, "you shall return," which the Prætor makes use of in this matter, have a broad signification, so that the produce of the property must also be surrendered.

(5) And, therefore, when the Prætor agrees to the restitution, the produce must also be given up; as in proceedings under the interdict based upon the commission of violence.

(6) Moreover, if, induced by force or fear, I give up property, it is not held to be restored to me unless the produce of the same is also restored; nor can my default deprive me of any of my rights.

(7) If I am entitled to an action to recover something which is not mine, as, for example, on a stipulation; I cannot recover the produce, even if the other party is in default. But if issue has

been joined, then

Sabinus and Cassius hold that, according to the principles of equity, any profits which may have afterwards accrued must be delivered up, in order that the case may be placed in its original condition. I think that this opinion is very correctly stated.

(8) The profits of property must also be restored in the case of a purchaser.

(9) In a partnership, however, the profits must be divided among the partners.

(10) Where I revoke the natural possession of property it remains mine; but let us see whether this applies to the profits. And, in fact, in cases of deposit and loan for use, the profits must be given up, as we have already stated.

(11) Again, in proceedings under an interdict based on force and clandestine action, the better opinion is that all accessions and profits should be returned.

(12) Crops gathered from land before marriage become part of the dowry, and should be returned along with it.

(13) The same principle applies to the profit of urban estates.

(14) Moreover, if I wish to divide a tract of land with you and you refuse, and I cultivate the land, should the crops from it be divided after the expenses have been deducted? I think that they should be divided.

(15) The profits should always be delivered in other *bona fide* actions.

(16) Where a dowry is left by a husband to his wife, the profits of the same obtained before marriage are included in the legacy.

39. *Modestinus, Differences, Book IX.*

Where mares have been left in trust, their foals are also due after the heir is in default. Where a number of horses have been left, even though there be no default, their offspring belongs to the increase of the drove.

40. *The Same, Rules, Book IV.*

The calculation of interest is legally made up to the day when the creditor sells his pledges.

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

Judgment having been rendered against a guardian, he delayed the execution of the judgment by taking an appeal. Herennius Modestinus gave it as his opinion that the judge who had jurisdiction of the appeal could also hold him responsible for interest during the intermediate time, if he ascertained that the appeal was fraudulently interposed for the purpose of delay.

(1) Lucius Titius, who owed the sum of a hundred *aurei* and interest on the same for a certain time, tendered and sealed up a smaller sum than he owed. I ask whether Titius did not owe interest on the money which he sealed up. Modestinus answered that if it was not agreed at the time of the loan that the debtor should be permitted to pay what he had borrowed by instalments, the payment of interest for the entire debt would not be affected; if, when the creditor was ready to receive the whole amount, the debtor who failed to make the payment of the entire sum only deposited a part of it.

(2) Gaius Seius borrowed a certain sum of money from Aulus Agerius on the following note: "The undersigned says that I have received, and I acknowledge having received from him, borrowed money to the amount of ten *aurei*, which I promise to pay to him on the *Kalends* of next July, together with the interest on the same that is agreed upon between us." I ask whether interest can be collected on this instrument, and if so, how much. Modestinus answered that if it does not appear how much interest was agreed upon, it cannot be collected.

42. *The Same, Opinions, Book XL*

Herennius Modestinus gave it as his opinion that crops taken from land after the ownership of the same had been acquired by means of a trust, belonging to the beneficiary; even though the greater part of the year had elapsed before the trust became operative.

43. *The Same, Opinions, Book XVIII*.

Herennius Modestinus held that a party who institutes proceedings in behalf of the Treasury can collect interest which was not included in the stipulation, after he has collected what is due to the Treasury for the time during which the debtor was in default.

44. *The Same, Pandects, Book X*.

No one can stipulate for a penalty instead of interest above the lawful rate.

45. *Pomponius, On Quintus Mucius, Book XXII*.

A wife, or a husband, acquires the right to the produce of property which has been given by one to the other, that is to say, what either has been acquired by his or her labor, for example, by sowing; but if an apple should be plucked, or a tree cut down, it does not become the property of the party responsible for the act, just as it would not belong to any *bona fide* possessor, because the produce is not derived from his or her personal exertion.

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

There is no doubt that whatever has been expended in gathering the crops should be deducted from the crops themselves.

47. *Scævola, Digest, Book IX*.

It is held that where a party is ready to join issue in a case, and his adversary fails to file his complaint, he will not be held to be in default.

48. *The Same, Digest, Book XXII*.

A husband bequeathed to his wife the usufruct of the third part of his property, and the ownership of the said third part if she should have children. The heirs accused the wife of forging the will and of other crimes, by which they were prevented from claiming the legacies. In the meantime, a son was born to the woman, and the condition of the legacy was thereby fulfilled.

The question arose, if it was established that the will was not forged, should the crops be delivered to the owner? The answer was that they should be.

49. *Javolenus, On the Last Works of Labeo, Book II*.

The power of giving property in pledge is a product of the same.

TITLE II.

CONCERNING MARITIME INTEREST.

1. *Modestinus, Pandects, Book X*.

Money is transported which is carried across the sea. If, however, it is expended in the same place where it was lent, it cannot be designated as transported. Let us see, however, whether merchandise purchased with this money will be considered to occupy the same position. It makes a difference whether the merchandise is carried at the risk of the creditor, for then the money will be transported.

2. *Pomponius, On Plautius, Book III*.

Labeo says if there is no one who can be notified on the part of the promisor with reference to money which is to be transported, an instrument should be drawn up in the presence of witnesses, which will take the place of a notification.

3. *Modestinus, Rules, Book IV*.

In the case of money transported by sea, it is at the risk of the creditor from the day on which it is agreed that the ship will sail.

4. *Papinianus, Opinions, Book III*.

It makes no difference whether the money to be transported is not at the risk of the creditor when it is received, or whether it ceases to be at his risk after a certain time, or upon the fulfillment of a certain condition; and therefore in either instance a higher rate of interest than is legal will not be due. In the first instance, a higher rate can never be demanded; in the second, when the risk has ceased to exist, neither pledges nor hypothecations can be retained for the purpose of collecting a higher rate of interest.

(1) If slaves should be sent with the money transported, for the purpose of collecting it when due, interest for every day mentioned in the stipulation will be payable to the limit of twelve per cent; but more than twice the amount cannot be collected. Where it was separately stated in the stipulation, with reference to the interest, when the money would be no longer at the creditor's risk, whatever lawful interest was lacking in one clause will be supplied by the effect of the other.

5. *Scaevola, Opinions, Book VI*.

The price is for the risk incurred, and resembles the case where you are entitled to receive what you paid and something besides, under a condition (even though it be a penal one) which was not fulfilled, provided it does not depend upon chance; for instance, one from which personal actions are accustomed to arise, as, "If you manumit a slave, if you do not perform a certain act, if I do not recover my health," etc. There will be no doubt that if, in order to equip a fisherman, I give him a certain sum of money on condition that he will repay me if he makes a good catch; or if I furnish money to an athlete in order that he may exhibit himself and practice his profession; on condition that, if he is successful, he will repay it.

(1) In all these instances, however, where an agreement is made without a stipulation, it causes the obligation to increase.

6. *Paulus, Questions, Book XXV*.

A broker who lent money at maritime interest, received certain merchandise which was in the ship by way of pledge, under the condition that if this was not sufficient to discharge the entire debt, he could have recourse to other merchandise loaded in different vessels, and which had already been pledged to other brokers with the understanding that if anything remained after they were satisfied, it would be considered pledged to the first broker.

The question arose, if the first ship which contained sufficient merchandise to pay the entire debt should be lost, whether the loss should be borne by the creditor if the ship was destroyed within the days appointed to make the voyage; or whether he would still have a claim upon the merchandise which remained in the other ships. I answered that in other cases the diminution of the property pledged is at the risk of the debtor, and does not concern the creditor, but when money to be transported is paid on such a condition that the creditor will have no claim unless the vessel arrives safely at its destination within the specified time, the obligation of the loan itself, where the condition is not fulfilled, is held to be at an end; and therefore the right of the creditor to even those pledges which were not lost will be extinguished. If the ship should be lost within the specified time, and the condition of the stipulation is held not to have taken place, no question can then be raised with reference to the availability of the pledges which were in the other vessels. But when can the creditor claim possession of the other pledges? He will certainly be able to do so when the condition of the obligation is fulfilled; or the pledges which he first received have been lost by some accident, or sold at too low a price; or if the vessel should be lost after the time has passed during which he was bound to assume the risk.

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

There are certain contracts by which interest is due, just as in the case of a stipulation. For if I give ten *aurei* to be transported by sea, on condition that if the ship arrives safely I will be entitled to the principal together with a certain amount of interest, it must be held that I can receive the principal and interest.

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

Servius says that a penalty for money transported by sea cannot be demanded, if the creditor was to blame for not receiving it within the specified time.

9. *Labeo, Epitomes of Probabilities by Paulus, Book V.*

If a penalty for failure to pay money transported by sea is promised, as is customary, even though on the first day when it is payable no one should be living who owed the said money, still, the penalty can be exacted, just as if there was an heir to the debtor.

TITLE III. CONCERNING PROOFS AND PRESUMPTIONS.

1. *Papinianus, Questions, Book III.*

Whenever a question is raised with reference to the family or race of any person, he must prove whether he belongs to it or not.

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

Proof is incumbent upon the party who affirms a fact, not upon him who denies it.

3. *Papinianus, Opinions, Book IX.*

Where an implied trust is charged upon a party who is appointed heir for an equal or a larger share of the estate, by both a first and a second will, the proof of changed intention on the part of the testator devolves upon him against whom suit is brought; for often a motive of secrecy induces owners of property to appoint persons heirs in whose good faith they have confidence.

4. *Paulus, Opinions, Book VI.*

The purchaser must prove that the slave in question had taken to flight before he purchased him.

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

Where anyone alleges that his adversary is deprived of some right by a particular law or constitution, he must prove it.

(1) Paulus also holds that where anyone denies that emancipation has been legally accomplished, he must furnish proof of his statement.

6. *Scævola, Opinions, Book II.*

A patron must clearly show that his freedman has given something for the purpose of cheating him, in order to be able to revoke a portion of what has been fraudulently bestowed.

7. *Paulus, Sentences, Book II.*

Where evidence of former flight is lacking, a slave shall be believed, if put to the torture, for he is held to be interrogated in his own behalf, and not for or against his master.

8. *The Same, On Plautius, Book XVIII.*

If a son under the control of his father denies the fact, the Prætor must direct the son to first prove his allegation, and this rule has been established on account of the affection which he ought to manifest for his father, and because the son practically alleges that he is free. Hence anyone who asserts his right to freedom is in the first place, ordered to prove it.

9. *Celsus, Digest, Book I.*

Where an agreement is made in which there is no mention of an heir, the question arises whether this has been done in order that only the person of the party himself may be considered. But although it may be true that he who makes use of an exception must establish good ground for doing so; still, the plaintiff, and not he who pleaded the exception, must prove that the agreement merely had reference to himself, and did not include his heir, because in such cases, we generally provide for our heirs as well as for ourselves.

10. *Marcellus, Digest, Book III.*

The Senate decreed that the registers of the Censor and the public records are better evidence than that of witnesses.

11. *Celsus, Digest, Book XI.*

A ward is not compelled to prove that the sureties furnished by his guardian were not solvent when they were accepted, for proof of this must be required of those whose duty it was to watch over the ward, and provide security for him.

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

Fifty *aurei* were bequeathed to you by will, and the same legacy was included in codicils which were subsequently executed. It is important to ascertain whether the testator intended to double the legacy, or merely to repeatedly mention it, or did so, having forgotten that he had already made the bequest in his will. From which party then must proof of the intention of the testator be exacted? At first sight, it would appear more just that the plaintiff should prove what he claims, but there is no doubt that proof is sometimes required of the defendant; for if I bring suit for a claim and the defendant answers that the money has been paid, he himself is required to establish this. Therefore, in the present instance, if the plaintiff exhibits two instruments, and the heir alleges that the last one is void, the latter must prove this in court.

13. *The Same, Digest, Book XXX.*

Where an inquiry was made with reference to the age of a man, our Emperor issued the following Rescript: "It is both hard and unjust, when a question arises with reference to a party's age, and different statements are made, that one should be accepted which is prejudicial; but in the trial of a case the truth should be considered, and his age should be computed according to the document which seems to be most credible, and to deserve the greatest confidence in the investigation of the matter."

14. *Ulpianus, On the Office of the Consul, Book II.*

Inquiries should be made with reference to a person who, having passed as a freedman, now alleges that he is freeborn and desires to proceed as plaintiff. If, indeed, he occupies the position of a freedman, there is no doubt that he must bring an action to have himself declared freeborn, and establish that this is the case. But if he enjoys the reputation of having been born free, and he is alleged to be a freedman (of course by him who is responsible for the controversy), he who says that he is his freedman must prove it. For what difference does it make whether anyone asserts that he is his slave or his freedman? Where, however, a party has sufficient confidence in his claim of freedom of birth as voluntarily to undertake to produce proofs of it for the purpose of obtaining a decision declaring him freeborn (that is to say that he was born free as he alleges), it may be asked whether he should be permitted to do so. I am of the opinion that this should be done, and that he should have an opportunity to prove that he is freeborn, and have a decision rendered in his favor, as no one can be taken at a disadvantage by such a judgment.

15. *Modestinus, Opinions, Book XII.*

A certain man, asserting that he was the son of Seia and Gaius, seized the estate of Gaius, although the latter had brothers, and discharged certain trusts in favor of these brothers, as if by the direction of the deceased, and took a receipt. They, having afterwards ascertained that the alleged son was not their brother, asked whether they could bring an action against him to

recover the estate, on account of the receipt which they had given him as the son of the deceased. Modestinus answered that the position of the party to whom the receipt had been given in discharge of the trust, and who could be proved by the brothers of the deceased not to be his son, was not in the slightest degree established by this fact, but that proof must be submitted by the brothers.

16. *Terentius Clemens, On the Lex Julia et Papia, Book III.*

The statement of a mother as to the birth of her children, as well as that of a grandfather, must be accepted.

17. *Celsus, Digest, Book VI.*

When a question is raised with reference to the *Lex Falcidia*, the heir must prove that this law is applicable, because if he cannot do so, judgment will properly be rendered against him.

18. *Ulpianus, Disputations, Book VI.*

Whenever services are demanded of a freedman, proof of his right to do so is required from the party who alleges that he is his patron; therefore Julianus holds that, although in a matter which is in controversy the patron is held to be entitled to possession, he who is said to be the freedman should not take the part of plaintiff, but he who asserts that he is the patron should do so.

(1) Where anyone alleges that some fraudulent act has been committed, he must prove the fraud, even though he may have made this statement in an exception.

(2) The plaintiff should be compelled to prove the truth of an interrogatory which is made, that is, where it is alleged that a party who was interrogated in court answered that he was the sole heir; or if, having been interrogated, he is said to have remained silent, the same rule must be held to apply; and the blame must be placed not upon him who stated in his exception that he did not answer, but upon the plaintiff.

19. *The Same, Disputations, Book VII.*

It must be said, with reference to exceptions, that the defendant is required to perform the part of plaintiff, and he himself prove his exception, just as the plaintiff must prove his claim; for instance, where he pleads an exception on the ground of a contract entered into, he must show that the contract was actually made.

(1) Where anyone who promised to appear in court alleges as a reason for not doing so that he has been absent on public business, or that some malicious act of his adversary prevented him from appearing, or his health, or a storm hindered him, he must prove it.

(2) Where a party makes use of an exception on the ground that the appointment of the attorney of his adversary is not valid, because his adversary could not appoint, or be appointed an attorney, he must prove the truth of the exception which he has interposed.

(3) The same rule will apply where suit is brought for a sum of money which is alleged to have been paid.

(4) Again, where an exception is pleaded on the ground of a decision rendered; or because an oath is said to have been tendered with reference to the property for which suit now is brought, or because the matter in controversy has reference to a game of chance, the party who filed the exception must prove all these allegations.

20. *Julianus, Digest, Book XLIII.*

Where anyone seizes a freeman by force, and keeps him in chains, he is most unworthy of the advantages enjoyed by a possessor, because it cannot be proved that, at the time that proceedings were first instituted, the man was free.

21. *Marcianus, Institutes, Book VI.*

I think that the better opinion is that he who brings the action, that is to say the legatee, must prove that the testator knew that the property bequeathed belonged, or was encumbered to another, and that the heir is not required to prove that it belonged to someone else, or was encumbered, because the necessity of proving his allegations always rests upon the plaintiff.

22. *Ulpianus, Opinions, Book I.*

He who says that he has changed his mind must prove it.

23. *Marcianus, On the Hypothecary Formula*.

It must be proved, before everything else, that it was agreed between the plaintiff and the debtor, that the property should be pledged or hypothecated. After the plaintiff has proved this, he must also establish the fact that the property belonged to the debtor at the time the pledge was agreed upon, or that the hypothecation was made with his consent.

24. *Modestinus, Rules, Book IV*.

Where a promissory note has been cancelled, although the presumption is that the debtor has been released, still, he can lawfully be sued for the amount which the creditor can show by manifest evidence is still due to him.

25. *Paulus, Questions, Book III*.

Where a question arises with reference to money which is not due, who must prove this? The matter should be adjusted so that if he who is said to have received the property denies that the money is not owing, and he who paid it proves its payment by competent evidence, then he who denies absolutely that he received the money, if he wishes to be heard, must be compelled to furnish proof that the money was lawfully due to him; for it would be absurd if he who, in the beginning, denied that he had received the money, and afterwards was shown to have received it, should require proof from his adversary that it was not owing to him.

If, however, in the first place, the plaintiff should acknowledge that he had received the money, but should assert that it was due to him, the presumption undoubtedly will lie in favor of the party who received it, for he who pays is never so negligent as to throw away his money without hesitation, and pay it when it is not due; and especially is this the case where the party who alleges that he paid what was not due is the diligent and careful head of a household, for it is incredible that a person of this kind should be so easily deceived.

Therefore he who alleges that he has paid money which was not due will be required to produce evidence that the said money was paid through the fraud of the party who received it, or on account of some just cause of ignorance, and unless he shows this he will have no right to recover it.

(1) Where, however, he who complains of the payment of money which was not due is a ward, a minor, or a woman, or, indeed, a man of full age but a soldier, or a cultivator of the soil and inexperienced in public business, or fond of a simple life and given to idleness; then he who receives the money must show that he actually did so, and that it was due and payable to him, and if he fails to do this he must refund it.

(2) This only applies where the party who paid the money contends that the entire sum was not due. Where, however, he complains of the payment of only a portion, on the ground that only a part of the money paid was not due; or that it was due in the beginning, but the debt was afterwards discharged, and he ignorantly paid it a second time; or that, being protected by an exception, he paid the money through mistake; he, himself, must, by all means, establish that he either paid more than was due, or that he paid money a second time through mistake, or that, being protected by an exception, he ignorantly paid the money; in accordance with the general rule which requires those to furnish proof who state that they have exceptions to offer, or who allege that they have paid the debt.

(3) In all the instances which we have suggested, permission should be granted to him upon

whom rests the burden of proof to tender the oath to his adversary, with reference to the truth of the matter, before tendering him the oath *pro calumnia;* so that the judge may regulate his decision according to the confidence which he has in the oath of the plaintiff, the right to the defendant to tender the oath back to his adversary being reserved.

(4) This point relates to the payment of money which is not due. Where, however, a written promise to pay is said to have been made for money which is not due, and the terms of the instrument are indefinite, then the party in whose favor the note was executed will be compelled to prove that the sum mentioned in it is due to him, unless he who made the note has explicitly stated his reasons for doing so; for then he must abide by his admission, unless he is ready to show by conclusive documentary evidence that he made the promise to pay money which he did not owe.

26. *Papinianus, Questions, Book XX.*

Procula, to whom a large sum of money was due from her brother under the terms of a trust, wished to set off this sum proportionately against his heirs after his death; and in opposition to this it was alleged that she had never demanded the money of her brother during his lifetime, but that she herself had paid him certain sums of money for various reasons growing out of accounts which they had with one another. The Divine Commodus, in deciding the case, did not admit the set-off, but held that she had tacitly released her brother from the execution of the trust.

27. *Scaevola, Digest, Book XXXIII.*

A man made a will, and bequeathed a lawful share of his estate to one who was only entitled to receive a certain amount, and he then provided as follows: "I give and bequeath one hundred *aurei* to Titius, which he has placed in my hands, but of which I have not given him any written evidence, because I have held all the fortune and property which he received from his mother in my possession without any note. Moreover, I desire that there should be delivered and paid to Titius a hundred and fifty *aurei* out of my estate, which I have received as the rent of land, being the proceeds of crops harvested and sold, as well as any sums shown on my books to have been received by Titius from his mother, and which I have appropriated to my own use."

I ask whether Titius can collect this money. The answer was that if Titius can prove that the property had come into the hands of the testator in accordance with the above-mentioned statement, he can do so; for it is held that in a case where a party is not entitled to receive more than a certain amount by a legacy, such provisions are added to a will in violation of law.

28. *Labeo, Epitomes of Probabilities, by Paulus, Book VII.*

Where it is the duty of an arbiter to decide a case, should he inquire whether a memorandum of the labor performed exists, or whether anyone remembers that the labor has been performed? Paulus says that when inquiry is made in a case of arbitration, as to whether a memorandum of the labor performed is in existence or not, it ought not to be asked whether anyone remembers the time, or under what consul the work was done, but whether it can be proved in any way whatsoever when it was done. And this should be accomplished, as the Greeks are accustomed to state, in a general way, for it cannot be retained in the memory that the work has been done; for example, within a certain year, since, in the meantime, no one will probably remember under what consuls it was performed. But where the opinion of all persons is that they did not hear of the work being done, or see it, or learn of it from any who might have seen it, or heard of it, and, no matter how far back one may go, no memorandum of the work performed can be found; this will be sufficient.

29. *Scævola, Digest, Book IX.*

The Emperors Antoninus and Verus stated in a Rescript to Claudius Apollinaris the following, namely: "It is decreed that proofs given with reference to children shall not consist of the

mere statements of witnesses, but also of letters which are alleged to have been sent to wives, if their authenticity is established, and they can be introduced as documentary evidence."

(1) A wife, who had been repudiated while pregnant, brought forth a son during the absence of her husband; and, in the course of the proceedings instituted in consequence, confessed that the child was illegitimate. The inquiry arose whether the son was under the control of his father, and if when his mother died intestate, he could enter upon her estate by order of his father, or whether the confession made by his angry mother would prejudice his rights. The answer was that, in cases of this kind an opportunity always existed for ascertaining the truth.

30. *Labeo, Opinions, Book I.*

Labeo's opinion given to Festus was that a female slave could not offer, as proof of the freedom which she claimed, either a trust left to her by will, or the fact that provision for her maintenance had been bequeathed to her as the nurse of the testator.

31. *The Same, to Mactorius Sabinus, Book II.*

The mention of money in a note, which is alleged to be due for some other reason, does not possess the force of an obligation.

TITLE IV.

CONCERNING THE AUTHENTICITY OF INSTRUMENTS AND THEIR LOSS.

1. *Paulus, Sentences, Book IV.*

All those things by means of which legal proceedings can be instituted should be classed under the head of instruments, and therefore evidence, as well as persons, are placed in that category.

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

Where anyone is sued by the Treasury, this must be done, not by means of an extract or the copy of any written document, but on the original itself, so that the truth of the contract may be established. It is not proper that a forged document should have any force or effect in court.

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

Paulus stated that: "An obligation should not be antedated, but the parties who have agreed to this are not considered to be guilty of forgery, since the act was performed in the presence and with the consent of the parties, and the debtor is guilty of a greater offence than the creditor."

4. *Gaius, On the Hypothecary Formula.*

Where property is hypothecated, it does not matter in what terms this may be effected, as in the case in those obligations which are contracted by consent. Therefore, if it is agreed that property shall be hypothecated without this being done in writing, and this can be proved, the property with reference to which the agreement was made will be encumbered; for written instruments are drawn up in these matters in order that what has been agreed upon may be more easily established. The transaction will be valid, however, without them, if the evidence is forthcoming; just as marriage is valid where testimony exists without any written instruments having been executed.

5. *Callistratus, Questions, Book II.*

Where a transaction shows that it has actually been concluded without any documentary evidence, it will be none the less valid because no written instrument with reference to it exists.

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

Where a question arises with reference to the deposit of a will, and there is some doubt with whom this should be done, we prefer that it should always be left with an old, rather than with a young person, with one of high rather than with one of inferior rank, with a man rather than

with a woman, and with a freeborn person rather than with a freedman.

TITLE V.

CONCERNING WITNESSES.

1. *Arcadius, also called Charisius, On Witnesses*.

The employment of witnesses is frequent and necessary, and the testimony of those whose integrity is established should especially be taken.

(1) Witnesses can also be produced not only in criminal cases, but also in actions involving money, in accordance with the circumstances, and those can give evidence who are not forbidden to do so, or are excused from testifying by any law.

(2) Although a considerable number of witnesses is prescribed by certain laws, still, according to the Constitutions of the Emperors, this requirement is confined to a sufficient number of the same, in order that the judges may regulate it, and permit only that number of witnesses to be called which they deem necessary, lest a superfluous multitude may, through unrestricted power, be summoned for the purpose of annoying the parties to the suit.

2. *Modestinus, Rules, Book VIII*.

The rank, the integrity, the manners, and the gravity of witnesses must be taken into consideration, and therefore those who make contradictory statements, or who hesitate while giving their evidence, should not be heard.

3. *Callistratus, Concerning Judicial Inquiries, Book IV*.

The integrity of witnesses should be carefully investigated, and in consideration of their personal characteristics, attention should be, in the first place, paid to their rank; as to whether the witness is a Decurion or a plebeian; whether his life is honorable and without blame, or whether he has been branded with infamy and is liable to censure; whether he is rich or poor, lest he may readily swear falsely for the purpose of gain; whether he is an enemy to him against whom he testifies, or whether he is a friend to him in whose favor he gives his evidence. For if the witness is free from suspicion, either because his personal character is beyond reproach, for the reason that he is neither influenced by the expectation of gain, nor by any inducements of favor or enmity, he will be competent. Therefore, the Divine Hadrian stated in a Rescript addressed to Vivius Verus, the Governor of Cilicia, that he who hears a case has the best means of judging how much confidence should be reposed in witnesses. The following are the terms of the Rescript : "You are best qualified to ascertain how much faith should be placed in witnesses, who they are, what is their rank and reputation, whether they seem to speak sincerely, whether or not they have agreed upon and planned the same statements together, and whether they, without hesitation, return suitable answers to the questions put to them."

(1) Another Rescript of the same Emperor, addressed to Valerius Verus, on the subject of ascertaining the confidence to be placed in witnesses, is extant, and is in the following words: "It cannot be laid down with precision what evidence will be sufficient for the proof of any matter, just as it is not always essential to establish the existence of any fact by means of public documents, although this is frequently done. Otherwise, the number of witnesses, as well as their rank and authority, and their general reputation, would tend to confirm the proof of the subject under investigation.

"I can only say to you in general terms, that a judicial inquiry should not be confined merely to one kind of evidence, but that it is necessary for you to form your opinion as to what you believe to have been proved, or what you may think has not been satisfactorily established, through the exercise of your own judgment."

(2) The Divine Hadrian also stated in a Rescript to Julius Rufinus, Proconsul of Macedonia, that he must pay more attention to the witnesses than to their evidence. The words of the

Rescript on this point are as follows: "Alexander accused Aper of certain crimes before me, but he did not prove them, or produce any witnesses; but he desired to use evidence which I am unwilling to admit, for I am accustomed to examine witnesses, and I have sent him back to the Governor of the province that he may make inquiry with reference to the credibility of the witnesses, and unless he proves what he alleges, he shall be sent into exile."

(3) The same Emperor stated the following in a Rescript to Cabin-ius Maximus: "The weight to be attached to the oral evidence of witnesses who are present is one thing, and that of written testimony which is to be read is another. Therefore deliberate carefully whether you desire to retain them, and if you do, allow them their costs."

(4) It is proved by the *Lex Julia* relating to violence, that those shall not be permitted to give testimony against a defendant who has been freed by him or by his father; or who have not yet arrived at puberty; or anyone who has been condemned for a public crime, and has not been restored to his former condition, or who is in chains, or in prison, or has hired himself out to fight with wild beasts; or any woman who openly prostitutes herself, or has already done so; or anyone who has been sentenced or convicted of having received money for giving or withholding testimony. For, indeed, certain persons should not be allowed to testify on account of the reverence due to their position; others on account of the unreliability of their judgment; and still others because of the notorious infamy of their lives.

(5) Witnesses should not hastily be summoned from a long distance, and still less should soldiers be called away from their standards or their stations for the purpose of giving evidence; and this the Divine Hadrian stated in a Rescript.

The Divine Brothers also stated in a Rescript that: "With reference to the summoning of witnesses, the judge should carefully ascertain what is the custom in the province over which he presides; for if it should be proved that witnesses are frequently summoned to another city for the purpose of testifying, there is no doubt that those can be summoned whom the judge may decide are necessary to be called in the case."

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

It is provided by the *Lex Julia* having reference to public prosecutions, that a man, if unwilling, cannot be compelled to give testimony in court against his father-in-law, his son-in-law, his step-father, his stepson, his cousin, whether male or female, his cousin's child, or any of those who are related in a nearer degree. Nor can the freedman of anyone, or of his children, his parents, his or her wife or husband, be permitted to testify against him, if he is accused.

The same rule applies to a patron, and a patroness, for neither of them can be compelled to give testimony against their freedman, nor a freedman against his patron.

5. *Gaius, On the Lex Julia et Papia, Book IV.*

In the laws where the exception is made that neither a son-in-law nor a father-in-law, if unwilling, can be compelled to give testimony; it is held that the betrothed of the daughter is included in the term "son-in-law," and also that the father of the betrothed woman is included in the term "father-in-law."

6. *Licinius Rufinus, Rules, Book II.*

Those witnesses are not considered to be competent who can be commanded to testify.

7. *Modestinus, Rules, Book III.*

The evidence of a slave must be believed when there is no other way of ascertaining the truth.

8. *Scaevola, Rules, Book IV.*

Old men, invalids, soldiers, magistrates who are absent on business for the State, and such persons as are forbidden to appear, cannot be compelled to testify, if unwilling to do so.

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

A father is not a competent witness for his son, nor a son for his father.

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

No one is held to be a competent witness in his own case.

11. *The Same, Decrees, Book XXXIII.*

A party who has not been summoned as a witness is allowed to testify for the purpose of proving a transaction.

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

Where the number of witnesses is not specified by law, two are sufficient, for the term "several" is embraced in the number two.

13. *Papinianus, On Adultery, Book I.*

I know that the question has arisen whether those who have been convicted of calumny in public trials can testify in a public prosecution. They are not, however, forbidden to do so by the *Lex Remmia;* and the *Lex Julia* relating to violence, extortion, and peculation, does not prohibit such persons from giving evidence, nevertheless, what is omitted by the laws should not be omitted by the conscientious judge, whose duty it is to carefully weigh the credibility of the witness and determine whether he gives his testimony as a man of integrity should do.

14. *The Same, On Adultery.*

I am aware that it has also been discussed whether one who has been convicted of adultery can give evidence for the purpose of proving a will; and it is clear that he is justly forbidden from testifying in court. Therefore I think that a will which must be proved by a witness of this kind is not valid, either by the Civil Law, or by the Praetorian Law which follows it; so that neither an estate can be entered upon, nor the possession of the property of the deceased be granted on such testimony.

15. *Paulus, Sentences, Book II.*

A person who has been convicted of extortion cannot testify in the case of a will, or in a judicial proceeding.

(1) For an hermaphrodite to be qualified to testify in a case of a will it must be proved which sex is predominant.

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

Those who testify falsely, or give conflicting evidence, or betray both sides, can be punished by competent judges.

17. *Ulpianus, Rules.*

A father, and a son who is under his control, and also two brothers, subject to the authority of the same father, can be witnesses in the case of a will, or in the same transaction; since there is nothing to prevent several witnesses belonging to one household from testifying in a matter in which another party is interested.

18. *Paulus, On Adultery, Book II.*

Since the *Lex Julia de Adulteriis* prohibits a woman who has been convicted of adultery from testifying, it follows that even women have the right to give evidence in court.

19. *Ulpianus, On the Office of Proconsul, Book VIII.*

Farmers of the revenue cannot be compelled to testify; nor can anyone who has not absented himself to avoid giving testimony; nor anyone who may be employed in furnishing provisions to the army.

(1) Nor can wards be required to testify.

20. *Venuleius, On Public Prosecutions, Book II*.

An accuser should not call as a witness one who has been convicted of a crime, or who is under twenty years of age.

21. *Arcadius, also called Charisius, On Witnesses*.

A person who has been convicted of having written a libellous poem is incompetent to testify.

(1) It is also undeniable that, where the case demands it, not only private individuals, but even magistrates, if they are present, can be forced to testify. The Senate also decreed that a Prætor must also give his evidence in a case of adultery.

(2) Where the circumstances are such that we are compelled to accept a gladiator, or some person of this kind as a witness, his evidence is not to be believed, unless he is subjected to torture.

(3) When all the witnesses are of equal integrity and reputation, and the nature of the transaction, as well as the opinion of the court, coincides with their assertions, all their testimony should be accepted. Where, however, some of them make statements different from those made by the others, even the smaller number of them may be believed.

Moreover, if the evidence corresponds with the nature of the transaction, and no suspicion of either hostility or favor exists, the judge must confirm the impressions of his mind by the arguments and testimony which are most applicable to the case, and which he ascertains to be nearest to the truth. For it is not necessary to take into consideration the number of the witnesses, but rather their sincerity, as well as such evidence as appears to be more illuminated with the light of truth.

22. *Venuleius, On the Office of Proconsul, Book II*.

The magistrates of every district should be careful to afford facilities to all who wish to make wills, and themselves be witnesses and sign wills with others, by means of which matters may be more easily explained, and the proof of facts be secure.

23. *The Same, On Public Prosecutions, Book I*.

A witness cannot be produced against a defendant who has already given evidence against him.

24. *Paulus, Sentences, Book V*.

It has been decided that witnesses whom an accuser brings from his own house shall not be examined.

25. *Arcadius, also called Charisius, On Witnesses*.

It is provided by the Imperial Mandates that Governors shall see that patrons do not testify in cases which they are conducting; and this rule must also be observed in the case of those who are transacting the business of others.

TITLE VI.

CONCERNING IGNORANCE OF LAW AND FACT.

1. *Paulus, On the Edict, Book XLIV*. Ignorance is either of fact or of law.

(1) For where anyone is not aware that he to the possession of whose property he is entitled is dead, time does not run against him. Where, indeed, he is aware that his relative is dead, but he does not know that his estate belongs to him on account of his being the next of kin, or, where he is aware that he has been appointed an heir, but does not know that the Prætor grants the possession of the property of a deceased person to those who have been appointed his heirs; time will run against him because he is mistaken with respect to the law. The same rule

applies where the brother of the deceased thinks that his mother has the preference.

(2) If anyone does not know that he is related to the deceased, sometimes he is mistaken concerning the law, and sometimes with reference to the fact; for if he is aware that he is free, and who his parents were, but does not know that he is entitled to the rights of relationship, he is mistaken as to the law. Where anyone who is a foundling does not know who his parents are, and serves another as a slave, thinking that he himself is a slave, he is mistaken rather as to the fact than as to the law.

(3) Moreover, where anyone knows that another is entitled to the possession of the property of an estate, but does not know that the time during which he should have taken possession of the same has elapsed, he is mistaken as to the fact. The same rule applies where he thinks that he has obtained possession of the property. Where, however, he knows that he has not claimed the estate, and that he has allowed the time to elapse, but is ignorant that he is entitled to the possession of the property on the ground of succession, time will run against him because he is mistaken with respect to the law.

(4) We hold the same where a man is appointed heir to an entire estate, but does not think that he has a right to demand possession of the same before the will is opened; but if he is ignorant that there is a will, he will be mistaken with reference to the fact.

2. *Neratius, Parchments, Book V*.

Error in law should not, in every instance, be considered to correspond with ignorance of the fact; since the law can, and should be definitely settled, but the interpretation of the fact very frequently deceives even the wisest men.

3. *Pomponius, On Sabinus, Book III*.

There is a great deal of difference whether anyone is not informed regarding the case and acts of another, or whether he is ignorant of the law which affects himself.

(1) Cassius states that Sabinus holds that it should be understood that ignorance, in this instance, does not refer to a person of abandoned character, or to one who, through negligence, thinks himself secure.

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

It is denied that ignorance of the law is of any advantage in usucaption, but it is established that ignorance of fact is a benefit.

5. *Terentius Clemens, On the Lex Julia et Papia, Book II*.

It seems to be most unjust that knowledge should injure another rather than its possessor, or that the ignorance of one person should profit another.

6. *Ulpianus, On the Lex Julia et Papia, Book XVIII*.

Neither gross ignorance of the facts should be tolerated, nor scrupulous inquiry be exacted, but such knowledge should be demanded that neither excessive negligence, too great unconcern, nor the inquisitiveness that characterizes informers may be exhibited.

7. *Papinianus, Questions, Book XIX*.

Ignorance of the law is not advantageous to those who desire to acquire it, but it does not injure those who demand their rights.

8. *The Same, Definitions, Book I*.

An error of fact does not, indeed, prejudice the rights of men where they seek to obtain property, or to avoid losing it; and ignorance of the law is no advantage, even to women, when they attempt to acquire it. A mistake in law, however, does not injure any person in an attempt to avoid the loss of property. .

9. *Paulus, On Ignorance of Law and Fact*.

The ordinary rule is, that ignorance of law injures anyone, but ignorance of fact does not. Therefore, let us examine to what instances this rule is applicable, for it may be stated, in the first place, that minors under twenty-five years of age are permitted to be ignorant of the law; and this also is held with respect to women in certain cases, on account of the weakness of the sex; hence, so long as no crime has been committed, but only ignorance of the law is involved, their rights are not prejudiced.

On the same principle, if a minor under the age of twenty-five lends money to a son under his father's control, relief is granted him, just as if he had not lent the money to a son subject to paternal authority.

(1) Where a son under paternal control, who is a soldier, is appointed heir by a comrade-in-arms, and does not know that he can enter upon the estate without the permission of his father, he can ignore the law in accordance with the Imperial Constitution; and therefore the time prescribed for the acceptance of the estate does not run against him.

(2) Ignorance of the fact, however, does not injure anyone unless he should be guilty of gross negligence; for example, what if every one in the town knew what he alone does not? Labeo very properly says that neither the knowledge of the most inquisitive, or the most negligent man, should be understood to be meant, but that of him who can obtain it by diligent inquiry.

(3) Labeo, however, thinks that ignorance of the law ought not to be considered excusable unless the party should not have access to a magistrate, or is not intelligent enough to easily ascertain that ignorance of the law is a detriment to him, which is very rarely the case.

(4) Where anyone does not know that the vendor is the owner of the property sold, more attention should be paid to the transaction itself than to the opinion of the purchaser; and therefore, although he may believe that he bought the property from someone who was not its owner, still, if it is delivered to him by the owner, it will belong to him.

(5) Where a party who is ignorant of the law does not avail himself of the *Lex Falcidia*, a Rescript of the Divine Pius says that his rights will be prejudiced. Moreover, the Emperors Severus and Antoninus stated the following in a Rescript, namely: "Where, in discharging a trust, money is paid which is not due, it cannot be recovered, unless it was paid by mistake. Wherefore, the heirs of Cargilianus, when they paid over money left by will for the purpose of building an aqueduct for the Republic of Cirta, not only did not require the bonds which are usually executed to compel the repayment by municipalities of any excess which they might receive above what was permitted by the *Lex Falcidia;* but they even stipulated that the said sum of money should not be applied to any other purpose, and knowingly and deliberately suffered the said money to be used for the construction of the aqueduct, hence they had no right to demand that anything should be returned to them by the Republic of Cirta, on the ground that they paid more than was due; since there would be injustice on both sides, for the money to be recovered which had been given for the purpose of building an aqueduct, and for the Republic to be compelled to pay out of the funds belonging to it for a work which entirely represented the glory derived from the liberality of another.

"If, however, the heirs thought that the claim for the recovery of said money was well founded, for the reason that they failed, through lack of information, to profit by the provisions of the *Lex Falcidia*, they should know that ignorance of fact would be of advantage to them, but ignorance of law would not; and that relief is granted, not to fools, but to those who are honestly mistaken with reference to the facts." Although municipalities are mentioned in this Rescript, still, the same rule should be observed with reference to all kinds of persons. And while, in the case stated, mention is made of money left for the purpose of constructing an aqueduct, in this instance alone it must be held that an action for its recovery will not lie, for the beginning of this constitution is of general application, as it shows that if, through mistake, the trust was not discharged, any money paid which is not due cannot be recovered.

Moreover, that section is also of general application which sets forth that parties are not

entitled to recover who, through ignorance of the law, did not avail themselves of the benefit of the *Lex Falcidia;* and, according to this, it can be stated that if money which was left in trust and had been paid, had not been left for some specified purpose, even though it had not been expended but remained in the hands of the person to whom it was paid, an action to recover it will not lie.

10. *Papinianus, Opinions, Book VI.*

Youths who have not arrived at puberty and act without the authority of their guardians are not considered to know anything.

THE DIGEST OR PANDECTS.

BOOK XXIII.

TITLE I.

CONCERNING BETROTHALS.

1. *Florentinus, Institutes, Book III.*

A betrothal is the mention and promise of a marriage to be celebrated hereafter.

2. *Ulpianus, On Betrothals.*

"Betrothal" is derived from the word "promise," for it is customary among the ancients to stipulate and promise wives to one another.

3. *Florentinus, Institutes, Book III.*

From this source the term betrothed, applicable to both sexes, is derived.

4. *Ulpianus, On Sabinus, Book XXXV.*

Mere consent is sufficient to contract a betrothal. (1) It is settled that parties who are absent can be betrothed, and this takes place every day.

5. *Pomponius, On Sabinus, Book XVI.*

Provided that the absent parties are aware of the betrothal, or that they subsequently ratify it.

6. *Ulpianus, On Sabinus, Book XXXVI.*

If the guardians of a girl send a notice of the termination of a betrothal, I do not think that this will be sufficient to destroy the expectation of marriage, any more than it would be sufficient, of itself, to establish it; unless all this is done with the consent of the girl.

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

In case of a betrothal, it makes no difference whether witnesses are present, or whether the party makes a verbal promise.

(1) In betrothals, the acquiescence of those persons who must consent to the marriage is required. Julianus says that the father is always understood to consent, unless it is clear that he refuses to do so.

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

It is perfectly evident that insanity is an impediment to betrothal, but if it occurs afterwards, it will not annul it.

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

Inquiry is made by Julianus whether a marriage contracted before the twelfth year takes the place of a betrothal. I have always approved the opinion of Labeo, who held that if a betrothal had preceded a marriage, it would still continue to exist, even after the girl had begun to live with her husband; but if it had not been contracted previously, and the girl had been brought to the house of her husband, the betrothal could not be considered to have been made. Papinianus also concurs in this opinion.

10. *The Same, Disputations, Book III.*

Where a daughter is under the control of her father, he can send a notice to her affianced, annulling the betrothal; but if she has been emancipated, he can neither do this, nor bring an action for property given by way of dowry, because the daughter herself, by marriage, constitutes the dowry, and extinguishes the right to recover the same which results from the fact that the marriage has not been consummated; unless it may suggest that the father gave the dowry in behalf of his emancipated daughter, under the condition that if he should not

consent to the marriage, and, indeed, whether the marriage was contracted or not, he could recover what he gave; he will then be entitled to a personal action for its recovery.

11. *Julianus, Digest, Book XVI.*

A betrothal, like a marriage, is. made with the consent of the contracting parties, and therefore, as in the case of marriage, a son under paternal control must agree to it.

12. *Ulpianus, On Betrothals*.

A girl who evidently does not resist the will of her father is understood to give her consent. A daughter is only permitted to refuse to consent to her father's wishes, where he selects someone for her husband who is unworthy on account of his habits or who is of infamous character.

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

Where a son under paternal control refuses his consent, a betrothal cannot take place, so far as he is concerned.

14. *Modestinus, Differences, Book IV*.

In contracting a betrothal, there is no limit to the age of the parties, as is the case in marriage. Wherefore, a betrothal can be made at a very early age, provided what is being done is understood by both persons, that is to say, where they are not under seven years of age.

15. *The Same, Selected Cases*.

A guardian cannot himself marry his own ward, nor can he unite her in marriage with his son. It must be noted, however, that although we are treating of marriage, this rule also applies to betrothals.

16. *Ulpianus, On the Lex Julia et Papia, Book III*.

A Rescript of the Emperors Antoninus and Commodus which forbade senators to marry certain persons, did not mention anything with reference to betrothals; still, it is properly held that betrothals made under such conditions are void by operation of law; in order to supply what is lacking in the Rescript.

17. *Gaius, On the Lex Julia et Papia, Book I.*

Just and necessary reasons often exist for protracting a betrothal, for one, two, three, or four years, and even for a longer time; as, for instance, the illness of either of the parties, the death of their parents, accusations of capital crimes, or long journeys made through necessity.

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

It makes little difference, in the contracting of betrothals, whether this is done by the parties in the presence of one another, or by means of an intermediary, or in writing, or in some other way; and very frequently the conditions of marriages are settled by the agency of others than those chiefly interested.

TITLE II.

CONCERNING THE CEREMONY OF MARRIAGE.

1. *Modestinus, Rules, Book I.*

Marriage is the union of a man and a woman, forming an association during their entire lives, and involving the common enjoyment of divine and human privileges.

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

Marriage cannot take place unless all the parties consent, that is to say those who are united, as well as those under whose authority they are.

3. *The Same, On Sabinus, Book I.*

If I have a grandson derived from one of my sons, and a granddaughter derived from another, under my control, Pomponius says that my consent will be sufficient to enable marriage to be contracted between them; which is correct.

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

Where a girl under twelve years of age is married, she will not be a lawful wife until she has reached that age while living with her husband.

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

It is settled that a woman can be married to a man who is absent either by means of a letter, or through a messenger, if she is afterwards conducted to his house. If she remains absent, however, she cannot be married, either by letter or by messenger; for she must be brought, not to her own house, but to that of her husband, since this is, as it were, the domicile of matrimony.

6. *Ulpianus, On Sabinus, Book XXXV*.

Finally Cinna says that, where a man marries a woman who is absent and then, returning from a banquet on the other side of the Tiber, loses his life; it is held that his wife should mourn for him.

7. *Paulus, On the Lex Falcidia*.

Therefore, it could happen in this instance that a virgin might be entitled to her dowry and an action to recover the same.

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

A freedman cannot marry either his mother or his sister, who has been liberated from slavery, because the rule forbidding this is founded upon good morals and not upon law.

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

Where a grandfather is insane and his grandson wishes to marry, the consent of his father will be absolutely necessary; but if his father should be insane, the consent of his grandfather will be sufficient, if the latter is of sound mind.

(1) A son can marry if his father is in the hands of the enemy, and does not return within three years.

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

It is doubtful what course to pursue where the father is absent, and it is not known where he is, or even whether he is still alive. If three years should elapse from the time when the father's whereabouts or whether he was living began to be unknown, his children of both sexes will not be prevented from legally contracting marriage.

11. *Julianus, Digest, Book LXIII*.

Where the child of a man who is in captivity or who is absent marries before the three years of captivity or absence have elapsed, I think that the marriage will be legally contracted; provided that either the son or the daughter should marry a person whose condition will certainly not be offensive to the father.

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

If I have a wife, and, after having been repudiated by me, she marries Seius, whom I subsequently adopt, the marriage is not incestuous.

(1) A legal marriage cannot be contracted between me and a woman betrothed to my father, although she cannot properly be said to be my stepmother.

(2) On the other hand, a woman who is betrothed to me cannot marry my father, although she cannot properly be called his daughter-in-law.

(3) If my wife, after having been divorced, should marry another man, and have a daughter by him, Julianus thinks that the latter is not my stepdaughter, still, I must not marry her.

(4) I can marry the daughter of my adopted sister, for she is not my relative, as no one becomes an uncle by adoption. Those relationships are only formed by adoption which are legitimate, that is to say, which possess the rights of agnation. On the same principle, I can marry the sister of my adoptive father, if she was not born of the same mother as he.

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

Where a patroness is so degraded that she even thinks that marriage with her freedman is honorable, it should not be prohibited by a judge to whom application is made to prevent it.

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

Where an adopted son is emancipated, he cannot marry the widow of his adoptive father, because she occupies the position of a stepmother.

(1) The same rule applies where anyone adopts a son, for he cannot marry his widow, as she occupies the position of a daughter-in-law even after the emancipation of his son.

(2) Servile relationships must also be taken into consideration under this head; hence a slave who is manumitted cannot marry his mother, and the same rule applies to the case of a sister and her daughter. On the other hand, it must be said that a father cannot marry his daughter, if both of them have been manumitted, even though it is doubtful whether the alleged father is her parent. Wherefore, a natural father cannot legally marry his daughter born out of wedlock, since, in contracting marriage, natural law and modesty must be considered, for it is contrary to modesty for a man to marry his own daughter.

(3) The same rule that is applicable to servile blood-relationship must also be observed in cases of servile affinity; as, for example, I cannot marry a woman with whom my father lived in concubinage, for she occupies, to some extent, the position of a stepmother; and, on the other hand, a father cannot marry a woman who lived in concubinage with his son, because she occupies, as it were, the position of a daughter-in-law. Neither can anyone marry the mother of a woman with whom he lived in slavery, since she is, so to speak, his mother-in-law; and as servile cognation is recognized, why should not affinity be governed by the same rule? Where any doubt exists, it is always better and more decent to avoid marriages of this kind.

(4) Now let us see what is the meaning of the terms stepmother, stepdaughter, mother-in-law, and daughter-in-law, in order that we may ascertain whom it is illegal to marry. Certain authorities understand a stepmother to be the wife of the father, a daughter-in-law the wife of the son, and a stepdaughter the child of the wife by a former husband.

So far, however, as the present subject is concerned, it is more correct to hold that a man cannot marry the wife of his grandfather, or his great-grandmother, therefore there are two, or even several, stepmothers whom he cannot marry. This is not to be wondered at, for an adopted son cannot marry the widow of his natural, or adoptive father. Where his father has had several wives, he cannot marry any of them. Therefore the term "mother-in-law" not only applies to the mother of my wife, but also to her grandmother, and great-grandmother, and I cannot marry either of them.

The term "daughter-in-law" is not only applicable to the wife of a son, but also to the wife of a grandson, and great-grandson, although certain authorities designate these as grand-daughters-in-law.

A stepdaughter is understood to be not only the daughter of my wife, but also to refer to her granddaughter and great-granddaughter; and I can marry none of them. Augustus decided that I cannot marry a woman whose mother has been betrothed to me, for she has occupied the position of my mother-in-law.

15. *Papinianus, Opinions, Book IV*.

A man cannot marry the former wife of his stepson, nor can a woman marry a man who was formerly the husband of her stepdaughter.

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

It is provided by a Rescript of the Divine Marcus that, if the daughter of a senator should marry a freedman, the marriage will be void; and this was followed by a Decree of the Senate to the same effect.

(1) A son should consent to the marriage of the grandson, but where the granddaughter is to be married, the consent and authority of the grandfather will be sufficient.

(2) Insanity prevents the contraction of marriage, because consent is necessary; but it does not annul it after it has been legally contracted.

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

Where the relationship of brother and sister has been acquired by adoption, it will be an impediment to their marriage while the adoption lasts; therefore I can marry a girl whom my father adopted and afterwards emancipated. We can also be united in matrimony if I have been emancipated, and my father has retained her under his control.

(1) Hence, a man wishing to adopt his son-in-law was advised to emancipate his daughter; and, in like manner, one who wishes to adopt his daughter-in-law is advised to emancipate his son.

(2) We also forbid anyone to marry his paternal or maternal aunt, or his paternal or maternal great-aunt; although the former are related to him in the fourth degree. We also forbid a man to marry his paternal aunt and great-aunt even though they are connected with us by adoption.

18. *Julianus, Digest, Book XVI*.

Marriage contracted between these persons is not legal, unless the relatives consent to it.

19. *Marcianus, Institutes, Book XVI*.

In the Thirty-fifth Section of the *Lex Julia*, persons who wrongfully prevent their children, who are subject to their authority, to marry, or who refuse to endow them, are compelled by the proconsuls or governors of provinces, under a Constitution of the Divine Severus and Antoninus, to marry or endow their said children. They are also held to prevent their marriage where they do not seek to promote it.

20. *Paulus, On the Rescript of the Divine Severus and Commodus*.

It must be remembered that it is not one of the functions of a curator to see that his ward is married, or not; because his duties only relate to the transaction of business. This Severus and Antoninus stated in a Rescript in the following words: "It is the duty of a curator to manage the affairs of his ward, but the ward can marry, or not, as she pleases."

21. *Terentius Clemens, On the Lex Julia et Papia, Book III*. A son under paternal control cannot be forced to marry.

22. *Celsus, Digest, Book XV*.

Where a son, being compelled by his father, marries a woman whom he would not have married if he had been left to the exercise of his own free will, the marriage will, nevertheless, legally be contracted; because it was not solemnized against the consent of the parties, and the son is held to have preferred to take this course.

23. *The Same, Digest, Book XXX*.

It is provided by the *Lex Papia* that all freeborn men, except senators and their children, can marry freedwomen.

24. *Modestinus, Rules, Book I.*

Where a man lives with a free woman, it is not considered concubinage but genuine matrimony, if she does not acquire gain by means of her body.

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

A son who has been emancipated can marry without the consent of his father, and any son that he may have will be his heir.

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

Modestinus says that women accused of adultery cannot marry during the lifetime of their husbands, even before they have been convicted.

27. *Ulpianus, On the Lex Julia et Papia, Book III.*

Where a man of senatorial rank has as a wife a woman who has been manumitted, although, in the meantime, she may not legally be his wife, still, she occupies such a position that if he should lose his rank she will become his wife.

28. *Marcianus, Institutes, Book X.*

A patron cannot marry his freedwoman against her consent.

29. *Ulpianus, On the Lex Julia et Papia, Book III.*

It is stated that Ateius Capito, during his consulate, issued a decree of this kind. It must be observed, however, that this rule does not apply where a patron emancipated a female slave in order to marry her.

30. *Gaius, On the Lex Julia et Papia, Book II.* A pretended marriage is of no force or effect.

31. *Ulpianus, On the Lex Julia et Papia, Book VI.*

Where a senator is permitted to marry a freedwoman by the consent of the Emperor, she will be his lawful wife.

32. *Marcellus, On the Lex Julia et Papia, Book I.*

It should be noted that where a freedman gives himself to be adopted by a man who is born free, although he obtains the rights of a freeborn person in the adoptive family, being a freedman, still, he will not be permitted to contract marriage with the daughter of a senator.

33. *The Same, On the Lex Julia et Papia, Book III.*

Many authorities hold that when a woman, after separation, returns to her husband, this is the same marriage. I assent to this opinion, provided they are reconciled before a long time has elapsed, and neither of them has married anyone in the meantime, and especially if the husband has not returned the dowry.

34. *Papinianus, Opinions, Book IV.*

Where a general commission has been given to a man by someone to seek a husband for his daughter, this is not sufficient ground for the conclusion of a marriage. Therefore it is necessary that the person selected should be introduced to the father, and that he should consent to the marriage, in order for it to be legally contracted.

(1) Where a man has accused his wife of adultery in accordance with his right as a husband, he is not forbidden, after the annulment of the marriage, to marry again. If, however, he does not accuse his wife as her husband, it will be held that the marriage which has been contracted will remain valid.

(2) Marriage can be contracted between stepchildren, even though they have a common brother, the issue of the new marriage of their parents.

(3) Where the daughter of a senator marries a freedman, this unfortunate act of her father does

not render her a wife, for children should not be deprived of their rank on account of an offence of their parent.

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

A son under paternal control, who is a soldier, cannot contract matrimony without the consent of his father.

36. *Paulus, Questions, Book V*.

A guardian or a curator cannot marry a grown woman who is committed to his care, unless she has been betrothed to, or intended for him by her father, or where the marriage takes place in accordance with some condition mentioned in his will.

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

The freedman of a curator must be prevented from marrying the ward of the latter.

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

While anyone is discharging the duties of an office in a province, he cannot marry a woman who has either been born or resides therein, although he is not forbidden to betroth himself to her; but if, after his term of office has expired, the woman refuses to marry him, she can do so, after having returned any nuptial gifts which she may have received.

(1) Where anyone discharges the duties of an office, he can marry a woman to whom he has previously been betrothed, if the dowry given is not about to be confiscated.

(2) He who exercises a public office in a province is not prevented from marrying his daughters there, and bestowing dowries upon them.

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

I cannot marry the granddaughter of my sister, because I stand in the relation of a parent to her.

(1) If anyone should take as a wife a woman whom he is forbidden by good morals to marry, he is said to commit incest.

40. *Pomponius, On Plautius, Book IV*.

Aristo gave it as his opinion that a man could not marry the daughter of his stepdaughter, any more than he could his stepdaughter herself.

41. *Marcellus, Digest, Book XXVI*.

It is understood that disgrace attaches to those women who live unchastely, and earn money by prostitution, even if they do not do so openly.

(1) If a woman should live in concubinage with someone besides her patron, I say that she does not possess the virtue of the mother of a family.

42. *Modestinus, On the Rite of Marriage*.

In unions of the sexes, it should always be considered not only what is legal, but also what is decent.

(1) If the daughter, granddaughter, or great-granddaughter of a senator should marry a freedman, or a man who practices the profession of an actor, or whose father or mother did so, the marriage will be void.

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

We hold that a woman openly practices prostitution, not only where she does so in a house of ill-fame, but also if she is accustomed to do this in taverns, or in other places where she manifests no regard for her modesty.

(1) We understand the word "openly" to mean indiscriminately, that is to say, without choice, and not if she commits adultery or fornication, but where she sustains the role of a prostitute.

(2) Moreover, where a woman, having accepted money, has intercourse with only one or two persons, she is not considered to have openly prostituted herself.

(3) Octavenus, however, says very properly that where a woman publicly prostitutes herself without doing so for money, she should be classed as a harlot.

(4) The law brands with infamy not only a woman who practices prostitution, but also one who has formerly done so, even though she has ceased to act in this manner; for the disgrace is not removed even if the practice is subsequently discontinued.

(5) A woman is not to be excused who leads a vicious life under the pretext of poverty.

(6) The occupation of a pander is not less disgraceful than the practice of prostitution.

(7) We designate those women as procuresses who prostitute other women for money.

(8) We understand the term "procuress" to mean a woman who lives this kind of a life on account of another.

(9) Where one woman conducts a tavern, and keeps others in it who prostitute themselves, as many are accustomed to do under the pretext of employing women for the service of the house; it must be said that they are included in the class of procuresses.

(10) The Senate decreed that it was not proper for a senator to marry or keep a woman who had been convicted of a criminal offence, the accusation for which could be made by any of the people; unless he was prohibited by law from bringing such an accusation in court.

(11) Where a woman has been publicly convicted of having made a false accusation, or prevarication, she is not held to have been convicted of a criminal offence.

(12) Where a woman is caught in adultery, she is considered to have been convicted of a criminal offence. Hence if she is proved to have been guilty of adultery, she will be branded with infamy, not only because she was caught *flagrante delicto*, but also because she was convicted of a criminal offence. If, however, she was not caught, but was, nevertheless, found guilty, she becomes infamous because she was convicted of a criminal offence; and, indeed, if she was caught but was not convicted, she would still be infamous. I think that even if she should be acquitted after having been caught, she will still remain infamous, because it is certain that she was taken in adultery, and the law renders the act infamous and does not make this dependent upon the judicial decision.

(13) It is not mentioned here, as in the *Lex Julia* on adultery, by whom or where the woman must be caught; hence she is considered infamous whether she was caught by her husband or by anyone else. She will also be infamous according to the terms of the law, even if she was not caught in the house of her husband or her father.

44. *Paulus, On the Lex Julia et Papia, Book I.*

It is provided by the *Lex Julia* that: "A senator, or his son, or his grandson, or his great-grandson by his son, or grandson, shall not knowingly or with malicious intent become betrothed to, or marry a freedwoman, or a woman whose father or mother practices, or has practiced the profession of an actor. Nor shall the daughter of a senator, or a granddaughter by his son, or a great-granddaughter by his grandson marry a freedman, or a man whose father or mother practices, or has practiced the profession of an actor, whether they do so knowingly, or with malicious intent. Nor can any one of these parties knowingly, or with malicious intent become betrothed to, or marry the daughter of a senator."

(1) Under this head a senator is forbidden to marry a freedwoman whose father or mother has, at any time, exercised the profession of an actor. A freedman is also forbidden to marry the daughter of a senator.

(2) If the grandfather or grandmother of the woman belonged to the theatrical profession, this will not be an obstacle to the marriage.

(3) No distinction is made whether the father has the daughter under his control or not. But Octavenus says that it must be understood that the father is legitimate, as well as the mother, even if the child is illegitimate.

(4) Again, it makes no difference whether the father is a natural or an adoptive one.

(5) Would it be an obstacle if the father had belonged to the theatrical profession before he made the adoption, or if the natural father had been connected with this profession before his daughter was born? Where a man of this degraded rank adopts a child, and afterwards emancipates her, can he not marry her, just as would be the case where a natural father dies? Pomponius very properly thinks that, in this instance, the opinion is contrary to the meaning of the law, and that children of this kind cannot be classed with the others.

(6) If the father or mother of a freeborn woman, after the marriage of the latter, should begin to exercise the profession of the stage, it would be most unjust for the daughter to be repudiated by her husband, as the marriage was honorably contracted, and children may already have been born.

(7) It is evident that if the woman herself becomes a member of the theatrical profession, she should be repudiated by her husband.

(8) Senators cannot marry women whom other freeborn men are forbidden to take as wives.

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

In that law which provides that where a freedwoman has been married to her patron, after separation from him she cannot marry another without his consent; we understand the patron to be one who has bought a female slave under the condition of manumitting her (as is stated in the Rescript of our Emperor and his father), because, after having been manumitted, she becomes the freedwoman of the purchaser.

(1) This rule does not apply to anyone who has sworn that he is the patron of the woman.

(2) Nor should he be considered her patron who did not purchase the woman with his own money.

(3) It is clear that we must not doubt that a son under paternal control, who is a soldier, acquires this right if he manumits a female slave by means of his *castrense peculium;* for he becomes her patron in accordance with the Imperial Constitutions, and this privilege does not belong to his father.

(4) This section of the law has reference only to a freedwoman who is married, and does not apply to one who is betrothed; hence, if a freedwoman, who has been betrothed, notifies her patron of her repudiation of the contract, she can contract matrimony with another, even if her patron should be unwilling.

(5) The law says in the next place: "If her patron should be unwilling," and we should understand the term "unwilling" to refer to a party who consents to a divorce, and therefore she who is divorced from an insane husband, is not exempt from the consequences of this law; nor where she does so while the latter is ignorant of the fact, for her patron is more properly said to be unwilling than one who dissents.

(6) Where a patron is captured by enemies, I apprehend that she can marry just as would be the case if her patron was dead. Those who adopt the opinion of Julianus hold that she could not contract marriage, for he thinks that the marriage of a freedwoman lasts even during the captivity of her patron, on account of the respect which she owes him. It is evident, however, that if her patron should be reduced to any other kind of servitude, the marriage would unquestionably be dissolved.

46. *Gaius, On the Lex Julia et Papia, Book VIII*.

Can it be doubted whether this law will apply where a patron marries a freedwoman in whom another party jointly has rights? Javolenus denies that it does apply, because she is not properly held to be the freedwoman of one man who also is that of another. On the contrary, others hold that it cannot be denied that she is the freedwoman of one man, because she is also the freedwoman of another; and this opinion the majority of jurists have approved as correct.

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

The daughter of a senator who has lived in prostitution, or has exercised the calling of an actress, or has been convicted of a criminal offence, can marry a freedman with impunity; for she who has been guilty of such depravity is no longer worthy of honor.

48. *Terentius Clemens, On the Lex Julia et Papia, Book VIII*. The same legal rights are accorded to the son of a patron, in the marriage of a freedwoman belonging to his father, as are granted to the patron himself. This rule applies where the son of one patron, during the lifetime of another, marries the freedwoman of both.

(1) It is settled that where a patron marries his freedwoman who has disgraced herself, he will not be entitled to the advantages conferred by this law, because he married her in violation of its provisions.

(2) Where one son marries a freedwoman who has been allotted by will to another, the former will not be entitled to the same rights as a patron. And, in fact, he will have no control over her, because the Senate transferred all the rights belonging to a patron to him for whom his father intended her.

49. *Marcellus, On the Lex Julia et Papia, Book III.*

It should be observed that men of inferior station can marry women with whom others of higher rank are forbidden by law to contract matrimony, on account of their superior dignity. On the other hand, men of exalted rank cannot take as wives women whom it is not lawful for those who are of inferior station to marry.

50. *The Same, On the Lex Julia et Papia, Book III.*

It is said to have been recently decided that where a man marries his freedwoman whom he manumitted in compliance with the terms of a trust, she can contract matrimony with another without his consent; and I think this is correct, because he should not enjoy the privilege of a patron who was obliged to manumit the woman and did not do so voluntarily, as he rather gave her the freedom to which she was entitled, than conferred any benefit upon her.

51. *Licinius Rufinus, Rules, Book I.*

When a female slave has been manumitted for the purpose of matrimony, she cannot marry anyone else than the party by whom she was set free, unless her patron renounces the right of marriage with her.

(1) Where, however, a son under paternal control manumits a female slave by order of his father, for the purpose of matrimony, Julianus thinks that she is in the same position as if she had been manumitted by the father, and therefore that he can marry her.

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

Incestuous marriages confer no right of dowry, and therefore the husband can be deprived of everything which he receives, even though it comes under the head of profits.

53. *Gaius, On the Provincial Edict, Book XI.*

Marriage cannot take place between parties who stand in the relationship of parents and children, or in the next degree, or in any more distant degrees, *ad infinitum*.

54. *Scævola, Opinions, Book I.*

It makes no difference whether the relationship is derived from lawful marriage, or not; for a

man is forbidden to marry his illegitimate sister.

55. *Gaius, On the Provincial Edict, Book XL*

It is also considered abominable to marry an adopted daughter, or granddaughter, and this rule of law is of such force that it still remains applicable even where the adoption has been dissolved by emancipation.

(1) I cannot marry the mother of my adoptive father, nor his maternal aunt, nor his granddaughter the issue of his son, as long as I remain in the family. After I have been emancipated, however, there is no doubt that nothing will prevent me from marrying any one of them, because I shall not be considered as related to them after emancipation.

56. *Ulpianus, Disputations, Book III*.

Where a man keeps the daughter of his sister as a concubine, even though she be a freedwoman, he is guilty of incest.

57. *Marcianus, Institutes, Book II*.

Anyone who administers an office in a province cannot consent to the marriage of his son in said province.

(1) Marcianus says in a note, in the Second Book on Adultery by Papinianus, that the Divine Marcus and Lucius, Emperors, stated in a Rescript addressed to Flavia Turtulla, by means of Mensor, a freedman : "We are induced, by the length of time during which you, being ignorant of the law, have lived in matrimony with your uncle, and also because you have been married with the consent of your grandmother, as well as on account of your numerous offspring, to decide, taking all these circumstances into account, that the legal status of your children, the issue of a marriage contracted forty years ago, shall be confirmed, and that they shall, therefore, be considered legitimate."

58. *Marcianus, Rules, Book IV*.

It is stated in a Rescript by the Divine Pius that, if a freedwoman, representing herself to be freeborn, should deceive a senator and marry him, an action should be granted against her, just as in the case of the Prætorian Edict, for the reason that she can derive no advantage from her dowry, as it is void.

59. *Paulus, Concerning the Assignment of Freedmen*.

By the Decree of the Senate, in which it is provided that a guardian cannot either give his ward in marriage to his son, or marry her himself, his grandson also is meant.

60. *The Same, On the Address of the Divine Antoninus and Commodus*.

Where anyone is not actually a guardian, but the responsibilities of guardianship, nevertheless, attach to him, is he included in the terms of the Address; as, for instance, where his female ward is captured by the enemy, or where he withdraws from the guardianship by means of false allegations, so that he still remains subject to the responsibilities of the trust under the Sacred Constitutions?

It must be said that these instances also come under the Decree of the Senate; for it has been established that liability of this kind existed in a case involving three guardianships.

(1) Where, however, anyone is charged with responsibility for the person of another, let us see whether this may not be beyond the scope of the Decree of the Senate; for example, if a magistrate incurs responsibility in case of guardianship, or a party becomes surety for a guardian or a curator; because under such circumstances, these things will not be considered to apply to a third guardianship, and it must be approved in consequence.

(2) But what if an honorary guardian is appointed, as such a guardianship is not included among the three, will this same question arise? Reason indicates the contrary, because it is stated that an honorary guardian must assume the responsibility if he suffers the guardianship

to be improperly administered.

(3) There is no doubt that a party who, after having been appointed guardian, does not attend to the administration of the trust, comes within the scope of the Address, because he is liable under the Sacred Constitutions just as if he had administered it.

(4) But what if the guardian desired to be excused for some reason, and could not produce any proof at the time, so that the investigation of his excuse was deferred; and meanwhile his female ward should grow up, would the Decree of the Senate be applicable to him?

The question is dependent on whether, after the ward had arrived at puberty, and the guardianship was at an end, his excuse could be accepted. For if it was accepted, and he should be discharged, he can marry her with impunity; but if it ought not to be accepted after his trust is terminated, he cannot legally marry her.

Papinianus says in the Fifth Book of Opinions that where the office of a guardian is terminated, his excuse must not be accepted; and therefore he is responsible for the time which has elapsed. This opinion, however, is by no means satisfactory to me, for it is unjust for the guardian not to be excused, or for his marriage to be prevented where his excuse has been accepted, on account of delay which did not take place through fraud, but from necessity.

(5) Although it is provided by the terms of the Address that a guardian cannot marry his ward, it must still be understood that he cannot even be betrothed to her; for she, generally speaking, cannot be betrothed to a person to whom she cannot be married, since she who can be married can be legally betrothed.

(6) But what if the adopted son of a guardian should illegally marry the ward, and afterwards be emancipated? It must be believed that the Senate did not have reference to the adoption of children who had been emancipated, because, after emancipation, the adoptive family is left entirely out of consideration.

(7) The natural children of a guardian, even though they may have been given in adoption, are included in the Decree of the Senate.

(8) But what if a guardian, after having been appointed, should appeal, and his heir is subsequently defeated, must he be responsible during the time which has elapsed? And if the heir is the son of the guardian, and should lose his case, will he come within the scope of the Address? It follows that he would, since he has an account to render.

61. *Papinianus, Questions, Book LII.*

Where a dowry is confiscated on account of an unlawful marriage, the husband must pay all that he would be compelled to do, in an action on dowry, with the exception of the necessary expenses which usually diminish the dowry by operation of law.

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

Although the father was willing that the marriage of their daughter should be left entirely to the judgment of the mother, she will not be permitted to select the guardian; for the father is not presumed to have the appointment of a guardian in mind; since he especially deferred to the wishes of the mother in order to prevent her giving the daughter in marriage.

(1) There is impropriety in a woman marrying the freedman of her husband and patron.

(2) Where a guardian renders his accounts to a curator, he cannot marry his ward before the time appointed by law; not even if, in the meanwhile, she has become a mother through having contracted another marriage.

63. *The Same, Definitions, Book I.*

Where the prefect of a cohort or of cavalry, or a tribune, marries a woman of the province in which he is stationed, this being prohibited by law, the marriage will be void. This case is

similar to that of a ward, as the marriage is forbidden on account of the authority exercised. But is there room for doubt that where a virgin marries, she can be deprived of what was left to her by will? As in the case of a ward married to her guardian, the wife can acquire everything that is bequeathed to her; still, any money which has been left by way of dowry must be given up to the heir of the woman.

64. *Callistratus, Questions, Book II*.

The Senate decreed that a freedman, who was also the guardian of his patron's daughter, should be banished because she married him, or his son.

(1) I think that the foreign heir of a guardian should be included in the terms of the Decree of the Senate by which guardians and their sons are forbidden to marry their female wards; since marriages of this kind are prohibited to prevent wards from being cheated by those who are compelled to account to them for the administration of their guardianship.

(2) A guardian is not forbidden to give his daughter in marriage to his ward.

65. *Paulus, Opinions, Book VII*.

Persons who administer public offices in their native provinces are not held to violate the law by marrying in said provinces; and this is also provided by certain Imperial Decrees.

(1) Paulus says in the same place: "I am of the opinion that, even though a marriage is contracted in a province contrary to law, still, after the term of office has expired, if the parties continue to be of the same mind, the marriage will become lawful, and therefore any children born subsequently will be legitimate, as in the case of a legal marriage."

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

Where a guardian or a curator marries his ward before she has reached the age of twenty-six (if she has not been betrothed by her father, or allotted by him to anyone in his will), or if he gives her in marriage to his son; both parties will become infamous on this account, and shall be arbitrarily punished, depending upon the rank of the ward. It makes no difference, in this case, whether the son is his own master, or is under the control of his father.

(1) It is very improper for the freedman of a curator to marry a ward of his patron who is administering the affairs of the curatorship.

67. *Tryphoninus, Disputations, Book IX*.

The son of a guardian is forbidden to marry his ward, while his father is compelled to render an account of the guardianship; whether he does so during the lifetime of the guardian, or after his death. I do not think that it makes any difference whether the son becomes his heir; or whether he rejects the estate of his father; or whether he does not become his heir because he was disinherited; or, having been emancipated, he was passed over in the will; for it might be compelled to surrender property belonging to the guardianship which has been fraudulently given to him by his father.

(1) There is one point with reference to which doubt may arise; for instance, where a grandfather is administering the guardianship

of his granddaughter born to an emancipated son, can he give her in marriage to a grandson by another son, whether he is emancipated or still remains under his control, as his affection for both of them will remove any suspicion of fraud? Although the Decree of the Senate, in its strict interpretation, applies to all kinds of guardians, still, in consideration of the great affection entertained by a grandfather, a marriage of this kind should be permitted.

(2) Where a son under paternal control is the guardian or curator of a girl, I think that there is still more reason that she should not be allowed to marry his father. Should she be allowed to marry his brother, who is under the control of the same father?

(3) Let us see if the son of Titius should marry a girl who was your ward, and you then adopt

Titius, or his son, whether the marriage will be annulled, as is settled in the case of an adopted son-in-law, or whether the adoption will constitute an impediment to the marriage.

The latter is the better opinion, even if the curator, while he is administering his office, should adopt the husband of the girl whose curator he is; for, as soon as the guardianship is terminated, and the girl is married to someone else, I think that, in order to prevent the adoption of her husband, it would be necessary to show that it was contrived to prevent the rendering an account of the guardianship, which the Address of the Divine Marcus included as a cause for the prevention of marriages of this description.

(4) Where a curator is appointed for the property of an unborn child, he will be subject to the prohibition of this Decree of the Senate, for he also must render an account. The time consumed in the administration of a curatorship should not be considered by us, because, whether it be long or short, the time required to carry out such a trust by the person charged with its performance is of no consequence.

(5) While Titius was administering the guardianship of a female ward, or as her curator was transacting her business, she died, and left a daughter as her heir, before an account had been rendered. The question arises whether Titius could give her in marriage to his son. I said that he could do so, because the account due to the estate was merely a simple debt; otherwise, every debtor who was liable to him for any reason whatsoever would be forbidden to marry her himself, or give her in marriage to his son.

(6) Where a guardian causes his ward to reject the estate of her father, he should give her a good reason for doing so, for he might happen to have judgment rendered against him on this ground if he acted without proper deliberation; even if he did not avail himself of the aid of the Prætor, after taking proper advice, because the father of the girl died insolvent. Nevertheless, as it is necessary for this to be proved in court, the marriage will be hindered; for he who has administered a guardianship advantageously and with fidelity, will still be prohibited from contracting such a marriage.

68. *Paulus, On the Turpilian Decree of the Senate*.

Where any man marries a female relative, either in the ascending or descending line, he commits incest according to the Law of Nations. He who marries a female relative in the collateral line, (where this is expressly forbidden), or some woman is connected with him by affinity, and he does this publicly, he will incur a lighter penalty, but if he commits such an act clandestinely, he will incur a more severe one.

The reason for this difference with reference to marriage improperly contracted with a relative in the collateral line is, that those who publicly commit the offence are not subjected to a more grievous penalty because they are considered to be ignorant, but those who commit it secretly are punished severely as being contumacious.

TITLE III.

CONCERNING THE LAW OF DOWRY.

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

The right to a dowry is perpetual, and, in accordance with the desire of the party who bestows it, the contract is made with the understanding that the dowry will always remain in the hands of the husband.

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

It is to the interest of the State that women should have their dowries preserved, in order that they can marry again.

3. *Ulpianus, On the Edict, Book LX11I*.

The term dowry does not apply to marriages which are void, for there cannot be a dowry without marriage. Therefore, where the name of marriage does not exist, there is no dowry.

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

When the usufruct is added to the mere ownership given by way of dowry, it is held that this is an increase of the dowry and not a second one; just as where there is an accession made by alluvion.

5. *Ulpianus, On Sabinus, Book XXXI.*

A profectitious dowry is one derived from either the property or the act of a father, or some other ancestor.

(1) Hence where an ancestor, or his agent, gives a dowry or orders another to give it, or when anyone who is transacting his business gives it, and the ancestor ratifies his act, this is a profectitious dowry.

(2) Where anyone who is desirous of making a gift to a father gives the dowry, Marcellus says in the Sixth Book of the Digest that this dowry also comes from the father, and is profectitious, which is correct.

(3) Moreover, if the curator of an insane person, or of a spendthrift, or of anyone else, gives a dowry, we say that it also is profectitious dowry.

(4) If, however, we suppose that the Prætor or Governor of a province issues a decree stating how much of the property of a father, who is held in captivity either by the enemy or by robbers, shall be given to his daughter by way of dowry, this also is held to be profectitious.

(5) Julianus says that a dowry is not profectitious where a father rejects an estate for the purpose of providing a dowry, because the husband of his daughter has been substituted, or where he would be able to claim the estate *ab intestato*. If, however, the father should reject a legacy in order that it might remain in the hands of his son-in-law, who was the heir, by way of dowry, Julianus holds that this was not derived from his property, because the father did not pay out any money belonging to himself, but merely declined to acquire the legacy.

(6) Where a father, not in the capacity of a parent, but because he has become surety for another, promises a dowry, and, as surety, is compelled to pay, Neratius says that this dowry is not profectitious, although the father cannot recover from the principal debtor what he has paid.

(7) But if the father promises the dowry, and provides a surety or another debtor in his behalf, I think that the dowry will be profectitious; for it is sufficient for the father to be liable either to the principal debtor or to the surety.

(8) Where a son under paternal control borrows money and charges his creditor to give a dowry for his daughter, or if he receives the money and gives it, the dowry is held to be derived, as Neratius says, from the grandfather; inasmuch as the latter will be obliged to endow his granddaughter, for the transaction seems to have been made with reference to the property of the grandfather.

(9) Julianus states in the Seventeenth Book of the Digest that where anyone gives a certain sum of money to his father, with the understanding that he is to give it to his daughter by way of dowry, this is not a profectitious dowry; for the father is bound to give the money, and if he does not do so, he will be liable to an action for its recovery.

He says that this same rule applies to a mother, since, if she gives a sum of money to her husband under the condition that he shall pay it to his son-in-law by way of dowry for his daughter, the wife is not held to have donated the money to her husband; therefore, he says very properly, that this gift is not one of those prohibited by the Civil Law, as she did not give it to her husband in order that he might keep it, but for him to pay it to her son-in-law, that he might expend it for the benefit of her daughter; hence if he should not employ it for that purpose, he will be liable to an action for its recovery. Therefore Julianus says that this dowry is adventitious, and we hold it to be such.

(10) Where a son under paternal control promises a dowry, and gives it after having become his own master, it is profectitious, for he does not pay the money as a debt of the estate of his father, but as a debt of his own contracted when he was under paternal control, from liability for which he is released through having become the head of a household.

(11) If a father should give a dowry in behalf of his emancipated daughter, no one doubts that it is none the less profectitious, for not the right of authority, but the title of parent renders a dowry profectitious. This is only true where the father gives the dowry, but if where he owes it to his daughter, and gives it with her consent, the dowry becomes adventitious.

(12) Papinianus says in the Tenth Book of Questions that where a father, being the curator of his daughter who is her own mistress, constitutes a dowry for her, he will be held to have done so rather as her father than in the capacity of curator.

(13) Julianus says in the Nineteenth Book of the Digest that an adoptive father has the right to recover a dowry, if he himself bestowed it.

(14) Where anyone promises a dowry for the daughter of another, and her father becomes the heir of the promisor, Julianus says that a distinction exists if the father becomes the heir and gives the dowry before marriage, and if he does so subsequently. If this took place before marriage, the dowry is held to be profectitious, for he would be able, by serving notice, to recover it; if, however, it occurred after marriage, it would not be profectitious.

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

Relief is granted to the father by law where, having lost his daughter, he is entitled to the return of the dowry which came from him, and this is done by way of solace, in order that he may not suffer both the loss of his daughter and that of the money.

(1) Where a father gives, by way of dowry, land belonging to another but which he purchased in good faith, the dowry is understood to be profectitious.

(2) If, in the bestowal of the dowry, either of the parties has been imposed upon, relief is granted, even to one who is over twenty-five years of age; because it is not consistent with what is proper and just for one person to profit by the loss of another, or to suffer loss through the gain of another.

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

Equity demands that the profits of a dowry shall belong to the husband, for, as he sustains the burdens of matrimony, it is but just that he should receive the profits.

(1) The profits received during marriage do not belong to the dowry, but where they are received before marriage they become part of it; unless there was some other agreement made between the future husband and wife; for then the profits will not be returned, because they are considered to be a donation.

(2) Where an usufruct is given by way of dowry, let us see whether or not the profits of the same must be returned. Celsus says in the Tenth Book of the Digest that it must be ascertained what the intention of the parties was; and where there was no agreement to the contrary, he thinks that the right of usufruct alone constitutes the dowry, and that the profits derived from it are not included therein.

(3) Where property is given by way of dowry, I think that it becomes part of the estate of the husband, and that the accession of time derived from his wife should be granted to her husband. Property thus given belongs to the husband, if it is bestowed, by way of dowry during the existence of the marriage. But what if it was given before marriage? If, indeed, the woman gave it with the understanding that it should immediately become his, it will do so. If, however, she gave it under the condition that it would become his when the marriage took place, we can undoubtedly say that it will belong to him when the nuptials are celebrated. Hence, if the marriage should not take place on account of repudiation, and the woman gave

the property with the understanding that it should immediately belong to the husband as soon as notice of repudiation is served, she will have a right to recover it. But if she gave it under the condition that it would become his as soon as the marriage was performed, and notice of repudiation is given, she can immediately recover the property. If she brings suit to recover it before notice of repudiation is served, an exception on the ground of bad faith, or *in factum*, can be pleaded in bar, for suit should not be brought for the recovery of property intended for a dowry.

8. *Callistratus, Questions, Book II.*

Where, however, it is evident that such action has not been taken, it must be held to be understood that the property immediately passes to the betrothed, and unless the marriage is solemnized it must be returned.

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

If I give certain property to Seia, in order that she herself may give it in her own behalf by way of dowry, it becomes hers, even though it should not be bestowed by way of dowry; but she will be liable to an action for its recovery. If I give anything in her behalf before marriage, it makes a difference under what condition I gave it, whether it was to belong to her husband at once, or after the marriage had been performed. If it was given to become his immediately, and notice of repudiation is served, I will have a right to recover it; but if this is not the case, I can claim it on the ground that the property still belongs to me. Wherefore, if the marriage cannot take place on account of some illegal impediment, in the second instance, the property will remain mine.

(1) If I deliver property to anyone to become a dowry after marriage has taken place, and I die before the marriage is celebrated, does the property constitute the dowry if the marriage is afterwards performed? I am in doubt as to whether it will pass to the person to whom it is given, because he who gave it is divested of the ownership, after death, as the donation was pending until the day of the marriage; and when the condition of the marriage is fulfilled, the ownership of the property will have already passed to the heir, and it must be held that he cannot be deprived of the same without his consent.

The more equitable opinion is the one in favor of the dowry, and for the heir to be required to consent to the act of the deceased; or, if he should defer his decision, or be absent, or be unwilling, the ownership should be transferred to the husband by operation of law, in order that the woman may not remain without any dowry.

(2) We must understand that property given on account of a dowry is that which is given as dowry.

(3) Again where property is given as what the Greeks call *parapherna* and the Gauls *peculium*, let us see whether the right to it at once vests in the husband. I think that if it is given to become his, it at once passes to the husband; and if the marriage should be dissolved, the woman cannot claim it as hers, but should bring a personal action for its recovery, and not institute proceedings by an action on dowry as the Divine Marcus, our Emperor, and his father, stated in a Rescript. It is evident that if a schedule of the property of the wife is given to her husband, as is generally done at Rome, for a wife is accustomed to place in a schedule the property which she is to make use of in the house of her husband, and which she does not give as a dowry, in order that he may sign it, as having received said property, and that she may retain possession of the document which contains a description of what she brought into his house.

Let us consider whether this belongs to the husband. I do not think that it does, not for the reason that it is not delivered to him, for what difference will it make whether it is delivered to him or not, if it is brought into his house with his consent; but because I do not believe that it was agreed between husband and wife that the ownership of said property would be transferred to him, but rather as it is certain that, in case of a separation, this cannot be denied;

and because frequently the husband assumes responsibility for such articles unless they are left in charge of his wife.

Let us see whether, if such articles should not be returned, the woman can bring an action on the ground of property removed, or on deposit, or on mandate. Where the safe-keeping of the effects was entrusted to the husband, she can bring an action on deposit, or mandate; otherwise, an action for property removed will lie, if the husband retains it with the intention of appropriating it, or suit for production can be brought, if he has not attempted to remove the property.

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

It is generally to the interest of the husband that the property which he receives as dowry should not be appraised, in order that he may not be compelled to be responsible for the same; and especially if he receives animals, or woman's garments by way of dowry. For if the latter are appraised, and the wife wears them out, the husband will, nevertheless, be liable for the amount at which they were estimated. Therefore, whenever property is given as dowry, without having been appraised, if it is increased in value she will profit by it, but if it is depreciated she must bear the loss.

(1) Where land which has not been appraised receives some accession, this will be for the benefit of the woman, and if it loses anything in value the loss will be hers.

(2) Where slaves are given by way of dowry, and have children, this profit does not belong to the husband.

(3) The increase of cattle given by way of dowry, however, belongs to the husband, because it is considered as profit; still, as it is necessary before everything else, for the property to be kept up, and where any animals die, the same number of head must be replaced with their offspring, the husband is only entitled to the remainder by way of profit, because the profit derived from the dowry belongs to him.

(4) Where property to be given by way of dowry is appraised before marriage, this appraisement is, as it were, conditional, for it depends upon whether the marriage takes place. Therefore, where the nuptials are celebrated, the appraisement of the property is perfected, and a genuine sale is made.

(5) Hence it may be asked whether the woman must bear the loss if slaves who have been appraised should die before her marriage. On this point it must be said that, as the sale is conditional, if death occurs while the condition is pending, it annuls the sale; and it must be held in consequence that the loss should be borne by the woman, for the reason that the sale was not yet complete, because the appraisement takes the place of a sale.

(6) If property is given by way of dowry, even though it may have been appraised, but an agreement is made that either the amount of the appraisement or the property itself shall be returned, and this clause is added, namely: "Whichever the wife may desire," she herself can choose whether she prefers to demand the property or the value of the same. If, however, this clause is added, namely: "Whichever her husband wishes," he will have the right of selection, or where nothing is said about the selection, the husband will be entitled to choose whether he would rather surrender the property or pay the price of it; for where one thing or another is promised, the party has a right to select which he will give, but where the property is no longer in existence, the husband must, by all means, pay its appraised value.

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

It is certain that the husband can return the property, even though it may be deteriorated.

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

Where the property is appraised after the marriage has been contracted, and this is approved as a donation, the appraisement is void, because property cannot be sold for the purpose of

making a donation, as such a transaction has no force as between man and wife; therefore the property will still remain as part of the dowry. Where a similar donation is made before marriage, the better opinion is that it is to be referred to the time when the marriage takes place, and therefore it will not be valid.

(1) Where a woman states that she has been deceived in the appraisement of her property, because it is too low; as, for instance, if she has been deceived with reference to the value of a slave whom she has given, it must be ascertained whether she has been taken advantage of in the delivery of the slave, in which case the slave should be returned to her; or whether she has been overreached in the appraisement, since, if she was only deceived in the appraisement, the husband will have the choice as to whether he will prefer to pay her the actual value of the slave, or surrender the slave himself.

This rule applies if the slave is living, but if he is dead, Marcellus says that the husband must pay his value, not his true value but that which was established by his appraisement, because the woman ought to congratulate herself that the slave was appraised. Where, however, the woman simply, gives the slave, there is no doubt that the risk remains with her, and not the husband; and Marcellus holds the same opinion where a minor has been deceived.

It is evident that if the wife has a purchaser who is willing to pay a just price, then it must be said that a proper appraisement should be made; and Marcellus states that this ought only to be done where the wife is a minor. Scævola, however, holds with reference to the husband that, if there is bad faith on his part, a just appraisement must be made, and I think that what Scævola says is perfectly correct.

(2) Where a wife agreed with her husband, who was her debtor, that he should have as dowry what he owed her, I think that she can bring an action on dowry; for although he will not be released from liability for a former debt by operation of law, still, he will be entitled to an exception.

13. *Modestinus, On the Difference in Dowries*.

Where a woman, after a divorce, returns to her husband before bringing an action on stipulation to recover her dowry, it may be positively stated that the action on stipulation will be barred by an exception on the ground of bad faith, as long as the marriage lasts.

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

Where a woman gives, by way of dowry, property which has been appraised, and afterwards is in default in delivering the same, and the property ceases to exist, I do not think that she will be entitled to an action.

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

Where she is not to blame, she will be entitled to the price, just as if she had delivered the property, because anything that happens will be at the risk of the purchaser.

16. *Ulpianus, On Sabinus, Book XXXIV*.

Whenever property which has been appraised is given by way of dowry, and is then evicted, the husband can bring an action on purchase against his wife, and whatever he recovers on that ground he must surrender to his wife in an action on dowry, if the marriage should be dissolved. Wherefore, if double the amount should come into the hands of the husband, the whole of it must be given up to his wife.

This opinion is equitable because, as the transaction is not an ordinary sale but made on account of the dowry, the husband should not profit by his wife's loss, for it is sufficient for him to be indemnified, and not to acquire any gain.

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

In matters relating to the dowry, the husband is responsible for fraud as well as negligence, because he received the dowry for his own benefit; he must, also, exercise the same diligence

which he manifests in his own affairs.

(1) Where property which has been appraised was given by way of dowry, and the marriage does not take place, it must be considered what can be recovered, the property itself, or the valuation of the same. It seems to have been the intention of the parties that the appraisement should only be made if the marriage takes place, because there was no other consideration for the contract. Hence the property should be recovered, and not its value.

18. *Pomponius, On Sabinus, Book XIV*.

If you have received, as dowry, certain slaves whose value has been appraised, and an agreement was entered into that, in case of a divorce, you would return other slaves appraised at the same value, Labeo says that the offspring of these slaves will be yours, because the slaves were at your risk.

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

Even if the dowry is given to another person by order of the husband, the latter will still be obliged to return it.

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

Julianus says that the following stipulation is valid, namely: "You will give me such-and-such a sum by way of dowry when you die,"

because it is customary to make an agreement that the dowry shall not be given by the wife during her lifetime. I did not hold that this is a similar instance, for it is one thing to postpone the collection of what is due, and another to stipulate in the beginning for it to be paid at a time when the marriage would not exist. This opinion conforms to that of Aristo, Neratius, and Pomponius.

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

It is settled that a stipulation made on account of a dowry, and which contains the condition, "If the marriage should take place," can only be a ground for legal proceedings where the marriage is solemnized; even though the condition may not have been stated. Wherefore, if notice of repudiation is served, the condition of the stipulation is said not to have been fulfilled.

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

And even if the woman should afterwards marry the same man, the stipulation will not recover its force.

23. *Ulpianus, On Sabinus, Book XXXV*.

But, for the reason that it is not necessary to insert this addition in the stipulation for the dowry, we hold also that it is not necessary to mention it when the dowry is delivered.

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

Where a daughter under paternal control, who is about to marry, gives a dowry to her future husband out of her own *peculium*, of which she has the management; and then, while the *peculium* remains in the same condition, a divorce takes place, the dowry can be lawfully repaid to her, just as a debt from the *peculium* of any other debtor.

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

A woman who was about to marry a man who owed her Stichus, the slave, made an agreement with him as follows: "Instead of Stichus whom you owe me, consider that ten *aurei* are given you by way of dowry," in accordance to the rule that has been established that one kind of property can be given for another, and the parties be released from liability; the ten *aurei* will be deemed to have been bestowed by way of dowry, because a change of dowries can be made by agreement.

26. *Modestinus, Rules, Book I.*

We hold that a dowry can be changed while the matrimonial condition exists, only where it will be an advantage to the woman, if the money is changed into property, or property is changed into money. This rule is generally adopted.

27. *Ulpianus, On Sabinus, Book XXXVI.*

When this is done, the land or the personal property becomes dotal.

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

A father cannot render the condition of his daughter worse after marriage, because the dowry cannot be returned to him without his consent.

29. *Ulpianus, On Sabinus, Book XXXVI.*

Where a father promises a dowry for his daughter, and bequeaths it, if he leaves it to her husband should it be considered whether the legacy is valid or not? I do not think that it is valid, for when a debtor bequeaths to a creditor what he owes him, the legacy is void. If, however, he makes the bequest to his daughter, the legacy is valid, for the dowry was due to the husband on account of the promise, and the legacy is due to the daughter. If the daughter should prove that the testator intended to double the legacy, she will be entitled to both, the dowry which her husband has a right to collect and the legacy on account of the bequest.

But if the testator intended that she should have one or the other of these, and the woman claims the legacy, and is met by an exception on the ground of bad faith, the heir will not be compelled to pay her the legacy, unless she indemnified him, on this account against her husband bringing an action based on the promise made.

Where, however, the husband institutes proceedings, it will not be necessary for her to indemnify the heir, but where the woman brings an action after him, she can be barred by an exception because the dowry has already been paid.

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

It must be held that a dowry given at the time of a former marriage does not become one where a subsequent marriage takes place, unless this is the intention of the parties; still, we always presume that this was their intention, unless some other agreement is proved to have been made.

31. *Papinianus, Opinions, Book IV.*

Where no divorce, but only a quarrel occurs, a dowry of the same marriage will continue to exist.

32. *Pomponius, On Sabinus, Book XVI.*

If a husband should, with the consent of his wife, sell stone obtained from quarries on the dotal land, or trees which are not classed as profits, or buildings situated on the premises, the money received from the sale will be considered as forming part of the dowry.

33. *Ulpianus, On Sabinus, Book VI.*

Where a stranger who promised a dowry becomes insolvent, the husband will be to blame for not having brought suit against him, especially if he promised the dowry through compulsion, and not voluntarily. For if he donated the property, the husband should be excused for not having pressed the donor for payment, against whom he could have obtained a judgment, to the extent of his resources, if he had brought suit; for the Divine Pius stated in a Rescript that where persons are sued on account of their liberality, they should have judgment rendered against them for the full amount that they are able to pay.

But if the father, or daughter herself made the promise, Julianus says in the Sixteenth Book of the Digest that, even if the father made it the risk must be borne by the husband, which

opinion should not stand. Therefore, the woman should bear the risk, for no judge will patiently listen to a woman who alleges that her husband did not press her father, who had promised her a dowry out of his property, for the payment of the same; and still less, where he did not bring an action against her. Hence Sabinus very properly holds that where the father or the woman herself promised a dowry, the risk should not be borne by the husband; but where the debtor makes the promise, the risk must be borne by the husband; and where someone else does so, by way of donation, the party who was benefited will be responsible.

We understand, however, that the advantage will accrue to the woman to whom the benefit of the property belongs.

34. *The Same, On Sabinus, Book XXXIII*.

A mother gave an utensil of gold for the use of her daughter; the father then gave the said utensil by way of dowry to the husband of the girl; and her mother afterwards died. If the father gave the article by way of dowry, without the knowledge or consent of his wife, it will belong to the heir of the mother, and he can bring an action to recover it; and because the property is evicted it is held that that much less of the dowry has been given by the husband, who will be entitled to an action against his father-in-law.

35. *The Same, On Sabinus, Book XXXV*.

Where a husband, for the purpose of renewing an obligation makes a stipulation with reference to a dowry promised by a father, or by anyone else, the dowry begins to be at his risk, just as it was formerly at the risk of the woman.

36. *The Same, On Sabinus, Book XLVIII*.

The debtor of a woman, by her order, bound himself to pay the money to her husband, and the latter then released him by order of his wife. The loss was sustained by the woman. In what way should we understand this? Should it be on the ground of the dowry, or for some other reason? The decision seems to have been made with reference to the debtor, who gave the promise to pay the dowry.

It must be ascertained whether this was done before or after the marriage; for it is held to be a matter of importance whether the discharge was given after the marriage took place, since if the dowry was already constituted, the husband will lose it by discharging the debtor. If, however, this was done before the marriage was celebrated, the dowry is held not to have been constituted.

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

The woman does not lose her right of action unless the marriage took place, for if it did not, the debtor will remain liable to her.

38. *Ulpianus, On Sabinus, Book XXVIII*.

It certainly should be considered whether the woman will be liable to her husband if she ordered him to discharge her debtor. And I think she will be liable to an action on mandate, and that this right is transformed into a dowry, because the woman is liable to the said action, and because she is held to have lost her property in consequence. If, however, she desires to bring an action on dowry, she ought to set off against her own claim what she has ordered her husband to do.

39. *The Same, On the Edict, Book XXXII*.

If a female slave should give property, as dowry, to a male slave, and afterwards, during their marriage, both of them obtain their freedom, without being deprived of their *peculium*, and continue in the marriage relation; the matter will be arranged in such a way that if anything remains of what was bestowed as dowry while they were in servitude, it will be held to have been tacitly converted into dotal property, so that the appraised value of the same will be due to the woman.

(1) Where a woman marries an eunuch, I think that a distinction should be made where he has been absolutely castrated, and when he has not, for if he has been absolutely castrated, you may say that the dowry does not exist; but where this has not been done, for the reason that marriage can exist, the dowry is valid, and an action to recover it will lie.

40. *The Same, On the Edict, Book XXXIV*.

The Divine Severus stated in a Rescript to Pontius Lucrianus that: "If a woman who has given a dowry, returns to her husband after having been divorced, without the annulment of the marriage contract, the magistrate before whom the matter is brought should have no hesitancy in deciding in her favor; as she certainly did not intend to return to the matrimonial condition without being endowed, and he must discharge his judicial duty just as the dowry had been renewed."

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

Where a dowry is promised, all the parties are liable, no matter to what sex or condition they may belong.

(1) Where the marriage does not take place, suit cannot be brought on the stipulation, for the acts, rather than the words of the parties, should be considered.

(2) A dowry is also constituted by the release of a creditor, when the husband, who is a debtor, is discharged for the purpose of constituting a dowry.

(3) Where a dowry is promised, under a condition, by a debtor of the woman, and afterwards, before the husband can demand the dowry, the debtor ceases to be solvent, it is settled that the loss must be borne by the wife, for the husband is not held to have accepted the claim at a time when he could not collect it. If, however, the debtor was insolvent at the time that he made the promise under a condition, the loss must be sustained by the husband; because he is held to have knowingly accepted the claim as it was at the time when the obligation was incurred. (4) Where a debtor promises a dowry to a woman, and afterwards makes her his heir; Labeo holds that the circumstances are the same as if the woman herself had promised the dowry. Julianus also approves this opinion; for he says it would not be just for a judgment to be rendered against him on account of money which she herself owes, and it is sufficient that she should be released from liability.

42. *Gaius, On the Provincial Edict, Book XL*

Where property which can be weighed, counted, or measured, is given by way of dowry, this is done at the risk of the husband, because it is given to enable him to sell it at his pleasure; and when the marriage is dissolved, he must return articles of the same kind and quality, or his heir must do so.

43. *Ulpianus, Disputations, Book III*.

Although a dowry may be constituted by the release of the husband from liability for a debt; still, if this was ante-nuptial, and the marriage did not take place; Scævola says that, having been made in consideration of marriage, which did not occur, the release is void, and therefore the obligation remains unimpaired. This opinion is correct.

(1) Whenever a stranger releases a debtor for the purpose of constituting a dowry, and the marriage does not take place, the release will be of no effect, unless it was made because the creditor wished to donate the entire sum to the woman; for then it must be held that it was received by her through a fictitious delivery and then transferred to her husband. The right to a personal action for its recovery cannot, however, be acquired by the woman through the agency of a free person.

It is clear that, if the marriage takes place and is afterwards dissolved, the woman will have the right to claim the dowry, unless the stranger has released the husband from liability; and he himself will be entitled to an action for recovery, if the marriage should for any reason be

dissolved, for then the woman will not have a right to any such action. In accordance with this, where a dowry is constituted by the release of the husband from liability, and the marriage takes place, the result of the suit for the recovery of the dowry will be that, if the obligation from which the husband is released is unconditional, it will not be restored to its former condition; but the dowry must be paid in accordance with what is customary. But where the obligation was limited to a certain time, it should be restored to its former condition, if the time to which it is limited did not elapse before the marriage was dissolved, and if the debt was secured the security should be renewed.

In like manner, if the obligation which was turned into a dowry is conditional, and a divorce takes place while it was pending, the better opinion is that the obligation ought to be restored under the same condition. Where, however, the condition was fulfilled during the existence of the marriage, the time during which the money can be demanded should date from the day of the divorce.

44. *Julianus, Digest, Book XVI.*

If a father should promise a dowry for his daughter, and emancipates her before the marriage takes place, he will not be released from his promise; for even if the father should die before the celebration of the marriage, his heirs will still remain liable on account of his promise.

(1) Where a woman has a son under paternal control as her debtor, and she promises a dowry to his father as follows: "What you owe me, or what your son owes me, shall be yours as my dowry," she is not bound; but the result will be that anything that she can recover from the father in an action *De Peculio* will be included in her dowry.

Marcellus says that if, after this, she wishes to bring an action either against the son or the father, she will be barred by an exception on the ground of a contract entered into; but if she should bring an action on dowry, she can recover whatever was found to be in the *peculium* when the dowry was promised, and if it was promised after the marriage took place, the appraisement of the *peculium* must be made at the time that the nuptials were celebrated.

45. *Tryphoninus, Disputations, Book VIII.*

Where a woman who is about to marry a son under paternal control, who is her debtor, promises, by way of dowry only the right of action which she has for his *peculium*, the amount that is due to her on this account at the time of the marriage must be taken into consideration.

(1) Where, however, being about to marry another person, she directs the said son, who is her debtor, to promise her dowry out of his *peculium;* the time when the dowry is promised must be taken into account so that the amount of the *peculium* may be estimated.

46. *Julianus, Digest, Book XVI.*

Just as where a slave, having made a stipulation, acquires property for his master without the consent of the latter, so an obligation will be acquired for his master, if he permits a dowry to be promised in his master's name. The latter, however, will not be responsible for any risk, or for negligence, if the debtor of the woman promises the dowry.

A dowry is also constituted by the delivery of the dotal property to a slave or a son under paternal control, but neither the master nor the father will be liable either for risk or for negligence. Therefore, I say that this dowry will be at the risk of the woman, until either the master or the father ratifies the promise or donation; and therefore during the continuance of the marriage the property which was delivered can be recovered by a personal action. Moreover, it can be recovered by an action for an indeterminate amount, in order that the party may be released from his promise.

(1) If a woman, who is about to marry her debtor, promises him a dowry in the following words: "You shall have, as my dowry, what

you owe me, or the Sempronian estate," whichever of these the woman selects will be her dowry, and if she prefers that the debt shall remain in the hands of her husband, by way of dowry, she can protect herself by an exception against him if he brings an action for the estate. And if she gives the estate, she can collect the money due her from her husband.

(2) Where a father, erroneously thinking that he is indebted to his daughter, promises her a dowry, he will be liable.

47. *The Same, Digest, Book XVIII.*

Where a slave bestowed by way of dowry before marriage has any property which was given or bequeathed to him previously, the dowry will be increased in the same manner as in the case of the crops of a tract of land delivered before marriage.

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

A stipulation was entered into in the following terms: "You promise to pay ten *aurei*, by way of dowry, during the next year." The question arose from what date the year should be reckoned, whether from the day the stipulation was made, or from that when the dowry took effect, that is, the day of the marriage. The answer was that the year should be reckoned from the day of the marriage, for if we held otherwise, and the marriage did not take place within the year, the dowry could be considered to be due on account of the obligation.

(1) A father-in-law made a bequest to his son-in-law as follows: "My heir shall give a hundred *aurei* to Lucius Titius on account of my daughter." The son-in-law should claim this money, and when it is collected it ought to be received as a legacy; but Proculus is of the opinion that if a divorce takes place, it must be restored to the woman by means of an action on dowry; and, nevertheless, it becomes a part of the dowry. Julianus states in a note that an action of this kind should not even be refused a daughter, if she wishes to bring it.

49. *The Same, On Minicius, Book V.*

A certain man entered into a stipulation with a party concerning a sum of money which the latter wished to give as a dowry to his wife, and he then released him from liability for the same. The question arose whether or not this money constituted part of the dowry. The answer was that, if the husband had not released the promisor and he had become insolvent, we should inquire whether the money was not collected on account of the negligence of the husband, but as the husband released the debtor, he must, by all means, assume the entire responsibility; for the case is the same as if he had received the money, and then presented it to the promisor.

50. *Africanus, Questions, Book VIII.*

A woman gave a tract of land as her dowry, and, a divorce having taken place, she returned to her husband, and agreed with him that he should receive ten *aurei* by way of dowry, and give her back the land.

The ten *aurei* were paid, but she died during marriage before the land was returned. The matter is one involving good faith, and, in compliance with the contract, the land can be recovered, since it was held by the husband without any consideration.

(1) This point will seem perfectly clear if reference be had to the action on pledge. For if I should transfer to you the Cornelian estate by way of pledge, and afterwards convey to you the Titian estate, under the agreement that you will restore the Cornelian estate to me, I think that there is no doubt whatever that I can immediately and properly bring an action on pledge against you, for the recovery of the Cornelian estate.

51. *Ulpianus, Opinions, Book II.*

Where property which a father has given to his emancipated daughter is afterwards given for her by way of dowry, with her consent, the dowry is held to have been given by the daughter, and not by the father.

52. *Marcianus, Rules, Book III.*

Whenever a husband returns property to his wife in a suit for the recovery of her dowry, he must surrender whatever he obtained in this way, not only where the land given as dowry was appraised, but also where it was not, because the land was included in the dowry; and likewise if she promised to pay double damages in case of eviction, even where she was not obliged to do so.

53. *Neratius, Parchments, Book III.*

A man wished to make a present to his wife, and a debtor of hers, who was not solvent, promised her a dowry. The husband will only be responsible to the extent that the debtor was solvent, and if the latter should acquire anything which might enable him to meet his obligations, the responsibility will increase in proportion to the amount which he acquired. And it will continue to exist, even if he afterwards became more indigent because when the dowry was promised, the donation consisted only of what could not be collected from the debtor, and when the latter became solvent, the obligation still persisted, on account of the donation; since the matter is in the same condition as it would be if the debtor had been wealthy at the time when the dowry was promised.

54. *Gaius, On the Edict of the Urban Prætor; Title, "Purchasers of Estates."*

Property purchased with money belonging to a dowry is held to be dotal.

55. *Paulus, On Plautius, Book I.*

Where liability is incurred by reason of a dowry, a surety given on this account will be liable.

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

A man, who owed the slave Stichus to a woman, was delegated by her to constitute her dowry, and, before the debtor made payment, Stichus died. As the debtor was not to blame in making payment, and the husband was not in default in taking action, the loss caused by the death of Stichus must be borne by the woman; although, even if her husband had been in default in making a demand for him, and if Stichus had died while in the hands of her husband, he would not be liable to an action on dowry.

(1) The dowry should be under the control of him who sustains the burdens of marriage.

(2) After the death of the father, the burdens of marriage immediately pass to the son, just as the children and the widow become subject to his authority.

(3) When it is said that the dowry is diminished by the necessary expenses under operation of law, this only applies where a tract of land given by way of dowry partially ceases to be dotal, but where the expenses are not refunded, a portion of the land, or all of it, may be retained. Where, however, expenses which amount to the value of the land are incurred at different times, Scævola says that it ceases to be dotal, unless the woman should voluntarily tender to her husband the amount of the expenses within a year.

If both money and land are included in the dowry, and necessary expenses have been incurred on account of the land, Nerva says that the expenses should be deducted from the money forming part of the dowry. But what if the woman should pay the expenses to her husband, will the dowry be increased, or will it be held to have been given intact? Where the dowry consists of land, the injustice of this would seem to be greater, according to the opinion of Scævola; for if it ceases to be dotal the husband could alienate it. Again, how can money paid in this way become dotal, or will not the money already be considered as part of the dowry? The better opinion is that the land will revert to its former condition of dowry, and that its alienation in the meantime will be prohibited.

57. *Javolenus, On Plautius, Book I.*

Where a woman is about to marry a son under paternal control, and promises a dowry to her father-in-law in the following terms: "Whatever your son owes me shall be yours as my

dowry," I think that it makes a difference whether the obligation of the son or the right of action which the woman has against the father for property employed for his benefit, is referred to in the promise; for if what the son is required to pay is meant, all the money for which he is liable is included in the promise of the dowry.

If, however, what the father must pay out of the *peculium* for property employed for his benefit is referred to, an estimate should be made of how much that was at the time when the promise was given, and this sum will be considered to form the dowry for which judgment can be rendered against the father, in the name of the son, at the above-mentioned date. If, however, it is not perfectly clear which obligation the woman had in mind, the presumption is that she had reference to the debt of the son, unless it is perfectly evident that the contrary is the case.

58. *Celsus, Digest, Book XIX.*

If the betrothal has not yet been made, and you promise a dowry to Titius in behalf of Seia, at a time when she refused to marry him, and she should, notwithstanding, marry him afterwards, you will owe the dowry, unless another marriage should have taken place in the meantime.

(1) Where a woman entered into a stipulation with Titius for the female slave Pamphila, and, afterwards, being about to marry him, she permitted him to take as dowry what he owed her; even though Pamphila did not belong to him, would Pamphila, nevertheless, be included in the dowry, and would she be at the risk of the woman in case of her death? Or in case she should have a child, must it be returned to the woman?

If the first stipulation remained in force, the offspring of the slave should not be given up, unless it made a difference whether the husband had possession of the property which he owed at the time that the dowry was constituted (for it could be held that the property itself came into his hands), or did not have possession of it; as, if the latter was the case, the better opinion is that the release from the obligation should rather be considered to have come into his hands than the property itself, and therefore that the offspring of the slave is not due to the woman.

59. *Marcellus, Digest, Book VII.*

If a woman should promise a dowry as follows: "Ten *aurei* shall belong to you or to Titius as my dowry," in this instance, it may be said that she can give the sum to Titius, but her husband will always be liable for the dowry, just as if he had ordered it to be given to Titius. There is nothing extraordinary about this, since a woman who intends to promise a dowry to a man can be substituted by him to make the promise to another, although it is usually held that a woman will not be liable for her dowry to anyone else than to her husband, as in these instances the dowry is acquired by the husband; for we do not believe that she would have made such a promise when she was thinking about her marriage with Titius.

(1) When an heir is appointed to an entire estate, and is asked to deliver three-fourths of the same to a woman, and, under her direction, promises her husband, by way of dowry, what he owes her, I apprehend that he will not be liable. He will be liable, however, in the delivery of the estate, to assign to the woman all rights of action, both those in his favor and those for which he is bound; but he cannot assign these rights to anyone else than the party to whom he owes them on account of the trust.

Another might say that the husband could bring an action against him for an uncertain sum, to compel him to pay the estimated amount due under the trust. I cannot agree to this, for it is just that the debtor of the woman should only be liable for the amount which the husband can receive out of what is due. Still, in order that she may not be without a dowry, it must be said that a share of the estate left to her should be restored to her under the Trebellian Decree of the Senate, so that she herself may give her husband this as her dowry, because the trust and all its liabilities belong to her, and, on account of the extreme subtlety and necessity of the

case, the substitution will be of no force or effect.

(2) You gave ten *aurei*, by way of dowry, for a woman who was thought to be free, and in this instance you will be entitled to an action to recover what you have given; just as if you had done this in behalf of a free woman, and the marriage did not take place. If the woman should marry, after having been manumitted, what you gave will only be a dowry, if you gave it with the intention that it should become a dowry when the marriage ceremony was performed. Therefore, if you gave the property as a present to the woman, her master will have a right to recover it; just as where a party is about to give something to a woman, and the latter orders it to be given to her husband.

60. *Celsus, Digest, Book XL*

I ask what sum a curator should consent to be given as dowry by his ward to a woman who is grown. The answer was that this depends upon the amount of his means as well as upon the rank of the woman and her husband, as reason may suggest.

61. *Terentius Clemens, On the Lex Julia et Papia, Book III*.

A curator may be appointed for the general management of property, or for the purpose of giving a dowry, and where a larger dowry is promised than is justified by the estate of the woman, the promise will be void by operation of law, because an authorization fraudulently granted is not held to be confirmed by the law. Still, the question should be asked whether the entire obligation is annulled, or only what was promised in excess of what should have been. It is more equitable to hold that that only is annulled which is superfluous.

(1) The said curator should deliver the property bestowed as dowry, but he cannot sell it to anyone, and give the price of the same, by way of dowry. But it may be doubted whether this is correct, for what if the ward cannot marry honorably unless she gives money as dowry, and this will be more advantageous to her? However, property which is given by way of dowry can very frequently be alienated, and the money become the dowry. In order that this question may be determined, if the husband prefers to receive the property as dowry, it is not necessary to inquire any farther; but if he is not willing to contract marriage unless money is given, as dowry, it then becomes the duty of the curator to appear before the judge who appointed him, so that, if proper cause is shown, even though the man is absent, he may permit the dowry to be constituted by the proceeds of the sale of the property.

62. *Modestinus, Opinions, Book V*.

Titia, a minor under twenty-five years of age, exchanged the fourth part of the estate of her mother, which she held in common with her brothers, and received a tract of land instead of her share, just as if a sale had taken place. This land, together with other property, she gave as dowry. I ask if complete restitution should be granted to her, and if she should receive her share of one-fourth of the estate; and should she return the land, what course must her husband pursue, or ought he to be content with the other property given by way of dowry?

I also ask, if he should die, and her heirs, as her representatives, should bring suit for complete restitution, and some of them should demand a fourth part of the estate, and others the land, whether the husband would be compelled to return the land, and remain satisfied with the other property of the dowry as his profit. Modestinus answered that there is nothing in the case proposed to justify the husband being deprived of the dowry, but the woman of her heirs should have judgment rendered against them for the actual value of the land, and the appraisement of the same should be made with reference to what it was worth at the time it was given by way of dowry.

63. *The Same, On Discoveries*.

When a stipulation for the return of a dowry is made by a stranger, it becomes operative the moment the divorce takes place, and the right of action obtained by the stipulator is not extinguished if the marriage should be renewed. Therefore, if the woman has no dowry at the

time of the second marriage, the stipulator must again consent for the constitution of the dowry; provided that the said dowry which another party stipulated for with her permission is not derived from the woman herself, for then his consent will not be necessary.

64. *Javolenus, On Cassius, Book IV*.

Where a husband made no subsequent provision with reference to a dowry, if, after a divorce has taken place, the woman should marry another man, and afterwards, having again been divorced, return to her first husband, the dowry will be tacitly restored to him unimpaired.

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

If either through a legacy or by inheritance, property of some kind should be acquired by a slave who is given as dowry, and the testator was unwilling for the said property to belong to the husband, it must be returned to the wife if the marriage is dissolved.

66. *The Same, On Quintus Mucius, Book VIII*.

If the usufruct of land, the ownership of which does not belong to my wife, is given to me by way of dowry by the owner of the same, it would be difficult, after a divorce, to determine how the right of usufruct could be returned to the woman; as we have stated that it cannot be transferred by the usufructuary to anyone but the owner of the property, and if it is transferred to a stranger, that is to say, to one who does not own the property, nothing passes to him, and the usufruct reverts to the owner of the land. Therefore, certain authorities very properly hold that, by way of remedy, the husband should be permitted to rent the usufruct to his wife, or to sell it to her for a nominal consideration, so that the right itself will remain with the husband, but the power to gather the crops will belong to the wife.

67. *Proculus, Epistles, Book VII*.

Proculus to his grandson, Greeting. Where a female slave marries, and gives her husband money, as dowry, whether she knows that she is a slave or not, she cannot make her husband the owner of said money, and it will still remain the property of the person to whom it belonged before it was given as dowry to her husband, unless he should have obtained it by usucaption. And not even after the woman has become free, while living with the same man, will she be able to change the condition of this money. Hence, not even after a divorce has taken place, can she legally bring an action based on her right of dowry, or a personal action to recover the money, but the party to whom it belongs can legally sue for it.

But if the husband has obtained a right to said money through usucaption after having had it in his possession, of course because he thought that the woman was free, I am confirmed in my belief that he has profited by the transaction, provided he obtained the right to the money by usucaption, before the marriage. I am of the same opinion where he obtained anything by means of said money before it became the dowry, provided he was not in possession of it, and was not guilty of fraud to avoid being in possession.

68. *Papinianus, Questions, Book X*.

The promise of a dowry is none the less valid where the father was ignorant in the beginning that the marriage had been performed, if he should afterwards consent to it; since every promise of a dowry is understood to be founded on the tacit condition under which the marriage is to take place. For where a girl less than twelve years of age has been married, as if she was older, her husband can demand the dowry when she, while still living with him, attains the age of twelve years. While it is commonly stated that the promise of a dowry only has reference to first marriages, and that the obligation does not continue to exist if the woman marries the man to whom she promised the dowry after he has married someone else, it will then be operative when another marriage has intervened.

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

Where a woman, after a divorce, with the knowledge of her husband, promises as dowry lands

of which she has been in possession for a long time, it is held to have been tacitly agreed that the dowry which has been promised shall not be claimed; and if the husband should bring suit for it, he can be barred by an exception on the ground of contract pleaded by the wife.

(1) Where a woman gave money due to her from Seius, together with the interest to accrue in the future, as dowry that has been promised, it is reasonable that any interest which may have accrued after the marriage should also form a portion of the dowry.

(2) It was decided, where it had been stipulated after a divorce, that the money constituting the dowry with the interest should not be paid after the date of the second marriage, because only the payment of the principal could be collected; that the interest for the intermediate time would be due.

(3) Where a woman was married during the absence of her husband, and conducted to his house, and in the meantime incurred no expense chargeable to the property of her husband, the latter cannot honorably demand interest on the dowry which was promised to reimburse him for the support of his wife.

(4) A son-in-law stipulated with his father-in-law for a dowry to be paid upon a certain day in accordance with the wishes of the latter, without having mentioned the property, or the amount of the same. It is established that the stipulation would be valid, without considering the wishes of the father-in-law; nor should the case be held to be similar to the one where a tract of land is not mentioned, and it is held that a bequest, or a stipulation of said land is void; as a great difference exists between the manner of constituting a dowry, and the uncertainty of the property to which it has reference, for the amount of the dowry can always be established in accordance with the resources of the father and the rank of the husband.

(5) Where a girl is formally contracted in marriage to the son of her guardian, with the consent of her father; a dowry can legally be constituted by the guardian in proportion to the wealth of the former, and the rank and birth of the girl.

(6) Where a dowry has been legally promised in behalf of a freedwoman by her patroness, the latter cannot retain the same if the freedwoman should prove ungrateful.

(7) Where a marriage is dissolved, and property which has been appraised and given by way of dowry is to be returned, the amount must be stated, but a sale is not contracted. Therefore, where the property is evicted, if the woman gave it in good faith, her husband will have no right of action; otherwise, she will be liable for fraud.

(8) Where property has been appraised and delivered by way of dowry, even though the woman may continue to use it, the ownership will be held to have passed to the husband.

(9) It is proper that the offspring of female slaves, given as dowry, should be considered a portion of the same; and therefore an agreement with the husband that the said offspring shall be held in common by him and his wife is void.

70. *Paulus, Questions, Book VI.*

Where doubtful questions arise, it is better to decide in favor of the dowry.

71. *The Same, Questions, Book XXXII.*

When a stranger promises a dowry in behalf of a woman, the latter must assume the risk. If, however, the husband takes charge of the claim, and collects the interest, it is held that the risk will be his.

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

A woman gave all her property as dowry. I ask whether her husband, as her heir, is obliged to be responsible for the debts of her estate? Paulus answers that where anyone retains all the property of a woman on account of a dotal obligation, he cannot be sued by her creditors, but that the promise of the property only applies to what remains after the debts have been deducted.

(1) Paulus holds with reference to dotal property, that even the father of the husband is responsible for fraud and negligence.

(2) Paulus also holds that, where a woman gives a dowry out of her own property, and causes her mother to make stipulations, she can afterwards alter the dotal instrument.

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

A person who is dumb, deaf, or blind, is liable on account of a dowry, because each of them can contract a marriage.

(1) While marriage exists, the dowry can be returned to the wife for the following reasons, provided she does not squander it, namely: in order that she may support herself and her children, or may purchase a suitable estate, or may provide sustenance for her father banished to some island, or may relieve her brother or sister who is in want.

74. *Hermogenianus, Epitomes of Law, Book V.*

Where a betrothed woman gives a dowry, and does not marry, or where a girl, in order to become a wife, gives it before she reaches the age of twelve years; it is held that the privilege which applies to personal actions should, by way of favor, as in the case of a regular dowry, be extended to include a personal action for recovery.

75. *Tryphoninus, Disputations, Book VI.*

Although the dowry becomes a part of the property of the husband, it nevertheless, in fact, belongs to the wife. It has, with reason, been decided that if she gave land which was not appraised as dowry, and, on account of this, a stipulation for double damages was provided, and the land should be evicted from the husband, the latter can immediately bring an action on the stipulation. Moreover, as it is to her interest that the property given by way of dowry should not be evicted, and because she herself suffers from the eviction because she ceases to possess what constituted the dowry; it is held that she is also entitled to the profits of the same while the marriage continues to exist, even though the ownership of the property is in the husband, and he sustains the burdens of matrimony.

76. *The Same, Disputations, Book IX.*

Where a father promises a dowry to his daughter by a donation *mortis causa*, the promise will be valid, for he will be bound just as if he had made it at the time of his own death. If, however, he should recover, why should he not be released from the obligation by means of a personal action, just as would be the case where someone else entered into a stipulation, or promised a dowry in behalf of another?

The case is similar where a personal action will lie to recover money which has been given, or to compel a party to release an obligation incurred *mortis causa*. The same cannot be said with reference to a woman, if she promised a dowry *mortis causa*, because a dowry is void, unless it can be used to defray the expenses of marriage.

77. *The Same, Disputations, Book X.*

Where a woman about to marry her debtor who owes her money at interest promises him, by way of dowry, what he owes her; the interest which has become due after the marriage has taken place does not constitute part of the dowry, because the entire obligation is cancelled; just as if all the debt had been paid to the woman, and she had given it by way of dowry.

78. *The Same, Disputations, Book XI.*

Where a woman having a right of usufruct in land belonging to her husband gives to him by way of dowry, although the usufruct no longer is hers, still, the husband is not entitled to it, because he is using his own land, as owner; but, by means of the dowry, he obtains the complete title to said land, and does not hold it separate from the usufruct, and he cannot lose it by non-user. Still, in case of a divorce, he must reestablish the usufruct in said land for the benefit of his wife. If, however, she should die during marriage, the husband is held not to

have profited by reason of the dowry, because even if he had not married the woman, the usufruct, having been terminated by her death, would revert to the land, and therefore he would not be compelled to contribute to the funeral expenses of his wife.

(1) It is evident that if a father, who has a usufruct in a tract of land, gives it to his son-in-law by way of dowry, for his daughter, and she dies during marriage, he will have a right of action against his son-in-law for the re-establishment of the usufruct.

(2) If a woman constitutes a dowry for her husband by giving him the usufruct in her land, then the usufruct will, properly speaking, be attached to the person of her husband, and he will lose it by non-user. If this should happen, let us see whether the woman will still be endowed. If, indeed, the ownership of the land is in the woman, and the usufruct reverts to the same, nothing now remains of the dowry which can be recovered by him in an action on dowry, because he cannot be blamed for having lost the usufruct by non-user, since she herself has profited by it, and hence she will remain without a dowry.

But if the wife should alienate the property, and it should become more valuable without any advantage to her, she will still retain the right to her dowry, because the husband, who, when he could have enjoyed the usufruct, lost it by non-user, will be liable to an action on dowry. If, however, the usufruct continued to exist until the divorce took place, its restitution will be for the benefit of the woman, because although it does not immediately pass to her, still, it reverts to the property either for some price or consideration, and without any disadvantage to the owner. But where the husband did not lose the usufruct, his right to it will not be extinguished by the death of the wife.

But where a divorce takes place, let us see, in the first and second instances, whether the profits should be divided in proportion to the time of the year which has elapsed. This opinion should be adopted. The restitution of the usufruct, however, ought to be made so that it will be transferred to the woman who owns the land, and be united with the ownership of the same. Even if the woman is not the owner of the land, an action on dowry will, nevertheless, lie to compel the husband to relinquish the usufruct; for the wife will be liable to an action on sale to compel her to deliver it, whether she expects to obtain a certain price for it from the purchaser, or prefers to do him a favor, rather than leave the right with someone who is unfriendly to her, and to whom it has been transferred; which she is allowed to do by law.

(3) A wife gave an usufruct to her husband by way of dowry, and during the marriage she sold him the tract of land. The question arose what she would be entitled to recover in an action on dowry, if a divorce took place. I replied that it was important to inquire how much the land had been sold for; as, if an appraisement of the mere property was made, the woman, in an action on dowry, was entitled to recover the price of the usufruct. But what if the husband should die before issue was joined? His heirs would not be liable for anything. For even if anyone else appeared as purchaser of the property, the heir of the husband would be liable to the woman for nothing, and the usufruct would revert to the land. If, however, the whole tract was sold for as much as it was worth, and the usufruct was not understood to have been reserved, it would be held that the woman was entitled to the dowry during the existence of the marriage.

(4) Where a tract of land held in common was given by way of dowry, and the other joint-owner brought an action against the husband for partition, and the land was adjudged to him, the amount of the judgment against the joint-owner in favor of the husband would be the dowry, but if the land was adjudged to a stranger without any bidding, the dowry would be a part of the price for which the land was sold. But this would not be considered to take the place of the property, and, in case of a divorce, it would not be necessary to pay it all at once, but it should be paid within a specified time.

If, however, the land should be adjudged to the husband, that portion of it which had been given by way of dowry, would still remain dotal; but if a divorce took place, the other portion, on account of which the first, as dowry, came into the hands of the husband, must be returned;

that is to say, he will receive as much, by way of price, from his wife as he had paid to her joint-owner on account of the judgment which was rendered against him.

If either of the parties should attack this as being unjust, neither should be heard, not the woman if she objects to receiving the other part of the land, nor the husband if he refuses to surrender it; but let us see whether, as long as the marriage is in existence, only that portion of the land which was given by way of dowry is dotal, or whether the other portion is not so likewise. Julianus says that only one of the portions is dotal, and I stated in court that only one of them should be considered such.

(5) Where anyone who is protected by an exception binds himself, through mistake, in a stipulation with a husband to pay him a sum of money by way of dowry, and does not do so, he can be compelled to pay him; and he will be entitled to a personal action for recovery against the woman or her father, dependent upon which of them substituted him on account of the amount which he did not owe, and which he either promised, or paid to the husband.

79. *Labeo, Epitomes of the Last Works of Javolenus, Book VI.*

A grandfather gave a dowry for his granddaughter, the daughter of his son, to his son-in-law, and then died. Servius denies that the dowry reverts to the father, and I agree with him, because it cannot be held to be derived from him, as he never owned any of the property.

(1) A father promised a hundred *aurei* to his daughter, by way of dowry, on condition that it should be paid when perfectly convenient. Ateius says that Servius gave it as his opinion, that the father should pay the dowry as soon as he could do so without subjecting himself to dishonor and infamy.

80. *Javolenus, On the Last Works of Labeo, Book VI.*

If the debtor of a woman should promise a dowry to her betrothed, the woman can bring an action for the money against her debtor before the marriage; and Labeo says that the debtor will not be liable to the husband upon this ground afterwards. This opinion is incorrect, because the promise is in suspense as long as the obligation remains in this condition.

81. *Papinianus, Questions, Book VIII.*

A father gave as dowry for his daughter a certain sum of money which he had borrowed, or for which he had incurred liability. As soon as this money was expended the dowry became profectitious.

82. *Proculus, Epistles, Book V.*

Where a woman directed her husband to give a certain sum of money which he owed her as dowry for their common daughter, and he did so, I think it should be considered whether he gave the dowry in his own, or his wife's name. If he gave it in his own name, he will still owe the money to his wife, but if he gave it in his wife's name, he will be released from liability to his wife.

83. *Javolenus, On the Last Works of Labeo, Book VI.*

If the debtor of a woman should promise her betrothed a dowry, she cannot collect the money from her debtor before the marriage, because the promise is in suspense as long as the obligation remains in this condition.

84. *Labeo, Epitomes of Probabilities by Paulus, Book VI.*

Where the promise of a dowry is involved, judgment should be rendered against the party who made it, without reference to his pecuniary resources. Paulus says that this is always true with reference to a stranger, but where a son-in-law claims the promised dowry from his father-in-law, while the connection between them exists, judgment will be rendered against the father-in-law in accordance with the amount which he is able to pay. If he brings an action after the marriage has been dissolved, I think that the amount to be paid will depend upon the circumstances and personal character of the parties. For what if the father-in-law had imposed

upon his son-in-law by giving him reason to expect a dowry, when he knew that he was unable to furnish it, and had done this for the purpose of deceiving his son-in-law?

85. *Scævola, Digest, Book VIII.*

A father gave a tract of land as dowry for a daughter, and, having died, left the daughter the sole heir of his estate. She, having been pressed by the creditors, decided that it would be better to sell the tract of land which had been given by way of dowry, because it was less productive, and to retain the other tracts belonging to the estate, because they yielded a larger income. The husband gave his consent to this, provided there was no fraud in the transaction. I ask whether that part of the dowry which was included in this tract of land could be lawfully transferred to the woman during the marriage. The answer was that it could be, if the price of the same was paid to a creditor.

TITLE IV.

CONCERNING DOTAL AGREEMENTS.

1. *Javolenus, On Cassius, Book IV.*

It is lawful for an agreement to be made after marriage, even if none has previously been, entered into.

(1) Agreements made for the purpose of returning a dowry should be entered into by all the parties who have either a right to recover the dowry, or from whom it can be recovered, in order that one of them, who is not a party to the proceedings, will not be able to obtain any advantage from the magistrate who may be called upon to enforce the agreement.

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

Where an agreement has been made that the dowry shall remain in the hands of the husband, no matter in what way the marriage may be dissolved, provided there are any children, Papinianus stated to Junianus, the Prætor, that in case the marriage was terminated by the death of the husband, it must be held that no agreement had taken place for the retention of the dowry, and that, under such circumstances, an agreement which was prejudicial to the dowry, should not be observed when the death of the husband takes place.

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

Where an agreement is entered into which has reference to the time of a divorce, and a divorce does not take place, the agreement will not become operative.

4. *Ulpianus, On Sabinus, Book XXXI.*

If it should be agreed that the profits of property should be converted into a dowry, will the agreement be valid? Marcellus says in the Eighth Book of the Digest that such an agreement is not valid, for a woman by a contract of this kind almost becomes unendowed. He, however, makes the distinction that if a woman should give a tract of land as dowry, under the condition that her husband shall deliver to her the profits of the same, such an agreement is void; and the same rule applies if she gave an usufruct as dowry under a similar agreement. If, however, a contract should be made with reference to giving the profits, that is to say, that any profits which may be obtained shall compose the dowry, and the land, or the usufruct of the same is delivered in compliance with it, not with the understanding that the profits are to become dotal, but that the husband can collect the profits which will become a part of the dowry; he can be compelled by an action on dowry to deliver said profits. The profits will, therefore, form the dowry, and he can enjoy the interest obtained from them, as well as acquire what is added to the principal.

I think that, in both instances, consideration should be paid to the intention with which the dowry was given, so that if the wife gave a large dowry because she wished the income of the same to constitute it, and expected the husband to be content with the interest it might yield; it can be said that the agreement will be valid, for then the dowry is not unprofitable.

Suppose, for example, that the husband receives an annual income of forty *aurei* by way of dowry, while if such an agreement had not been entered into he would have received more than three hundred, would not it be of great advantage to him to obtain so profitable a dowry? And what shall we say if the agreement has been drawn up in such terms that the husband can turn the profits into a dowry, and that the wife must maintain herself and her family, and provide for them, and pay all their expenses? Why can you not hold that an agreement of this kind will be valid?

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

A contract cannot be made which will prevent the husband from taking action in case of the immorality of his wife, or which will permit him to collect more or less than the law allows under such circumstances; for the right to inflict public punishment cannot be annulled by a private agreement.

(1) Agreements of this kind should not be observed where reference is had to the recovery of property given or removed, because in the first instance, women are invited to steal, and in the second, the Civil Law is violated.

(2) If it should be agreed that the husband shall not bring suit for necessary expenses incurred, the agreement should not be observed, because expenses of this kind diminish the dowry by operation of law.

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

Pomponius says that a husband cannot contract to give a guarantee only against fraud with reference to the dowry, which is provided for the benefit of married persons, although he can agree that he shall not be responsible for the claim of a debtor, who has promised him a dowry. Pomponius holds that he can agree that the dowry will be at the risk of the wife; and, on the other hand, stipulate that the dowry which is at the risk of the wife shall be at the risk of the husband.

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

Where a dowry is given in behalf of a daughter, it is best for the son-in-law to make an agreement with both parties; although, in the beginning, when a dowry is given, the father can impose any condition which he wishes, without considering the person of the woman. But if, after the dowry has been given, he wishes to make an agreement, both parties must be considered when this is done, since the dowry has already been acquired by the woman. In this instance, the father either makes the agreement without his daughter, or alone, or he does so after haying called his daughter in, and the agreement will either benefit or injure no one but himself. If, however, the daughter alone enters into a contract by which the condition of her father becomes improved, it will also benefit him, since he can acquire property by means of his daughter, while a daughter cannot do this through her father. But where the contract made by the daughter in injurious, while it may prejudice her rights, it will in no way be disadvantageous to the father, unless he institutes proceedings together with his daughter. It must be said that the daughter can never, by making any agreement, cause the condition of her father to become worse, as in case she should die during marriage the dowry will revert to her father.

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

Where a son under paternal control marries while his father is insane, or is in the hands of the enemy, or where his daughter marries under similar circumstances, an agreement having reference to a dowry entered into with either must be made with each individually.

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

When an agreement is entered into providing that if a daughter should die during the lifetime of her father-in-law, her entire dowry shall be given to the latter, and if he should die, to his son, and if his son should also die, to the heir of the father-in-law; such a stipulation by an

indulgent construction can be upheld as equitable.

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

A grandfather, in providing a dowry for his granddaughter, agreed that it should never be claimed by himself, or his son, but that it could be claimed by any other heir than his son. The latter will be protected by an exception based on the contract, as we are permitted to provide for our heirs, and there is nothing to prevent our doing so for any certain person, if he should be our heir; but this does not apply to other heirs. Celsus held the same opinion.

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

Where a father promised a dowry, and agreed that it should not be claimed by him while he was living, nor, in any event, so long as the marriage continued to exist, the Divine Severus decreed that the agreement should be interpreted just as if it had contained the addition, "While he was living." For this is to be understood to have reference to paternal affection, and the wishes of the contracting parties, in such a way that the latter part of the agreement will be held to have reference to the lifetime of the father, as a different construction would separate the profits of the dowry from the expenses of marriage, which would be intolerable; and the result would be that the woman would be held to have no dowry. Hence it was brought about by this Rescript, that if the daughter should die while her father was living, or should be divorced without any blame attaching to her, the dowry could, by no means, be claimed by her husband, but that he could claim it if the father should die while the marriage existed.

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

Where a father gave a dowry, and agreed that if his daughter died during marriage, the dowry should remain in the hands of her husband; I think that the agreement must be observed, even if no children had been born.

(1) Among the agreements which are usually entered into before and after marriage, some are voluntary, as, for instance, where it is stated that the woman shall support herself with the promised dowry; and, as long as the marriage continues, the dowry cannot be demanded of her by her husband; or she can furnish him a certain sum for his support; or some other provisions similar to these may be made.

There are other agreements which relate to the law, for example, those which prescribe the way in which a dowry shall be returned when it is claimed; and, in cases of this kind, the will of the contracting parties is not always observed. If, however, it should be agreed that the dowry, under no circumstances, can be claimed, the woman will remain unendowed.

(2) Where a woman agrees that no more than half of the dowry can be demanded of her, and she stipulates for a penalty; Mela says that she should be content with one or the other of two things; either with an exception based upon the agreement with a release of the obligation of a penalty, or if she proceeds under the stipulation, she should be denied the right to. an exception.

(3) Where a tract of land which has been appraised is given by way of dowry, and the woman agrees that if it brings any more when sold, the surplus shall become part of her dowry; Mela says that such an agreement must be carried out, just as, on the other hand, she can agree to be liable for the deficiency in case the land should sell for less.

(4) If a wife should agree that whether a tract of land given by way of dowry sells for either more or less than the appraisement, the price that it brings shall constitute her dowry, this agreement must be executed; but if the property should sell for less, through the fault of the husband, the wife can recover the deficiency from him.

13. *Julianus, Digest, Book XVII.*

Moreover, if the land should not be sold, the appraisement of the same should be furnished.

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

With reference to the time when the dowry should be returned, the law permits an agreement to be made fixing the day when this may be done, provided that the condition of the woman is not rendered any worse thereby:

15. *Gaius, On the Provincial Edict, Book XI*. That is to say, it may be returned sooner.

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

An agreement cannot be made for the dowry to be returned at a later date than that established by law; any more than it can be agreed that it shall not be returned at all.

17. *Proculus, Epistles, Book XI*.

Atilicinus to his friend Proculus, Greeting: "Where an agreement was made between a man and his wife before marriage, that, in case a divorce took place, the same time should be granted for the return of the dowry that was given for its bestowal; the woman gave the dowry to her husband five years after marriage. A divorce having taken place, I ask whether the husband should restore the dowry to his wife within five years, or whether he must do so within the time fixed by law?

Proculus answered with reference to the time of returning the dowry: "I think that by an agreement the condition of the woman can be improved and cannot be made worse; therefore, if it is provided that the dowry shall be returned in a shorter time than that established by law, it should be carried out, but if it is agreed to return it after a longer time, such a contract is not valid."

As to this opinion, it is proper to state that if it is proved by the agreement that, after divorce, there should be the same delay for the return of the dowry as there was for its delivery after marriage, and if this delay in returning it was shorter than that authorized by law, the agreement will be valid, but if it is longer, it will not be.

18. *Julianus, Digest, Book XVIII*.

Although, during the continuance of the marriage, the husband and wife may be unable to agree to defer the restoration of the dowry for a longer time than is authorized by law; still, after a divorce, if there was good reason for the agreement, it should be kept.

19. *Alfenus, Epitomes of the Digest by Paulus, Book III*.

It is different where a father, in promising a dowry for his daughter, agrees that it shall be paid by him in one, two, three, four, and five years; and states that it shall be returned in the same manner, if the marriage should be dissolved, for this agreement will be valid if the daughter should become the heir of her father, and if she was present at the time when the contract was made.

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

An agreement made on account of property given or appropriated by the wife, or expenses incurred, will be valid; that is to say after a divorce has taken place.

(1) Where a stranger is about to give a dowry out of his own property, he can stipulate for and agree to anything that he chooses even without the knowledge of the woman; for he is imposing conditions upon what belongs to him, but after he has given the dowry, he can only enter into an agreement concerning it with the consent of the woman.

(2) If it should be agreed that the dowry cannot be demanded either from the wife or from the father, the heir of either of them will not be entitled to an exception. If, however, the agreement was that it should not be claimed during the marriage, in the lifetime of the father, it can be claimed immediately after his death; and if the husband should not claim it, he will be liable on the ground of negligence if the dowry could be exacted; unless the marriage was dissolved before he had the power to demand it.

21. *Julianus, Digest, Book XVII*.

Where a woman promises a certain sum of money, by way of dowry, and, instead of it, gives slaves under the condition that they shall be at her risk, and if any children are born to them they shall belong to her, the agreement must be carried out; for it is settled that a contract can be made between husband and wife setting forth that a dowry consisting of a sum of money may be changed and transferred to other property, if it will be advantageous to the woman.

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

A certain man received a tract of land from his wife by way of dowry, and it was agreed between them that the husband should give the rent of said land to his wife as annual income. The husband afterwards leased the land to the mother of the woman to be cultivated for a certain amount of rent, and she died without having paid it, leaving her daughter her sole heir, and then a divorce took place. Her husband brought suit against the woman for the rent which her mother owed him, and it was decided that an exception should not be granted her, as if the agreement had not been made between her and her husband that the said rent should be given to her for her maintenance; since, under some circumstances, donations may legally be made between husband and wife, for what is given by way of annual income is a species of gift.

23. *Africanus, Questions, Book VII.*

A father, at the time that he gave a dowry to his daughter, agreed that if she should die leaving one or more children, the dowry should be returned to him, after deducting the third part of the same; or, after his death, that it should be given to one or the other of the children who were under his control. This was afterwards expressly stipulated. After the death of the father, the woman died during marriage, leaving children. The question arose whether the children could claim two-thirds of the dowry, in accordance with the stipulation. I answered that they could, for the effect of the stipulation was that if the woman should die during marriage, her dowry should be returned to her father, and the same rule applies as where a stipulation was entered into in the following terms: "If a ship comes from Asia, do you agree to pay me a certain sum of money, or, after my death pay it to Lucius Titius?" for if the ship should arrive after the death of the stipulator, the money will be due to my heir.

24. *Florentinus, Institutes, Book III.*

Where it was agreed between husband and wife that a certain portion of the dowry, or all of it, should be retained in case of the birth of one or more children; the agreement must be carried into effect, even on account of children who had been born before the dowry was given or increased, for it is sufficient for them to be born during the marriage with reference to which the dowry was bestowed.

25. *Ulpianus, Opinions, Book I.*

With reference to the return of a dowry, where it was agreed to do so if the girl died before marriage, it is also held that the husband agreed not to claim it, and that the father had obtained the right to transmit to his heir an exception on the ground of contract.

26. *Papinianus, Opinions, Book IV.*

It was agreed between a father-in-law and his son-in-law that if the daughter should die leaving a child one year old, the dowry would belong to her husband, but if the child should die during the lifetime of its mother, the husband could retain only a portion of the dowry where the wife died during marriage. The woman lost her life by shipwreck at the same time as her child, who was one year old. For the reason that it appeared probable that the child died before its mother, it was decided that the husband could retain a portion of the dowry.

(1) A husband can retain a dowry granted to a daughter by an agreement, and if he should fail to do so through mistake, the daughter, who is the sole heir to her father and an heir to a part of her mother's property, can, it is not wrongly held, assert a preferred claim to the dowry improperly paid by her father, in case of the partition of her mother's estate.

(2) Where it is agreed between a father and a son-in-law that the dowry shall be returned to

the father, in case the daughter should die during marriage without leaving any children, it must be understood to have been agreed between the parties that if the daughter should die leaving children, the dowry shall be retained, and that no portion of the same shall be separated from it on account of any addition which has been made thereto, if no agreement to the contrary was made.

(3) It was agreed that a wife should be transported at the expense of her husband wherever she went, and therefore in strict pursuance of this agreement the woman followed her husband, and sought him in the province where he was serving as centurion. If the husband did not keep the agreement, although a direct action would not lie, still an equitable action *in factum* should be granted.

(4) Where a daughter, who was promising a dowry for herself, inserted in the contract that if she should die during marriage without leaving any children, her dowry should be paid to her mother; this agreement of her daughter confers no right of action upon the mother. Still, if the heir of the daughter should pay the money composing the dowry, and the husband should bring suit for it, an exception can be pleaded against him for claiming the dowry in violation of his own agreement.

(5) A father stipulated for the dowry to be given to him, if his daughter should die during marriage. While the marriage was still in existence, the father was convicted of a capital crime. The condition of the stipulation would not take effect if a divorce took place, or the marriage was dissolved by the death of the husband. If, however, the woman should die during marriage, the right to an action on dowry arising from the stipulation would be acquired by the Treasury. But if the parties should be remarried after a divorce, the stipulation would not become operative for the benefit of the Treasury, even though the daughter died during the second marriage, as it had reference to the first marriage.

27. *The Same, Definitions, Book I.*

If a woman who has children should return to her husband through duplicity, after a quarrel; as for instance, where, through venal motives, she agrees that she shall not be endowed; this agreement being contrary to custom ought not to be enforced, in accordance with the circumstances of the case.

28. *Paulus, Questions, Book V.*

The question is asked whether, where a woman, either before or after marriage, agrees that her creditor shall be satisfied with the crops of land which she gave by way of dowry, will the agreement be valid? I say that it will be valid, if it is made before marriage and that in this way the dowry will be diminished; but if it is made after marriage, as the profits of the dowry are intended to relieve the matrimonial burdens, the husband practically consents to pay the creditor out of his own property, and the transaction will be a mere gift.

29. *Scævola, Opinions, Book II.*

Where a husband received certain lands which had been appraised, by way of dowry, and, during the existence of the marriage, with the intention of deceiving his wife, agreed that the said lands should not be considered as appraised, so that he could render them less valuable without running any risk; the question arose whether the lands which had been appraised should remain so according to the dotal estimate, and the husband be liable to their deterioration. I answered that the contract would not be affected by what was proposed, because this was done during marriage, provided the dowry was not diminished in value; still, if the land should be deteriorated after the contract was made, the woman would be entitled to a dotal action on this ground against her husband.

(1) Titius gave a dowry for a woman, and made a stipulation with reference to it in case of death or divorce. A divorce having taken place, Titius died without claiming the dowry, and the woman renewed her marriage with the consent of the heir. The question arose whether the heir could demand the dowry on the ground of the stipulation. I answered that the heir of

Titius would be barred by an exception on the ground of contract, if he had given his consent that the amount which he could recover on account of the stipulation should become the dowry of his mother, when the marriage was renewed.

(2) A woman, who gave property as dowry, agreed that if she died during marriage it should be returned to her brother, and the latter made a stipulation to that effect. The wife, at her death, bequeathed certain dotal property to her husband, as well as to others, and she also manumitted certain slaves who formed a part of the dowry. The question arose whether the husband was liable to the brother for the property which the woman bequeathed, and the slaves which she manumitted. I answered that there was nothing in the facts stated why he should not be, as the heirs of the deceased, as well as the legatees were liable on account of the manumission.

30. *Tryphoninus, Disputations, Book X.*

Bæbius Marcellus promised Bæbius Maryllus a hundred *aurei*, by way of dowry for his daughter, and it was agreed between them that the dowry should not be claimed during the existence of the marriage; or, if the daughter should die during marriage without leaving any children, after the death of her father, half of the dowry should remain in the hands of Maryllus, and half of it should be returned to the brother of the woman; and these matters were also set forth in a stipulation.

Marcellus having died leaving a son and a daughter, and having bequeathed the entire dowry to his daughter, Maryllus divorced his wife by whom he had a daughter, and his wife died, leaving her brother and her daughter heirs to equal shares of her estate. Maryllus brought suit before Petronius Magnus, the Prætor, for the entire dowry, against the son of Marcellus, who was his heir, 9n the ground of the promise of the same; alleging that it had been agreed upon between the two parties that if the woman died without leaving any children, half of the dowry should remain in the hands of her husband, and that the proper construction of the agreement was that the entire dowry should belong to him if the woman should have a son or a daughter.

On the other hand, it was held that the exception based on the common agreement was also advantageous to the heir, but that, in the case proposed, the heir being, as it were, the representative of the deceased, could not protect himself by means of an exception on the ground of contract; but that, if he himself had been sued for the dowry during the lifetime of the woman, he might have barred Maryllus by this exception, because a divorce had taken place, and he could interpose the same defence, even after the death of his sister. Therefore it was decided that the heir must be released from liability for the said claim, but that there should be nothing in this opinion to prevent the assertion of the claim based on the trust, under the terms of which Maryllus was entitled to half of the estate as the heir of his wife, obtained through his daughter by hereditary right.

31. *Scævola, Questions, Book III.*

If it is agreed between husband and wife that the profits of the last year of marriage, which have not yet been obtained, shall be applied for her benefit, a contract of this kind is valid.

32. *Javolenus, On the Last Works of Labeo, Book VI.*

A wife gave to her husband, by way of dowry, land appraised at a hundred *aurei*, and then made an agreement with him to return the land to her at the same price in case of a divorce. The husband afterwards sold the said land for two hundred *aurei*, with the consent of his wife, and then a divorce took place. Labeo thinks that the husband should have the privilege of paying her two hundred *aurei*, or of returning the land, whichever he may choose; and that the obligation arising from the agreement should not be released. I think that Labeo gave this opinion because the land had been sold with the consent of the woman, otherwise it should, by all means, be returned.

(1) If a father promises a certain sum of money as a dowry for his daughter, and it is agreed

that he shall not be compelled to pay it against his consent, I think that nothing can be collected from him; because the clause contained in the contract which stated that he could not be compelled to pay it, should be held to refer to the dowry.

TITLE V.

CONCERNING LAND GIVEN BY WAY OF DOWRY.

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

The *Lex Julia*, having reference to land given by way of dowry, sometimes does not apply; for instance, where the husband fails to make provision against threatened injury, and the neighbor is placed in possession of the premises given as dowry, and is afterwards directed to return the same. In this case the neighbor becomes the owner, because the alienation is not a voluntary one.

(1) But it is possible for the entire title to the land to pass to another, as, for instance, to the heir of the husband, but still, with the same condition that it cannot be alienated.

2. *Ulpianus, On Adultery, Book V.*

If a husband should be reduced to slavery, cannot his owner alienate his land? I think the better opinion is that he cannot.

(1) Wherefore, if the property of the husband should be confiscated, the sale of the land would, nevertheless, be prevented; even though the Treasury is always held to be a good and solvent successor.

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

Where a tract of land is devised to slaves who form part of the dowry, according to the *Lex Julia* it also becomes dotal.

(1) Land given as dowry cannot be alienated whenever the wife is entitled to a dotal action, or where one should by all means be brought.

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

The *Lex Julia*, which has reference to land given by way of dowry, and provides that a husband cannot encumber or alienate it, ought to be more broadly interpreted, so as to apply as well to a betrothed person as to a husband.

5. *Ulpianus, On All Tribunals, Book II.*

Julianus states in the Sixteenth Book of the Digest that a husband cannot lose any servitude attaching to the land, or impose any new ones upon it.

6. *The Same, On Adultery, Book V.*

Freedom from a servitude due to an urban estate subject to dowry cannot be granted by the husband, for fear that by this the condition of the property may be deteriorated.

7. *Julianus, Digest, Book XVI.*

Where a husband acquires a tract of land that belongs to Titius, and which is subject to a servitude for the benefit of real estate subject to dowry, the servitude becomes confused. But if he returns the said land to Titius, without renewing the servitude, the husband will be to blame, and, in this instance, he must pay such damages as may be assessed by the court. Where, however, the husband is not solvent, prætorian actions will be granted against Titius in favor of the woman for the re-establishment of the servitude.

(1) When, however, a woman gives as her dowry land to which a tract belonging to her husband owes a servitude, it comes into the hands of the husband without the servitude; and therefore it cannot be held that the rights attaching to said land have become deteriorated through the act of the husband. What then should be done? It is the duty of the judge, who is

to decide with reference to the dowry, to order the land to be returned to the woman, or to her heir, and the servitude to be re-established.

8. *Alfenus, Epitomes of the Digest by Paulus, Book III.*

A certain man requested his wife to cut down an olive plantation which was on the dotal land, in order to replace it with a new one. The man afterwards died after bequeathing the dowry to his wife, and it was decided that the wood which had been cut from the olive trees should be returned to her.

9. *Africanus, Questions, Book VIII.*

If a woman promises, by way of dowry, to her husband who is her debtor, land for which he owes her, the said land becomes dotal.

(1) Where she promises him, as dowry, either the land or ten *aurei* which he owes her, he will have the right to decide of which of these the dowry shall consist.

(2) But if the husband owed Stichus, a tract of land, and his indebtedness was promised to him as dowry, and Stichus should die, the dowry will then consist of the land.

(3) Julianus says that the result of all this would be that if either the Cornelian or the Sempronian estate for which he was indebted was promised to him as dowry, whichever of these he selected would constitute the dowry; and it is evident that if he wished to alienate either of them he could not alienate the other. If, however, he afterwards should purchase the one that he alienated, he would still have the power to alienate the one which he had retained, if he desired to do so.

10. *Paulus, Questions, Book V.*

The application of this law is therefore indefinite, because the obligation was dotal. Hence where the husband was able to alienate one tract of land could he also alienate the other, because he had the right to repurchase the first, even if this had not yet been done? Or should this not be allowed, for fear either one of them might compose the dowry? It is certain that one of them would be held to have been lawfully alienated, if the other was afterwards redeemed.

11. *Africanus, Questions, Book VIII.*

Where a tract of land given as dowry is appraised in order that the woman may have the right of choice, it is held that the land cannot be alienated. The contrary rule, however, prevails, if this depends upon the will of the husband.

12. *Papinianus, On Adultery, Book I.*

Even though the marriage should be dissolved, the land is still understood to be dotal.

(1) The consent of a father-in-law to the sale of land belonging to a dowry is of no force or effect.

13. *Ulpianus, On Adultery, Book V.*

We should understand dotal land to include both that situated in town and country, for the *Lex Julia* had reference to every kind of buildings.

(1) The term "land" also applies to a portion of the tract, hence, whether the entire tract has been given as dowry, or only a part of the same, it cannot be alienated. This is the law at present.

(2) We understand the term "dotal land" to refer to that of which the ownership is acquired by the husband, so that then only is he forbidden to alienate it.

(3) The same relief is granted by the law to the heir of the wife, as is granted to the wife herself.

(4) Where a wife is appointed heir to her husband, and the land belonging to the dowry is bequeathed, if, after the deduction of the legacy, the woman should have an amount of interest in the estate equal in value to the dowry, the legacy will be valid.

The question arises whether it will be valid if the amount should be less. Scævola says that a portion can be recovered, if not all of it, if a certain amount is lacking to make up the dowry; and that only that much will remain in the hands of the woman which is required to supply the deficiency.

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

Where a woman, who was about to marry Titius, transferred to Mævius, with the consent of her husband, the land which she had given as dowry; the dowry will be in the same condition as if she had transferred it to Titius herself.

(1) If anyone should give a tract of land as dowry for a woman, it becomes dotal; for it is considered to have come into the hands of the husband on account of his wife.

(2) Where a husband owes his wife land belonging to another, and she promises it to him by way of dowry, it will be in suspense, and will become dotal when it comes into his hands.

(3) If a woman rejects land which has been devised to her by way of dowry, or even if she fails to accept an estate or a legacy, where her husband was substituted, the land will become dotal.

15. *Papinianus, Opinions, Book I.*

It has been decided that dotal land, the possession of which was retained by the husband after letters which he sent to his wife, in which he stated that the land would not become dotal, can be retained by the husband after the wife had died during marriage, for the reason that she would not be entitled to an action on contract.

16. *Tryphoninus, Disputations, Book XI.*

Where a woman gave her husband, by way of dowry, a tract of land of which Titius had possession in good faith, and had a right to claim for himself on the ground of prescription, and her husband neglected to bring suit for said land when he could have done so, he will be responsible. For although the *Lex Julia*, which forbids dotal land to be alienated, also has reference to an acquisition of this description, it does not, however, interrupt possession which has existed for a long time, if this had already begun before the land was rendered dotal. It is evident that if a very few days are lacking to establish the prescriptive right, the husband will not be at all to blame.

17. *Marcianus, Digest, Book VII.*

A husband sold and delivered land forming part of a dowry. If his wife died during marriage, and the dowry was a source of profit to the husband, the purchaser cannot be deprived of the land.

18. *Javolenus, On the Last Works of Labeo, Book VI.*

A husband opened marble quarries on dotal land. A divorce having taken place, the question arose to whom the marble which had been taken out but which had not yet been removed, belonged; and whether the wife or the husband should bear the expense incurred in working the quarries. Labeo said the marble belonged to the husband, but he denied that anything should be paid to him by the wife, because the expense was not necessary, and the land had been rendered less valuable.

I think that not only necessary expenses but also those that are useful should be paid by the wife, and I do not believe that the land was decreased in value, if the quarries were of such a kind that the quantity of stone in them would, in time, be increased.

(1) If the wife should be in default, where an agreement was made that she should receive the

land after paying the appraised value of part of the same to her husband; Labeo says that any profits collected in the meantime belong to the latter. I think that the better opinion is that the husband should be entitled to a proportionate share of the profits, and that the remainder should be refunded to the woman; which is the law at present.

THE DIGEST OR PANDECTS.

BOOK XXIV.

TITLE I.

CONCERNING DONATIONS BETWEEN HUSBAND AND WIFE.

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

In accordance with the custom adopted by us, gifts between husband and wife are not valid. This rule has been adopted to prevent married persons from despoiling themselves through mutual affection, by setting no limits to their generosity, but being too profuse toward one another through the facility afforded them to do so.

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

Another reason is that married persons might otherwise not have so great a desire to educate their children. Sextus Cæcilius also added still another, namely, because marriage would often be dissolved where the husband had property and could give it, but did not do so; and therefore the result would be that marriage would become purchasable.

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

This reason is also derived from a Rescript of the Emperor Antoninus, for it says: "Our ancestors forbade donations between husband and wife, being of the opinion that true affection was based upon their mutual inclination, and also taking into consideration the reputation of the parties who were united in matrimony, lest their agreement might seem to be brought about for a price, and to prevent the better one of the two from becoming poor, and the worse one from becoming more wealthy."

(1) Let us see between what persons donations are prohibited; and, indeed, if a marriage is solemnized in accordance with our customs and laws such a donation will not be valid. It will be valid, however, if any impediment should arise so that marriage cannot be contracted. Therefore, if the daughter of a senator marries a freedman in violation of the Decree of the Senate, or if a woman in a province, in opposition to the Imperial Decree, marries an official who is discharging his duties there, the donation will be valid, because such a marriage is void.

But it is not right that donations of this kind should be valid, nor that the condition of those who are guilty of an offence should be improved; still, the Divine Severus, in the case of the freedwoman of Pontius Paulinus, a Senator, rendered a different decision because the woman had not been treated with the affection to which a wife was entitled, but rather with that due to a concubine.

(2) Those who are under the control of the same person are forbidden to make gifts to one another; as, for instance, the brother of a husband who is under the control of the father-in-law of the wife.

(3) We apply the term "control" not only to children but also to slaves, for it is the better opinion that those who are subject to the husband by any law cannot make such donations.

(4) Hence, if a mother makes a gift to her son who is under the control of his father, the gift will be of no effect because he acquires it for his father. If, however, she gives it to him while he is a soldier and is about to leave for the camp, it is held that the gift will be valid, because it is acquired by the son, and forms part of his *castrense peculium.* Wherefore, if a son or stepson, or any other person subject to the authority of the husband, makes a gift out of his *castrense peculium* it will not be void.

(5) Therefore a person who is under the control of the father-in-law is prohibited from making presents to the wife and the daughter-in-law, provided the husband is under the control of the father.

(6) The wife and daughter-in-law, on their part, are forbidden to make gifts to a husband or a son-in-law. Moreover, a gift will not be valid where it is given to those under their control or under the control of the parties to whose authority they are subject; provided the husband and father-in-law are under the control of the same person, or the husband is under the control of the father-in-law. Moreover, where the husband belongs to another family, neither the father-in-law nor anyone under his control, nor anyone subject to the authority of the latter, is forbidden to receive a gift from the wife.

(7) A mother-in-law is not prohibited from bestowing gifts upon her daughter-in-law, or *vice versa*, because in this instance the right of paternal authority is not involved.

(8) If my slave, in whom another enjoys the usufruct, gives a present to my wife out of his *peculium* which does not belong to me, or a freeman who is serving me in good faith as a slave does this; the question arises, will such a donation be valid? In the case of a free person, indeed, a donation can be permitted to a certain extent, but others have no right to alienate their *peculium* by giving it away.

(9) Not only are husband and wife themselves not permitted to make donations, but other persons cannot do so.

(10) Moreover, it should be remembered that gifts between husband and wife are forbidden to such an extent that they are void by operation of law. Hence, if a certain article is to be given, its delivery will not be valid, and if a promise is made to a party making a stipulation, or if he is released from liability for a debt, the transaction will not be valid; for, by operation of law, any transaction entered into by husband and wife with reference to a donation will be of no effect.

(11) Therefore, if a husband gives money to his wife, it will not become her property, because it is evident that she cannot acquire the ownership of the same.

(12) If, however, a husband should order his debtor to pay the obligation to his wife, in this instance, the question arises whether the money becomes hers, and whether the debtor will be released. Celsus states in the Thirteenth Book of the Digest that it would seem that it cannot be held that the debtor is released, and that the money becomes the property of the husband and not of the wife. For if the donation is not prohibited by the Civil Law, the result of the transaction will be that the money would come into your hands from your debtor, and then pass from you to your wife; since through the rapidity with which the two acts are united, one of them is obscured. It does not appear, however, to be either novel or strange for a debtor to pay a creditor and the creditor to pay his wife, because it is understood that you yourself receive what you obtain at the hands of another. For in case anyone who pretends to be the agent of your creditor receives money from your debtor under your direction, it is settled that you will be entitled to an action for theft, and that the money itself is yours.

(13) This opinion confirms what Julianus stated in the Seventeenth Book of the Digest, namely: that if I should direct someone who is about to make me a present to give to my wife, the transaction will be of no effect, for it would be considered just as if I had received it myself, and, having become my property, I gave it to my wife. This opinion is correct.

4. *Julianus, Digest, Book XVII.*

The same rule applies if I should direct a person who is about to make a donation *mortis causa*, to me, to make it to my wife; nor does it make any difference whether the donor recovers, or dies. Nor should it be held that, if we say that this donation is valid, I would become any the poorer, because if the donor recovers, I will be liable to a personal action; but if he dies, I will cease to have the property which otherwise would have been included among my possessions, because of my having donated it.

5. *Ulpianus, On Sabinus, Book II.*

Where a man who desires to make a gift to his betrothed gives it to Titius, in order that he

may bestow it upon the woman, and Titius delivers it after the marriage has taken place; if the husband employed him as an intermediary, the donation made after the marriage took place will not be valid. When, however, the woman employed him, and the donation has already been made for some time, that is before marriage, therefore, although Titius delivered it after the marriage was celebrated, the donation will be valid.

(1) Where a husband had two debtors, Titius and his wife, and he releases the wife from liability by way of a gift, neither party will be released because the discharge of the woman is void. This Julianus also states in the Seventeenth Book of the Digest. It is evident that if you suppose that Titius is discharged, he will indeed be released from liability, but the woman will still be liable.

(2) Generally speaking, it must be held that any transaction involving a gift which has reference to married persons themselves, or to others that are interposed, will not be valid. If the affair is mixed, and concerns other property and persons in such a way that the components cannot be separated, the donation will not be prevented; but if they can be separated, the other parts of the transaction will be valid, but the donation will not be.

(3) Where a debtor of the husband, by the direction of the latter, promises his wife the money which he owes, the promise is void.

(4) Where a wife, for the purpose of making a donation to her husband, promises to pay his creditor and gives a surety; Julianus says that the husband will not be released, or the wife or her surety be liable, and the result will be just as if she had not made any promise.

(5) Julianus also says with reference to sales, that where one is made of property for a price less than its value, by either husband or wife, it will be of no effect. Neratius, however (whose opinion Pomponius does not reject), says that where a sale is made between husband and wife as a donation, it is of no effect; provided that the husband did not have the intention of selling the property, but merely pretended to do so, in order that he might donate it. For, in fact, if he had the intention of selling it and remitted a portion of the price to the woman, the sale would be valid, but the remission of the price will be void to the extent of the profit which accrues to the woman. Hence, if property which is worth fifteen *aurei* is sold for five, and its value is only ten, the woman must refund only five *aurei*, because she is considered to have profited by that amount.

(6) Where a wife, or a husband, fails to make use of a servitude by way of a donation, I think that the servitude is lost; but, after a divorce, it can be recovered by an action.

(7) Where a wife, or a husband, consents to be barred by an exception for the purpose of making a donation, a decision rendered by a judge granting a release will be valid; but an action can be brought against the party who has obtained the advantage.

(8) A donation of a burial-place is permitted, for it is settled that a husband can give a burial-place to his wife, and, on the other hand, that she can give one to him. If the party who receives it buries anyone there, the place will become religious. This arises from the fact that it is usually stated that a donation only is forbidden which has a tendency to make the giver poorer, and the receiver richer. Hence, in this instance, a party is not held to become more wealthy by the acquisition of property dedicated to religious purposes. Nor should the statement have any weight that the woman would have purchased another burial-place, if she had not received this one from her husband; for although she would have become poorer if her husband had not given it to her, still, she does not become more wealthy, for the reason that she is at no expense.

(9) This also affords ground for the opinion that if a husband should donate land for a burial-place to his wife, it is understood that it only becomes hers when a dead body is buried therein. For, before the place becomes religious, it remains the property of the donor, and therefore if the woman should sell it, it will, nevertheless, continue to remain his property.

(10) According to this, if a husband should give his wife a monument of great value, which

had not been used, the donation will be valid, but it would only be valid when it became religious.

(11) Even if the woman herself should be buried there, although the marriage was terminated by her death, still, the place would become religious through favorable interpretation.

(12) Hence, if a husband should give his wife something as an offering to God, or land upon which she has promised to erect some public work, or to build a public temple, the place will become sacred. If, however, he should give her anything to be donated or consecrated to God, there is no doubt that the gift will be valid. Wherefore, if he furnished her with oil to be used in a temple, the donation will be valid.

(13) Where a husband is appointed an heir, and rejects the estate for the purpose of making a donation to his wife; Julianus says in the Seventeenth Book of the Digest that the donation is valid. For he does not become any the poorer by not acquiring the property, for he only does so who loses his own patrimony. The rejection of the estate by the husband benefits the wife if she should be substituted, or should become heir *ab intestato*.

(14) In like manner, if a husband rejects a legacy, we hold that the donation is valid if the woman is substituted with reference to the legacy, or even if you suppose that she was appointed the heir.

(15) Where anyone is asked to deliver an estate to his wife after reserving a certain amount of it for himself, and he delivers it without any deduction, Celsus says in the Tenth Book of the Digest that the husband is considered rather to have acted with a more conscientious sense of his duty in the delivery of the property than to have donated the same.

Celsus gives a very just reason for this opinion, for a great many persons, in a case of this kind, rather consider that they are discharging their duty than that they are donating anything, and that where they make a more ample delivery of property belonging to another, than they are required to do, they are complying with the wishes of the deceased, and are not paying out anything of their own; and it is not without reason that we often think that the deceased desired something to be done which he did not request.

This opinion is more applicable to a case where a man was asked to deliver an estate, and did not reserve the fourth to which he was entitled, but still discharged his trust, after neglecting to take advantage of what was granted by the Decree of the Senate. For he, indeed, discharged his trust having carried out the wishes of the testator. This is the case where he did not make an error in the calculation, but there is no doubt that he would be entitled to an action for the recovery of money which was not due, and which he had paid in the execution of the trust.

(16) Therefore, when nothing is paid out of the property, it is rightly held that a donation between husband and wife will be valid; for it is valid where the party who makes the donation does not diminish his or her means; and the donation will still be valid even if the property should be diminished, provided the one who receives it does not become more wealthy thereby.

(17) Marcellus asks in the Seventh Book of the Digest whether the donation will be valid where a woman received money from her husband and expended it in behalf of one of her relatives who held the rank of centurion. He says that it will be valid, for the woman did not become more wealthy by the transaction, any more than if she had borrowed the money in order to pay it in behalf of her relative.

(18) Moreover, with reference to donations forbidden by the Civil Law, the gift may be revoked in such a way that, if the property is still in existence, it can be recovered from him or her to whom it was given. But if it has been consumed, a personal action will lie to recover the amount to which either of the parties has been enriched.

6. *Gaius, On the Provincial Edict, Book XL*

Whatever is retained by reason of a donation which is not permitted by law, is understood to

be retained without any reason, or unjustly; in either of which instances a right of action for recovery will ordinarily arise.

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

Moreover, what time should be considered in order to determine whether the parties have profited pecuniarily: should it be the date when issue was joined, or that when judgment was rendered? The time when issue was joined should be taken into consideration, and this our Emperor and his father stated in a Rescript.

(1) Where a husband gives his wife money for the purchase of perfumes, and she pays it to his creditor, and afterwards purchases perfumes with her own money; Marcellus says in the Seventh Book of the Digest that she will not be held to have profited by the transaction. He also says that if he should give her a dish for the same purpose, and she should keep it, and purchase perfumes with her own money; the husband would not be entitled to an action to recover the dish, because the wife has not become any the more wealthy, as she spent an equal sum for something which was perishable.

(2) Where a man and his wife give one another the sum of five *aurei* and the husband keeps his, and the wife spends hers, it was very properly decided that there was a set-off of the two gifts; and this the Divine Hadrian decreed.

(3) Marcellus also says that if a man should give money to his wife, and she should purchase land with it, an estimate should be made as to how much the woman had profited by the transaction. Hence, if the land was of very little value at present, we must hold, in consequence, that its value at the time issue was joined should be taken into consideration. It is evident that if the land is of great value, only the amount which was paid must be refunded, and not the interest of the price.

(4) A nice question arises where a woman purchases land for fifteen *aurei*, and her husband does not pay the entire price but only two-thirds of the same, that is to say, ten *aurei;* and his wife pays five out of her own money; and at the present time the said land is only worth ten *aurei*, how much will the husband be entitled to recover? The better opinion is that he should recover two-thirds of ten, and that what is lost of the price should be equally borne by the husband and wife.

(5) Where a husband alleges that he has increased the value of property which he received as dowry, for the purpose of benefiting his wife, our Emperor and his father stated a remedy for this in a Rescript as follows: "As you say that the price of the property was increased for the purpose of benefiting your wife, the magistrate who has jurisdiction of the matter shall decide that if you refuse a certain proportion of the money, you must return the land itself, after having deducted the reasonable expenses which you have incurred." It is therefore left to the choice of the husband to deliver whichever he prefers.

The same rule of law applies if, on the other hand, the woman makes complaint of a diminution in the value of the property. The principle is the same as that ordinarily followed where property is lent for use after appraisement; as Pomponius states in the Fourth Book of Various Extracts.

(6) Where a wife purchases from her husband lands which she had received as security for the return of her dowry, and the said purchase is said to have been made for the purpose of benefiting her, the transaction will be void. But our Emperor and his father stated in a Rescript that the obligation of pledge will continue to exist. I give the words of this Rescript in order that it may be established that a *bona fide* sale made between husband and wife cannot be annulled. "If your husband sold you pledges given to secure your dowry and money which had been loaned him, not for the purpose of benefiting you, and the transaction was concluded in good faith, it will be valid. But if it is shown that this was only done under pretext of making a donation, and consequently the sale will be held to be void, your right to the property pledged will remain unimpaired by public law."

(7) If a wife buys an article, and her husband pays the purchase money for it, it is sometimes held that the entire property can be recovered from the woman as she has become pecuniarily benefited with reference to the whole of it; just as where a woman purchases property and owes the price of the same, and her husband releases her from the claim of the vendor. For what difference does it make whether he pays her creditor or the vendor?

(8) A certain man gave a slave to his wife under the condition that she would manumit him within a year. If the woman should not comply with the wish of her husband, does not the Constitution of the Divine Marcus confer freedom upon the slave, whether the husband is still living, or whether he is dead? Papinianus says, as the opinion of Sabinus has been accepted, who thinks that the slave only begins to become the property of the party to whom he was given at the moment when freedom was granted him, that therefore the woman cannot manumit him after the specified time has elapsed, even if she should desire to do so; that the Imperial Constitution is not applicable, nor can the will of the husband render it applicable, since he could manumit his own slave. I also approve this opinion, because neither the vendor nor the donor desires to, or can impose any condition upon himself, but he can do so upon the party who receives the slave. Therefore the ownership remains with him, and the Constitution is not operative.

(9) A donation made for the purpose of manumission is valid; although this may be done, not with the understanding that freedom shall be granted immediately but within a certain time. Hence, if a husband gives his wife a slave to be manumitted after a specified period, the slave does not become hers until she begins to manumit him, after the expiration of the said period. Wherefore, if he should be manumitted before that time her act will not be valid, for it must be remembered that if anyone gives his wife a slave to be manumitted within a year, and she does not manumit him within the year, but does so afterwards, her act will be void.

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

If, before the slave is manumitted, the marriage should be dissolved by death or divorce, the donation will be annulled; for it is held to be a condition of such a donation that the slave should be manumitted during the marriage.

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

If a husband gives his wife a slave under the condition that he shall never be granted his freedom, it must be held that a donation of this kind is absolutely void.

(1) Where a woman, having received money from a slave, manumits him or imposes certain services upon him as a condition of his freedom, Julianus says that these services are legally imposed, that the obligation will stand, and that the woman is not held to have profited by the property of the husband, since the slave promises his services as freedman.

Where, however, the woman receives the money of the slave for his manumission, and manumits him on this account; if he paid the money out of his *peculium*, it will still remain the property of the husband, but if anyone else paid it for the slave it will become the property of the woman. This opinion is founded upon justice.

(2) Donations *mortis causa* can take place between husband and wife,

10. *Gaius, On the Provincial Edict, Book XI.*

For the reason that the event of the donation extends to a time when the parties cease to be husband and wife.

11. *Ulpianus, On Sabinus, Book XXXIII.*

In the meantime, however, the property does not immediately pass to the person to whom it is given, but only when death takes place, and therefore, during the intermediate time, it remains in the hands of the donor.

(1) What is said with reference to the validity of donations *mortis causa* between husband and

wife is so true that, according to Julianus, not only a donation made with the intention that the property shall belong to the wife or husband will be valid when death takes place, but also every donation *mortis causa* will confer ownership of the object of the same upon him or her.

(2) Therefore, when a donation is not retroactive difficulties arise, as Marcellus states in the following instance: "A husband wished to make a certain donation *mortis causa* to his wife, and the latter interposed a son under paternal control who was to receive the donation and give it to her; then, after the husband died, he who received the gift became his own master. Is the delivery valid?" He says that the delivery must be held to be valid, because the son became his own master at the time to which the delivery was deferred, that is to say, when the husband died.

(3) He also says that he knew that it was the opinion of Sabinus, that where a husband delivered property to his wife *mortis causa* while she was under paternal control, the donation with all its advantages would belong to her if she should become independent during the lifetime of her husband. This opinion is also approved by Julianus in the Seventeenth Book of the Digest.

(4) Hence, if a wife should give property *mortis causa* to her husband while he was under paternal control, and he should become his own master, we say, without hesitation, that the property will be his.

(5) Moreover, on the other hand, if a wife should make a donation *mortis causa* to her husband while he is the head of the household and, at the time of her death, he should be subject to paternal control, the entire benefit of the donation will be acquired by the father.

(6) Consequently Scævola states in a note on Marcellus that if a woman interposes a slave for the purpose of delivering to her a donation *mortis causa*, and he delivers the property to the woman, and he should afterwards be free at the time of the death of the husband, the same rule must be held to apply.

(7) Marcellus also holds that if he who was interposed should die after he has given the property to the woman, while the donor is still living, the donation will be extinguished, because it should for some space of time become the property of the person interposed, and from him pass to the woman. This occurs where the woman to whom the property is given, and not the donor, causes the interposition of the third party. For if he was interposed by the husband, the title to the property immediately vests in him, and if he should deliver it before the death of the husband and then die, the delivery would be effective to a certain extent, but it would still be in suspense until the death of the donor took place.

(8) If a wife gives property to Titius in order that he may deliver it to her husband *mortis causa*, and, after her death, Titius should deliver the property to the husband against the consent of the heirs, it makes a difference whether Titius was interposed by the woman, or by the husband to whom the property was donated. If he was interposed by the wife, he will be liable to a personal action for recovery, if he delivered the property to the husband; but if he was interposed by the husband at the death of the wife, ownership of the land immediately vests in him whom the husband interposed, and the latter will be entitled to a right of action against him.

(9) If a wife gives property which she has received from her husband *mortis causa* to anyone else, such a gift will be void, because the title does not vest in the woman until the last moment of the life of her husband. It is clear that in those cases in which it is agreed that the donation shall be retroactive, a delivery made by the wife will be in abeyance.

(10) If a husband makes a gift to his wife, and she is afterwards divorced, will the donation be annulled? Julianus says that the donation will be void, and is not dependent upon any condition.

(11) He also says that a donation made on account of a divorce is valid:

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

Provided, however, that the donation was made at the very time of the divorce, and not after deliberation, while the parties were contemplating a divorce.

13. *Ulpianus, On Sabinus, Book XXXII*.

If, however, death did not result, the property would not be held to belong to the woman, because the donation had been made with reference to another event.

(1) Hence, if a husband makes a donation *mortis causa* to his wife, and suffers banishment; let us consider whether the donation will be valid. It is held that a donation made to become operative in the case of banishment is valid, just as in the case of divorce. Therefore, as marriage is not dissolved by banishment, and the woman is in no way to blame, it is only in accordance with humanity that a donation *mortis causa* made in the first place to be confirmed by an exile of this kind should be valid, just as it would be if the husband should die. This is true, however, only to the extent that the husband may not be deprived of the right to revoke it, because it is necessary to wait for his death in order for the donation to have complete effect; whether he revoked it at the time of his death, or whether he still remains subject to the penalty.

(2) Where anyone receives property for the purpose of building on his own ground, it cannot be recovered from him, because it is considered to have been a gift. This was also the opinion of Neratius, who says: "When property has been given for the purpose of building a house or for sowing land, anything else that he who receives it fails to do will come within the scope of the donation." Therefore gifts of this kind will be forbidden between husband and wife.

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

Where a husband gives money to his wife for the rebuilding of a house belonging to her, which has been destroyed by fire, the donation is only valid to the amount required for the construction of the house.

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

What a husband gives to his wife, by the year or by the month, can be revoked to the extent of the surplus, if it exceeds the bounds of moderation, that is to say, if it amounts to more than the income of the dowry.

(1) If a husband should give money to his wife and she collects the interest from it, she will profit by it. Julianus in the Eighteenth Book of the Digest stated this opinion with reference to a husband.

16. *Tryphoninus, Disputations, Book X*.

But what if out of a sum of a hundred *aurei*, which a husband presented to his wife, fifty should be lost through a debtor, and the wife should have the other fifty doubled by the interest? The husband cannot recover more than fifty from her on account of the said donation.

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

Let us also consider with reference to the crops of land which are donated, where the woman profits pecuniarily, whether they form part of the donation. Julianus says that the crops, as well as the interest, constitute a lawful gift.

(1) Where a slave who is donated acquires any property, it will belong to him who donated him.

18. *Pomponius, On Various Extracts, Book IV*.

Where either a husband or a wife uses the slaves or the clothing belonging to the other, or lives gratuitously in the house of the other, such a donation is valid.

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

Where a wife gives a slave to her son who was under the paternal control of her husband, and the said slave then acquired a female slave, the title to the latter will vest to the woman. Julianus says that it makes no difference with whose money the said female slave was purchased, because nothing can be acquired, even with his own property, through the slave by the donee, for this privilege is granted only to *bona fide* possessors. Where, however, he knows that the slave belongs to another, he is not his *bona fide* possessor.

(1) He also asks, where the female slave was purchased with the property of the husband, whether the latter can, by means of an exception, retain the price of said slave against his wife when bringing an action for her dowry. It must be said that, according to the opinion of Marcellus, the husband is entitled to an exception where he is sued for the dowry, and, according to Julianus, if he should pay it, he can bring suit for the recovery of the purchase-money.

20. *Javolenus, Epistles, Book XI*.

If a slave, who is given *mortis causa* to a wife before her husband dies, should enter into some stipulation, I think that the effect of the obligation would remain in abeyance until the husband is either dead, or is free from the danger of death on account of which he made the donation, and if either of these events takes place by which the donation is annulled or confirmed, this also will either confirm or annul the stipulation.

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

Where a husband pays for his wife a sum which she owes on account of a journey taken by her, has he a right to collect the amount on the ground that she was pecuniarily benefited thereby; or can it be held that this is not a donation? I think that the better opinion is that this is not prohibited, especially if she took the journey for the sake of her husband; for Papinianus states in the Fourth Book of Opinions that a husband cannot recover the travelling expenses of his wife and her slaves where the journey was undertaken in his behalf.

A journey is held to have been made in behalf of a husband, when his wife comes to seek him; and it makes no difference whether anything had been agreed upon in the marriage contract with reference to travelling expenses or not, for he does not make a donation who meets necessary expenses. Hence, if the wife made the journey with the consent of her husband, on account of the requirements of his business, and the husband gives her something for expenses, it cannot be recovered.

(1) Where a wife promises a dowry to her husband, as well as the interest on the same, it must undoubtedly be held that he can collect the interest; because this is not a donation, as the interest is demanded to meet the expenses of marriage.

What would be the case, however, if the husband should remit the claim for interest to his wife; would the same question remain with reference to the legality of the donation? Julianus says that it would, which is correct.

It is evident that if it should be agreed that the wife shall support herself and her slaves, and her husband permits her to enjoy her dowry for the purpose of maintaining herself and the members of her household, the question will be disposed of; for I think that her husband could not demand of her, as a donation, what had already been set off.

22. *The Same, On Sabinus, Book III*.

A man gave a slave *mortis causa* to his wife, and then appointed him his heir with the grant of his freedom. The question arises, is such an appointment valid? I think that if he appointed him his heir because he said that he changed his mind, the appointment will be valid, and the slave will become the necessary heir of his master. But if after he appointed him his heir, he gave him away, the donation will have greater weight; or if he gave him away before he did this, but still did not grant him his liberty with the intention of depriving him of it, the result

will be the same.

23. *The Same, On Sabinus, Book VI.*

Papinianus very properly thinks that the Rescript of the Divine Severus relates merely to the donation of property; hence if the husband bound himself by a stipulation for the benefit of his wife, he does not hold that the heir of the husband can be sued, even though the husband should die without having changed his mind.

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

Where a donation is made between persons who are not married, and who are united before the time prescribed by law for acquiring the ownership of property; or, on the other hand, if a donation is made between husband and wife, and before the above-mentioned time has elapsed, the marriage is dissolved; it is settled that the time of the prescription, nevertheless, continues to run, because, in the first instance, possession is transferred without any defect, and in the second the defect which existed is removed.

25. *Terentius Clemens, On the Lex Julia et Papia, Book V.*

Where, however, during the existence of the marriage, property belonging to someone else is given by a husband to his wife, it must be said that the wife is immediately permitted to begin to hold it by usucaption, because, although it was not given to her *mortis causa*, its usucaption will not be prevented. For the law, as established, has reference to those donations by which the wife is enriched, and the husband becomes poorer; and therefore a donation *mortis causa* may take place — just as is understood to be made between persons who are not married — with reference to property which can be acquired by usucaption, because it belongs to another.

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

If I order someone who has sold me property to give it to my wife as a donation, and he transfers possession of the same to her under my direction, he will be released from liability; because, although under the Civil Law she will not be understood to have possession of said property, it is evident, nevertheless, that the vendor has nothing which he can deliver.

(1) Neratius says that the same reasons which permit donations to take place between husband and wife, also render legitimate those made between a father-in-law and a son, or a daughter-in-law. Therefore, a father-in-law can make a donation to his son-in-law in expectation of death or divorce, and a son-in-law also, can make one to his father-in-law in view of the occurrence of either of these events.

27. *Modestinus, Rules, Book VII.*

A donation made before marriage between parties who are about to contract matrimony is valid by law, even if the marriage should take place upon the same day.

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

Where the property donated is destroyed or consumed, the loss must be borne by the donor. This is reasonable, because the property still belongs to him who gave it, and he loses what is his own.

(1) Where a husband incurs any expense with reference to children born of female slaves who constitute the dowry of his wife, either on account of instruction or support; this will be of no advantage to the husband, because he himself is making use of their services. He can, however, keep an account of whatever was given to their nurse for rearing them, because he is providing something for the preservation of their lives; just as if he had ransomed slaves forming part of the dowry from robbers.

(2) Where slaves of the husband have performed services for the wife, or *vice versa*, the better opinion is that no account should be taken of what they have done; and, indeed, the law applying to prohibited donations should not, in this instance, be strictly construed, as among

individuals who are hostile to one another; but this should be done as among persons united by the greatest affection, and who are merely apprehensive of want.

(3) When a woman purchases a slave for ten *aurei*, which have been given to her by her husband, and the slave is only worth five, it is held by Plautius that only five can be recovered; just as where, if the slave should die, nothing can be recovered. If, however, the slave was worth fifteen *aurei*, the husband cannot claim more than ten, since he has only become poorer to that amount.

(4) But if the woman purchased two slaves, and one of them should die, and the other is worth ten *aurei*, the question arises, what shall be done? Pomponius, and the greater number of authorities, think that it makes a difference whether the two slaves were sold for one price, or each for a different one. If they were sold for one price, the entire ten *aurei* can be recovered, just as where an article which has been bought becomes deteriorated, or where a flock or a vehicle is sold, and any portion of the same is destroyed; but if the slaves were sold for different prices, that amount can only be recovered for which the surviving slave was purchased.

(5) Pomponius states that Julianus was of the opinion that, where a wife acquires anything through a slave who had been purchased with money given to her by her husband, whether it be a legacy, an estate, or children born of female slaves, the husband will also have a right to recover it on this ground.

(6) It is settled that if a wife, before receiving her annual income from her husband, spends any of his money, or any which has been borrowed, she will be held to have taken the amount expended out of her annual income.

(7) Celsus says that it was very properly decided that, where a wife has stipulated for annual interest on her dowry, although the interest may not be due because the arrangement was made for yearly payments, the woman cannot bring an action on dowry, but the parties can set off their claims. Therefore, we hold that the same rule will apply to any agreement which is entered into with reference to annual payments.

29. *Pomponius, On Sabinus, Book XIV*.

If a woman should sell a slave purchased with money given to her by her husband, and then buy another, Fulcinius held that the woman must be responsible for the loss of the last slave. This is not true, even though the second slave was not purchased with money belonging to the husband.

(1) Where a husband gives wool to his wife and she makes clothing for herself out of it; Labeo says that the clothing belongs to the wife.

30. *Gaius, On the Provincial Edict, Book XL*

Still, the husband will be entitled to an equitable action.

31. *Pomponius, On Sabinus, Book XIV*.

Where, however, a husband makes clothing for his wife out of his own wool, although this is done for his wife and through solicitude for her, the clothing, nevertheless, will belong to the husband; nor does it make any difference whether the wife assisted in preparing the wool, and attended to the matter for her husband.

(1) Where a wife uses her own wool, but makes garments for herself with the aid of female slaves belonging to her husband, the garments will be hers, and she will owe her husband nothing for the labor of the slaves; but where the clothing is made for her husband, it will belong to him, if he paid his wife the value of the wool.

Where, however, the wife did not make the clothing for her husband, but gave it to him, the donation will not be valid; as it will only be valid when the clothing is made for her husband, and she will never be permitted to render a bill for the labor of her husband's female slaves.

(2) If a husband should give a lot to his wife in order that she may erect a house upon it, there is no doubt that the house will belong to the husband; but it is settled that the woman will be entitled to her expenses, for if the husband should claim the house, the wife can retain the expenses she incurred in building.

(3) Where there were two slaves, each of them worth five *aurei,* but both of them together were sold for five by a husband to his wife for the purpose of benefiting her, or *vice versa;* the better opinion is that they are held in common by the two parties in proportion to the price; for indeed it is not to be considered what the slaves are worth, but how much of the price has been remitted by way of donation.

There is no doubt that either a husband or a wife can purchase property from one another for less than it is worth, if there is no intention of making a donation.

(4) If a husband should sell anything to his wife for its true value, or *vice versa*, and for the sake of making a donation, and they agree that the vendor shall not furnish any guarantee with reference to the property, it should be considered what the agreement was with reference to the sale, whether the property was actually sold and the entire transaction was a valid one, or, indeed, if only the latter part of the agreement was void; just as if it would be when the purchase had been concluded, the agreement had been made after a change of mind. The better opinion is that only the latter part of the agreement is void.

(5) We hold that the same rule will apply if, for the purpose of making a donation, the parties agree that the vendor shall not guarantee that a slave is in the habit of running away, or is a vagabond; that is to say, the rights of action under the Edict of the Ædiles and on purchase shall remain unimpaired.

(6) Where a man owes his wife a sum of money payable at a certain time, he can pay it at once without fear of it being considered a donation, although if he had retained the money until the time it was due, he could have enjoyed the advantage of its use.

(7) If you are about to bequeath me a legacy, or leave me a portion of your estate, and are requested to do so, you can leave it to my wife, and this will not be considered a donation, because my property is in no way diminished; and Proculus says that the principal reason why our ancestors came to the aid of the donor was in order that one of the parties might not be despoiled through affection for the other; but they were not so evil disposed as to wish to prevent one of them from becoming wealthier.

(8) Where a husband makes his wife a very valuable gift on the *Kalends* of March or on her birthday, this is a donation; but if his wife should incur any expense by which she may be more honorably maintained, the contrary opinion must be held.

(9) A wife is not considered to have become any more wealthy if she spends money given to her by her husband for banquets, for perfumes, or for food for her slaves.

(10) Provisions which a husband furnishes for the slaves or the horses of his wife, and which belong to them in common, cannot be > recovered by him. I think that the contrary rule should be observed, however, where he supports the domestic slaves of his wife, or those which are kept for sale.

32. *Ulpianus, On Sabinus, Book XXXIII*.

This was the condition of the laws with reference to donations between husband and wife, as we have previously stated, when our Emperor Antoninus, before the death of his father the Divine Severus, in an Address delivered to the Senate during the consulship of Fulvius Æmilianus and Nummius Albinus, caused the Senate to relax to some extent the strictness of their provisions.

(1) The Address of our Emperor with reference to the confirmation of donations not only has reference to property obtained by a husband in the name of his wife, but also to all donations made between a husband and wife; so that by operation of law, the property belongs to the

party to whom it is donated, gives rise to a civil obligation, and comes within the scope of the *Lex Falcidia*, where this can become operative. I think that this law will apply, because what is donated is, as it were, confirmed by will.

(2) The Rescript says: "It is wrong for anyone who makes a donation to change his mind, but it would be hard and avaricious for the heir to take the property, when this, perhaps, would be contrary to the will of the party who donated it."

(3) We should understand this to refer to the change of mind of the donor in his last moments, for if he had made a donation to his wife and then changed his mind, and afterwards changed it again, it must be said that the donation is valid, as we are considering the man's last wishes, just as we are accustomed to do with reference to trusts, when we discuss an exception interposed on the ground of fraud, as the will of the party may be undetermined up to the last moment of his existence.

(4) Where, however, the donor changes his mind only once, we grant his heir the right of revocation, if it is perfectly evident that the deceased changed his mind. But if this is doubtful, the judge should rather incline to confirm the donation.

(5) If a husband should pledge the property he donated, we are inclined to hold that he has changed his mind, although he still retains the ownership of the property. What course, however, should be pursued if it was his intention for the donation to continue to exist? Suppose that the property remained in the possession of the woman under a precarious title, and that she was ready to satisfy the creditor? It must then be held that the donation is valid. For if the husband gave the property to her in the first place with this intention, I should say that the donation was valid, so that if the woman was prepared to satisfy the creditor, she will be entitled to an exception on the ground of bad faith; and, moreover, if she should pay the debt, she could, by means of an exception on the ground of bad faith, cause the right of action of the creditor to be assigned to her.

(6) Where the donor becomes the slave of a private individual, it must be said that the donation is not perfected, but is destroyed, although servitude is compared to death. Hence if the woman to whom the donation is made should be reduced to slavery, the donation will be extinguished.

(7) Where a husband made a donation to his wife, and, on account of remorse for some crime, committed suicide, or, even after death, his memory was rendered infamous, the donation will be revoked; though gifts which he made to others will be valid where he did not make such donations *mortis causa*.

(8) Likewise, where a husband who is in the army, makes a donation out of his *castrense peculium*, and afterwards is convicted of a crime; for the reason that he will be permitted to testify with reference to property of this kind even after having been convicted, provided he obtains the right to do so, the donation will be valid; for he who is permitted to give evidence can make a donation *mortis causa*.

(9) The Rescript says, "Has consumed," and this term we must understand to mean that he who received the donation has not become any more wealthy thereby. If, however, he has been pecuniarily benefited, the advantage conferred by the Rescript will not be applicable. But if he has not become any more wealthy, and has given an amount equal to the donation to the other party, it must be said that if the one who died was enriched, the other can recover what he gave, and is not obliged to set off what he has consumed, although where a divorce takes place, a set-off of this kind can be made.

(10) If a divorce should take place after the donation, or if the party who made the gift should die first, the ancient law must be observed; that is to say, the donation will be valid if the husband desires the wife to have it, but if he does not, it shall be extinguished; for many married persons separate well disposed toward one another, and many others cherish anger and hatred.

(11) But what if a divorce takes place, and the marriage is afterwards re-established, and the mind of the donor is either changed during the divorce, or remains the same; or, when the marriage is re-established, the wish of the donor becomes as it was in the first place; will the gift remain valid if the donor should die while the marriage is still in existence? It can be maintained that it will be valid.

(12) If, however, a divorce should not take place, but only a slight misunderstanding should arise, it is certain that the donation will be valid if the misunderstanding is removed.

(13) Where a wife and her husband have lived for a long time separated, but still preserve the matrimonial bond (which we know sometimes happens with persons of consular rank), I think that donations will not be valid, since the union has always existed; for marital affection, and not coition, constitutes marriage. Where, however, the donor dies first, the donation will then be valid.

(14) What shall we say where both parties, the one who made the donation and the one to whom it was made, are captured by the enemy? And before I venture to discuss this question, the Address of the Emperor which decided that a donation is of no force or effect if the party to whom it is given should die, must be considered. Therefore, if both parties should die, either through shipwreck, or the fall or the burning of a house, what shall we say? Where, indeed, it can be established which one of them died first, the question is readily disposed of, but if this cannot be proved, the question becomes difficult, and I am rather of the opinion that the donation will be valid, as we gather from the words of the Address, for it says: "If the party who received the donation should die first." But when both of them die at the same time it cannot be held that the one who received the donation was the first to depart from life. Hence, it is very properly held that, where they have made donations to one another, both of these will be valid if the parties die at the same time, because, although neither one survived the other, the Address did not contemplate the death of both together.

Where, however, neither survived the other, the mutual donation will be valid, for it must be said with reference to mutual donations *mortis causa* that an action for recovery can be granted to neither of the parties, and therefore that the heirs of both profit by the donations. In accordance with this view, if both parties are captured by the enemy at the same time, and both die while in captivity at different times, must the date when they were taken captive be considered to enable us to hold that the donations are valid; just as if both had died at once? Or shall we say that neither donation is valid, because the marriage was terminated during the lifetime of the party in question? Or shall we ascertain which one of them died first, in order to decide that the donation with reference to him was not valid; or whether, if the other should return to his country, his will be valid?

It is my opinion that where the parties do not return, the time when they were taken captive should be considered, just as if they had died then; but if one of them should return, he will be held to have survived because he did so.

(15) When a husband bequeaths certain property out of that which he had already donated, but fails to donate the rest, he is not held to have been unwilling that the remainder should belong to his wife; for frequently a party makes a bequest, and afterwards a donation, or some other reason may have existed for his making the bequest.

(16) The Address not only includes husband and wife, but also other parties who are also prohibited from making donations on account of marriage; as for instance, where a father-in-law makes a donation to his daughter-in-law, or *vice versa;* or a father-in-law to his son-in-law, or *vice versa;* or one of two fathers-in-law who have the parties united in marriage under their control makes a donation to the other; for, in accordance with the spirit of the Address, all these persons are permitted to make donations under the same circumstances.

This was also held by Papinianus in the Fourth Book of Opinions, for he said: "A father-in-law made a donation to his daughter-in-law, or to his son-in-law, and afterwards, one or the other of them died during marriage. Although the defect in the donation continues to exist,

still, if the father-in-law did not raise any question with reference to said donation, the terms of the Address will be held to operate against his heirs after his death, for the same reason which prohibits a donation of this kind demands that the benefit be afforded."

Therefore, in order that such a donation may be valid, Papinianus requires that the son of the party who made the donation shall die before him, and that the father-in-law shall die afterwards, without having changed his mind.

(17) Where a son under paternal control, who has a *castrense*, or a *quasi castrense peculium*, makes a gift to his wife, we must take into account the person of the son, and his death.

(18) If a daughter-in-law makes a donation to her father-in-law, we must consider her death and the continuance of her will until her last moments. Where, however, her father-in-law dies first, we hold that the donation will be extinguished. But if the husband should live, and survive his wife, must we admit that the donation will take effect? If indeed, the husband becomes the sole heir of his father-in-law, a new donation can be said to have been made for the benefit of the husband, so that where the former ends, the other begins; and where the son is not the heir of his father, the donation will be terminated for another reason.

(19) If the father-in-law repudiates his daughter-in-law, the donation will be void, even though the marriage, when the husband and wife agree, still continues to exist, in accordance with the Rescript of our Emperor; but the marriage will be at an end with reference to the parties among whom the donation is made.

(20) Hence if two fathers-in-law make donations to one another, the same rule will apply if they repudiate their son and daughter-in-law, and the donations they make to one another will be void. Where, however, a donation of this kind is made between fathers-in-law, the death of him who made it during the marriage and while the right of paternal control existed is required to render the donation valid.

The same rule also applies to those who are under the control of the said parties.

(21) Where one father-in-law makes a donation to another, and one, or both of them emancipate the persons who are united in marriage, it must be held that this donation has no reference to those mentioned in the Address, and therefore it becomes void.

(22) Where a man makes a donation to his betrothed which is to take effect at the time of the marriage, although the donation is not considered to have been made between man and wife, and the words of the Address do not expressly apply to it, still, the donation must be said to come within its scope, and it is valid if the will of the party continues the same until his death.

(23) The donation will become operative whether the property was actually donated, or an obligation was released; as for instance, where a man releases his wife from liability for what she owes him, by way of a donation, it can be said that the release itself is not in suspense, but that its effect is. Generally speaking, all the donations which we have mentioned as being prohibited, will be valid according to the terms of the Address.

(24) Where a partnership is contracted between husband and wife by way of donation, it is void according to the ordinary rule of law, nor does the liberal construction of the Decree of the Senate grant such an advantage that it can be held that an action on partnership will lie; still, the property which they hold in common cannot be revoked in accordance with the terms prescribed by their agreement. Therefore, an action on partnership will not be available, because that is not a partnership which is interposed for the purpose of the advantage of only one of the parties, even where this is done by others; and for this reason it does not become operative between husband and wife.

(25) The same must be said where a purchase is made by way of donation, for it is void.

(26) It is evident that if, for the purpose of making a donation, property is sold for less than it is worth, or if the price should afterwards be remitted, we must concede that the donation is valid, in accordance with the Decree of the Senate.

(27) Where a man had a betrothed and afterwards married her when it was not lawful for him to do so; let us see whether donations made, so to speak, during betrothal, are valid. Julianus discusses this question with reference to a minor of twelve years of age who had been brought to the home of her so-called husband while she was still too young to be married; and he says that she is his betrothed, but she is not his wife.

The better opinion, however, is the one held by Labeo, by myself, and by Papinianus in the Tenth Book of Questions, which is that if the betrothal preceded the alleged marriage it will continue to exist, although the party who married the girl may think that she is his lawful wife. Where, however, it did not precede the marriage, there can be no betrothal, as it did not take place, nor did any marriage, because it could not be celebrated. Therefore, where the betrothal came first, the donation is valid, but where it did not, it is void because the party did not make the donation, as it were, to a stranger, but to his supposed wife, and therefore the Address will not apply.

(28) Where, however, a senator betroths himself to a freedwoman, or a guardian to his ward, or any other of those persons who are forbidden to contract marriage does so, and afterwards marries the girl; will a donation made, as it were, during betrothal, be valid? I think that such betrothals should be rejected, and whatever property has been donated should be seized and confiscated by the Treasury, as having been bestowed upon persons who are unworthy to hold it.

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

Where a husband agrees to pay his wife a certain sum annually, she cannot bring an action on the stipulation during the marriage. But, if while the marriage is still in existence, the husband should die, I think that, because the donation has reference to an annual payment, the stipulation can be enforced under the Decree of the Senate.

(1) On the other hand, where a wife makes an agreement with her husband to pay him a certain sum every year, this can be refunded to her, and she can bring an action to recover what remains. I think that she can also bring a personal action for the amount to which her husband is enriched; because the annual allowance which a husband pays to his wife is not as important as that which a wife pays to her husband, for this is inconsistent, and contrary to the nature of the sex.

(2) If the husband stipulated with his wife for annual payments, and the woman should die during marriage, it must be said that the donation will become valid under the Address.

34. *The Same, On Sabinus, Book XLIII.*

If the wife should either give property to her husband and he should bestow it by way of dowry on behalf of their common daughter, or if she should permit him to give it by way of dowry for their daughter, after having made a donation to her husband; it can be held, in accordance with justice, that although the donation is of no force or effect, still, the gift of the dowry becomes valid by the subsequent consent of the wife.

35. *The Same, On the Edict, Book XXXIV.*

If the divorce did not take place in accordance with the prescribed lawful formalities, donations made after such a divorce are of no effect, since it can not be held that the marriage was dissolved.

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

Where property which has been donated is still in existence, it can also be recovered by a suit; but for the reason that a donation carries with it the right of possession, if the property is not returned, an appraisement for its just value can be made, and security against eviction should be furnished to the possessor for the amount that the property is worth. This opinion was also adopted by Pedius.

(1) A man sent a ring which belonged to another as a gift to his betrothed, and after the marriage he gave her one of his own instead of it. Certain authorities (Nerva for instance), think that this ring became the property of the woman, because the donation which had been made is held to have been confirmed, and not a new one given. This opinion I think to be correct.

37. *Julianus, Digest, Book XVII.*

Where a woman committed fraud to prevent the preservation of property given to her by her husband, or to avoid its production in court, he can bring an action against her for injury committed, if she did this after a divorce had taken place.

38. *Alfenus, Epitomes of the Digest by Paulus, Book III.*

Where a slave, held in common by a husband and his brother, gave a young slave to the wife of the brother, it was held that the gift was not valid so far as the share belonging to the husband, which the slave had given, was concerned.

(1) The law will be the same where one of three brothers has a wife and gives her property held in common by them all, for one-third of the gift will not belong to the wife; but with reference to the other two-thirds, if the brothers knew that they were given, or, after this Was done, they confirm the act, the woman will not be obliged to make restitution.

39. *Julianus, On Minicius, Book V.*

A husband who wished to give a sum of money to his wife, permitted her to make a stipulation with his debtor. She did so, but before having received the money, she divorced herself from her husband. I ask whether the latter can recover the entire amount, or whether an action based on the promise will be void on account of the donation. I answered that the stipulation will be of no effect. If, however, the promisor, not being aware of the facts, should pay the woman, and the money has not been expended, the debtor can recover it.

But where he is ready to assign his rights of action to the husband, he will be protected by an exception on the ground of fraud, and therefore the husband can recover this money by an action in the name of the debtor.

If, however, the money is not in existence, and the woman has become more wealthy on account of it, the husband can claim it; for it is understood that the woman has become more wealthy through having received property belonging to her husband, since the debtor can protect himself by an exception on the ground of fraud.

40. *Ulpianus, Opinions, Book II.*

Where property is given to a husband by his wife for the purpose of obtaining some office, the donation will be valid to the extent that it was necessary to provide the office for her husband.

41. *Licinius, Rufinus, Rules, Book VI.*

For the Emperor Antoninus decided that a wife could give property to her husband for the purpose of furthering his interests.

42. *Gaius, On the Provincial Edict, Book XI.*

Another reason for a donation has been recently introduced through the indulgence of the Emperor Antoninus, which we say is done for the sake of honor; for example, where a wife makes a donation to her husband to enable him to seek admission into the Senatorial, or Equestrian Order, or for the purpose of exhibitions.

43. *Paulus, Rules.*

A donation can be made between husband and wife in case of exile.

44. *Neratius, Parchments, Book V.*

Where a stranger gives property belonging to a husband to the wife of the latter, both of them

being ignorant of this fact, and where the husband also does not know that he has donated property belonging to himself, the woman can lawfully acquire said property by usucaption. The same rule of law will apply where anyone who is under the control of the husband, believing himself to be independent, makes a gift to his father's wife.

If, however, the husband should ascertain that the property was his before its title by usucaption vests, he can recover it, and her possession will be interrupted; even though the husband does not wish for this to be done, and the woman becomes aware that it is his; because this is an instance where the woman herself knows that the donation was made by her husband. It is more proper to hold that no impediment to the acquisition of the ownership of the property by her exists; for women are not absolutely prohibited from acquiring the property of their husbands, except where donations are made to them by the latter.

45. *Ulpianus, On the Edict, Book XVII.*

Marcellus states in the Seventeenth Book of the Digest that the husband can even remove his property without injury to his wife, and without fear of the Decree of the Senate, where the transaction which has taken place between them is illegal.

46. *The Same, On the Edict, Book LXXII.*

Possession of property does not necessarily imply a donation of the same between husband and wife.

47. *Celsus, Digest, Book I.*

The question as to whether the husband, in the discharge of his duties while transacting the business of his wife, has incurred expenses with reference to her property, is one of fact, and not of law. A conjecture based on the amount and character of the expenses incurred by him will not be difficult.

48. *The Same, Digest, Book IX.*

Whatever a husband gives to his wife still remains his property, and he can recover it, nor does it make any difference if he has been left large bequests by his wife.

49. *Marcellus, Digest, Book VII.*

Sulpicius to Marcellus. A woman who wished that, after her husband died, her land should pass to the common son of her and her husband who was under the control of his father, transferred the land to her husband, in order that he might leave it to his son after his death. I ask whether you think that the donation is of such a character as to render the transaction void, or whether, if it is valid, the woman will have the power to revoke it, if she is unwilling to allow it to stand?

The answer was, if a pretext or an excuse (so to speak), is sought for the gift, the delivery will not be valid; that is, if the wife expected that her husband would reap any advantage from it in the meantime. Otherwise, if she only made use of the services of her husband, and he gave them so that she might be able to revoke the donation; or, in order that the property with all its emoluments might pass through the father to the son, why should it not be considered valid, just as if the transaction had taken place with a stranger, that is to say, if the property had been delivered to him under the same circumstances?

50. *Javolenus, Epistles, Book XIII.*

Where a woman buys a slave for twenty *aurei*, and her husband pays five to the vendor at the time of the purchase, if a divorce takes place, he can certainly recover this sum. It makes no difference whether the slave has become deteriorated in value, or even if he should be dead, the husband will still be entitled to demand the five *aurei;* for the question arises, as to whether the woman has become enriched by the property of her husband, at the time when the question as to the return of the dowry arose. She is, in this instance, understood to have been pecuniarily benefited by having been released by the intervention of her husband from

liability for a debt, which she would still have owed, if her husband had not paid the money. Nor does it make any difference for what reason the woman owed the money, that is to say, whether it was borrowed, or whether she owed it on account of some purchase.

(1) Where the woman did not buy the slave, but received the money from her husband in order to buy him, then, in case the slave should die, or become depreciated in value, the loss must be borne by her husband, because, as she would not have purchased the slave if she had not received the money from her husband, he who gave it must bear the loss, provided the slave died; nor is the woman considered to have become enriched who was not released by her creditor, and is not in possession of what she purchased with her husband's money.

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

Quintus Mucius says that when a controversy arises as to whether anything has come into the hands of a wife, it is better and more honorable to hold that the property came into her hands through her husband, or through someone who is under his control, where it is not proved from what source she obtained it. Quintus Mucius appears to have adopted this opinion, for the purpose of avoiding any disgraceful inquiry with reference to a wife.

52. *Papinianus, Questions, Book X.*

Where a man, for the purpose of benefiting his wife, leases property to her for a very small sum, the transaction is void. Where, however, a deposit takes place between the parties at a low appraisement, for the purpose of benefiting one of them, it will be valid. These opinions are different, because the lease cannot be made without a certain rent, but a deposit can be made without any valuation of the property.

(1) A wife provided that the crops of a tract of land should be given to her husband by her heir, and if this should not be done, she promised a certain sum of money *mortis causa*. The husband, having died during the life of the wife, the stipulation was extinguished, as well as the delivery which was made *mortis causa* by the direction of the latter; for in an instance where a personal action for the recovery of property will lie among strangers, this will not take place among married persons.

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

It is settled that a father-in-law cannot make a donation to either his son-in-law or his daughter-in-law *mortis causa*, because if the father-in-law should die, the marriage will not be dissolved; nor does it make any difference whether the father disinherited his son or his daughter, or not. In case of divorce the rule is different for the same reason.

(1) A woman made use of property which had been given by way of dowry, after it had been appraised with the consent of her husband. If the said property becomes deteriorated by use, a set-off of the damage will not be permitted. Nor can the woman maintain that the property has been, as it were, left to her under the terms of the will, by which bequests were made to her by her husband; since an assumption of this kind does not seem to have given her, or deprived her of the said property.

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

A husband stipulated for the interest on a promised dowry, but did not claim it. As he had maintained his wife and her slaves for the entire time of the marriage, at his own expense, and left her the dowry as a preferred legacy, as well as confirmed by the ordinary legal formalities of a trust the donations which he had given her, it was held that the interest of the dowry was not included in the legacy, but had been remitted by the terms of the donation.

55. *Paulus, Questions, Book VI.*

A wife gave a sum of money to her husband, and the latter purchased either personal or real property with this money which had been given him, and, as he was not solvent, and the property was still in existence, I ask, if the wife should desire to revoke the donation, whether

she can legally proceed by a personal action for recovery; for the husband, although he is insolvent, seems to have profited by the donation, since the property acquired with the money of his wife was still in his possession.

I answered that it could not be denied that he had profited by the donation, for we do not inquire what property he may have released from liability from debt by means of it, but what property of his wife he has in his possession. For he does not differ from one to whom her property has been given, except in the mere fact that in this instance, the property still belongs to the wife, and she can recover it by means of a direct action.

The condition of the husband will be worse if suit is brought against him for the sum that the property is worth, and not for the amount in excess of the gift, than if he should be sued in an action on dowry. There is nothing, however, to prevent the woman from also bringing an equitable real action for the recovery of her own property.

56. *Scaevola, Questions, Book III*.

If I wish to give my wife absolutely, something which another person desires to give her *mortis causa*, what I order to be given to her will be void; because if the aforesaid party should regain his health, I will be liable to a personal action for recovery, and if he should die, I will, nevertheless, become poorer, for I will not have what I ought to be entitled to.

57. *Paulus, Opinions, Book VII*.

Where a woman received from her husband a sum of money by way of a donation, and wrote to him in the following terms: "When, at my request, my dearest lord, your indulgence granted me twenty *aurei* for the purpose of despatching certain business of mine; which sum was paid to me under the condition that if, through any fault or bad conduct of mine, our marriage should be dissolved during our lifetime; or if I should leave your house without your consent; or should repudiate you without any cause of complaint; or if it should be proved that a divorce was obtained on my account; I promise that, in any of these instances, I will repay and return to you without any delay, the twenty *aurei*, which you have this day consented to give me by way of donation."

I ask whether in case this woman should repudiate her husband, Titius, she must refund the money. Paulus was of the opinion that the money which the husband gave to the wife in accordance with the terms set forth in the stipulation can be recovered, if the condition was fulfilled, since then it is transformed from a donation into a loan. Where, however, the condition of the stipulation is not shown to have taken place, only that amount can be recovered by which the wife is proved to have been enriched by the donation which was made.

58. *Scaevola, Opinions, Book II*.

Where lands and slaves were given to Seia during concubinage, and were afterwards returned by her at the time of her marriage, and others received in their stead, what is the law? The answer was that, according to the facts stated, a business transaction seems rather to have been concluded than a donation to have been made.

(1) Also, when a question arises with reference to the food of slaves, the answer was that sustenance given during the time of concubinage cannot be recovered, nor even such as was furnished during the time of marriage, if the slaves were used by the wife as well as the husband.

(2) Where a son was accustomed to transact the affairs of his mother, and slaves and other property were purchased with her money by her consent, and he drew up the bills of sale in his own name, and died while still under the control of his father; the question arose whether his mother could institute proceedings against her husband, and if she could, what action she could make use of. The answer was that if the mother intended that her son should be liable for said money, she would be entitled to an action *De peculio* against the father under whose

control the son was, within a year after the latter died; and if she donated the property, she could recover it to the extent that the father profited by the said donation.

59. *Paulus, Opinions, Book II*.

Where anyone makes a donation to his wife under the condition that she shall receive what he gives her by way of dowry, and he dies, the donation will become valid.

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

A stepfather and a stepson are not forbidden to make donations to one another on the occasion of marriage.

(1) Donations are permitted between husband and wife in case of divorce; for this often happens either on account of the husband entering the priesthood, or because of sterility,

61. *Gaius, On the Provincial Edict, Book XL*

Or where marriage cannot conveniently exist on account of old age, illness, or military service,

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

And for these reasons the marriage is dissolved with a friendly disposition.

(1) A donation made between husband and wife, or between patron and freedwoman, is not confirmed where a divorce takes place or marriage is not solemnized. If a donation has been made, and a divorce has taken place between the parties, it is not shared between them, where the woman is not permitted to obtain a divorce from her husband against his consent. Hence the donation is considered as if it had not been given, where a divorce occurs under such circumstances.

63. *Paulus, On Neratius, Book III*.

Where materials belonging to a wife are joined to a building of her husband in such a way that if removed they can be of any use, it must be held that the woman can bring an action, for the reason that none is authorized by the Law of the Twelve Tables, although it is not probable that the Decemvirs did not have in mind parties by whose consent their property was joined to the buildings of others. Paulus remarks that, in this instance, proceedings can only be instituted in such a way that a suit for the recovery alone of the property when removed from the building will lie in favor of the wife, and not one for double damages in accordance with the Law of the Twelve Tables; for whatever is included in the building with the knowledge of the owner of the same is not stolen.

64. *Javolenus, On the Last Works of Labeo, Book VI*.

A man gave something to his wife after a divorce had taken place, to induce her to return to him; and the woman, having returned, afterwards obtained a divorce. Labeo and Trebatius gave it as their opinion in a case which arose between Terentia and Mæcenas, that if the divorce was genuine, the donation would be valid, but if it was simulated, it would be void. However, what Proculus and Cæcilius hold is true, namely, that a divorce is genuine, and a donation made on account of it is valid, where another marriage follows, or the woman remains for so long a time unmarried that there is no doubt of a dissolution of the marriage, otherwise the donation will be of no force or effect.

65. *Labeo, Epitomes of Last Works, by Javolenus, Book VI*.

Where a man makes a donation to a woman who is not yet marriageable, I think that it will be valid.

66. *Scaevola, Digest, Book IX*.

Seia, when about to marry Sempronius on a certain day, before she was conducted to his house, and before the marriage contract was signed, gave him a certain number of *aurei*. I ask

whether this donation is valid. I answered that strict attention should not be paid to the time, that is, whether the donation was made before she was conducted to his house, or before the marriage contract was signed, as very frequently this is done after the marriage has been celebrated; for unless the donation was made before the marriage was contracted, which is understood to have been done by the consent of the parties, it will not be valid.

(1) A girl was conducted to the country-seat of her intended husband three days before the ceremony took place, remaining in a separate room from that of her husband, and upon the day of the marriage before she passed under his control, and before she was received under the rite of water and fire, that is to say, before the nuptials were celebrated, he offered her ten *aurei* as a gift. The question arose that if a divorce took place after the marriage was solemnized, whether the sum donated could be recovered. The answer was that what had been donated as a gift before marriage could not be deducted from the dowry.

67. *Labeo, Epitomes of Probabilities, by Paulus, Book II.*

If a wife should purchase a slave with money given to her by her husband, or by someone who is under his control, and after the slave becomes her property, she should deliver him to her husband as a donation, the delivery will be valid, even though this is done with the same intention with which other donations are made, and no action for recovery can be granted her on this account.

TITLE II.

CONCERNING DIVORCES AND REPUDIATIONS.

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

Marriage is dissolved by divorce, death, captivity, or by any other kind of servitude which may happen to be imposed upon either of the parties.

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

The word divorce is derived either from diversity of opinion, or because those who dissolve their marriage go different ways.

(1) In cases of repudiation, that is to say, in renunciation of marriage, the following words are employed: "Retain your property" or "Retain the management of your property."

(2) For the purpose of dissolving betrothals, it is certain that a renunciation must be made, in which case the following words are used, namely: "I will not accept your conditions."

(3) It makes no difference whether the renunciation takes place in the presence or in the absence of the person under whose control one of the parties may be, or of him who is under said control.

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

It is not a true or actual divorce unless the purpose is to establish a perpetual separation. Therefore, whatever is done or said in the heat of anger is not valid, unless the determination becomes apparent by the parties persevering in their intention, and hence where repudiation takes place in the heat of anger and the wife returns in a short time, she is not held to have been divorced.

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

Julianus asks in the Eighteenth Book of the Digest whether a woman who has become insane can repudiate her husband, or be herself repudiated; and he says that an insane woman can be repudiated, because she is in the position of a person who has no knowledge of anything, but that she cannot repudiate her husband on account of her madness, nor can her curator do so, but her father can repudiate him. He would not have treated the question of repudiation unless it had been established that the marriage would continue to exist even though the woman was insane. This opinion seems to me to be correct.

5. *The Same, On the Edict, Book XXXIV*.

If a girl who has been emancipated should obtain a divorce in order that her husband may profit by her dowry, and defraud her father who could claim it as profectitious if she should die during marriage, relief should be granted the father to prevent him from losing the dowry, for the Prætor must come to the aid of the father just as much as to that of the husband. The right to claim the dowry should therefore be granted to the father, just as if his daughter had died during marriage.

6. *Julianus, Digest, Book LXII*.

The wives of those who are in the hands of the enemy can be considered to always retain the place of married women, solely on the ground that others cannot rashly marry them. And, generally speaking, it must be said that, so long as it is certain that the husband is in captivity and is living, his wife has not the right to form another matrimonial connection, unless she herself has given some cause for repudiation. But if it is uncertain whether the husband who is held by the enemy is living or dead, then, if the term of five years has passed from the time when he was taken captive, his wife will have the right to marry again, so that the first marriage will be held to have been amicably dissolved, and each one of the parties will have their respective rights annulled. The same rule must be observed where a husband remains at home, and his wife is taken captive.

7. *Papinianus, On Adultery, Book I*.

Where one party who has given the other notice of divorce repents, and the other is ignorant of the change of mind, the marriage must be held to continue to exist; unless the one who received the notice and is aware of the change of mind, himself or herself desires to dissolve the marriage, for then it will be dissolved by the one who received the notice.

8. *The Same, On Adultery, Book II*.

The Divine Hadrian exiled for the term of three years a man who, while on a journey, took the wife of another man to his house, from which she sent to her husband a notice of repudiation.

9. *Paulus, On Adultery, Book II*.

No divorce is valid unless it takes place in the presence of seven Roman citizens, who are of age, in addition to the freedman of the party who institutes proceedings for that purpose. We understand the freedman to be one who has been manumitted by the father, the grandfather, the great-grandfather, and other ascendants interested in the proceedings above mentioned.

10. *Modestinus, Rides, Book I*.

A freedwoman, who has married her patron, cannot separate from him without his consent, unless she has been manumitted under the terms of a trust, for then she can do so even though she is his freedwoman.

11. *Ulpianus, On the Lex Julia et Papia, Book III*.

Where the law says: "The right of a freedwoman, who is married to her patron, to obtain a divorce shall not be allowed," this is not held to have made the divorce ineffective, because marriage is ordinarily dissolved by the Civil Law; therefore we cannot say that the marriage exists, as a separation has taken place.

Again, Julianus says that a wife is not under such circumstances entitled to an action to recover her dowry; hence it is reasonable that when her patron desires her to remain his wife she cannot marry anyone else. For, as the legislator understood that the marriage was, to a certain extent, dissolved by the act of the freedwoman, he prevented her marriage with another, wherefore if she should marry anyone else, she will be considered as not married.

Julianus, indeed, goes farther, for he thinks that such a woman cannot even live in concubinage with anyone except her patron.

(1) The law says: "As long as the patron desires her to remain his wife." This means that the patron wishes her to be his wife, and that his relationship towards her should continue to exist; therefore where he either ceases to be her patron, or to desire that she should remain his wife, the authority of the law is at an end.

(2) It has been most justly established that the benefit of this law terminated whenever the patron, by any indication of his will whatsoever, is understood to have relinquished his desire to keep the woman as his wife. Hence, when he institutes proceedings against his freedwoman on the ground of the removal of property, after she had divorced him without his consent, our Emperor and his Divine Father stated in a Rescript that the party was understood to be unwilling that the woman should remain his wife, when he brings this action or another like it, which it is not customary to do unless in case of divorce.

Wherefore, if the husband accuses her of adultery or of some other crime of which no one can accuse a wife but her husband, the better opinion is that the marriage is dissolved; for it should be remembered that the wife is not deprived of the right to marry another except where the patron himself desires to retain her in that capacity. Hence, whenever even a slight reason indicates that the husband does not desire her to remain his wife, it must be said that the freedwoman has already acquired the right to contract marriage with another. Therefore, if the patron has betrothed himself to, or destined himself for some other woman, or has sought marriage with another, he must be considered to no longer desire the freedwoman to be his wife.

The same rule will apply where he keeps the woman as his concubine.

TITLE III.

IN WHAT WAY THE DOWRY CAN BE RECOVERED AFTER THE MARRIAGE HAS BEEN DISSOLVED.

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

The cause of the dowry always and everywhere takes precedence, for it is to the public interest for dowries to be preserved to wives, as it is absolutely necessary that women should be endowed for the procreation of progeny, and to furnish the state with freeborn citizens.

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

Where marriage is dissolved, the dowry should be delivered to the woman. The husband is not compelled, in the beginning, to promise it by stipulation to another, unless this will not in any way prejudice his rights; for it must be held that if he has reason to apprehend anything that may inconvenience himself, he should not be compelled to promise the dowry to anyone else but his wife. This is the case where the woman is her own mistress.

(1) But if she is under the control of her father, and the dowry comes from him, it belongs to him and to his daughter. Hence the father cannot, either in his own proper person or by an agent, claim the dowry without the consent of his daughter; and therefore Sabinus says that it should be promised in this manner. Hence, it ought to be promised to whomever both parties direct this to be done.

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

Again, if the father alone orders this, the right to bring suit for the dowry will not be taken away from his daughter after she becomes her own mistress. Moreover, if the father alone makes a promise with the consent of his daughter, the right of action will remain unimpaired so far as he is concerned. But can he act alone, or can he institute proceedings conjointly with his daughter? I think that the right of action to which the father, conjointly with his daughter, is entitled, is not lost; but if the daughter becomes her own mistress, this stipulation will prejudice him.

(2) When the father brings an action on dowry should we understand the consent of the

daughter to mean that she expressly consents, or that she does not offer any opposition? It is stated in a Rescript of the Emperor Antoninus that a daughter is held to give her consent to her father where she does not clearly manifest opposition.

Julianus states in the Forty-eighth Book of the Digest that a father is considered to institute proceedings with the consent of his daughter, when the latter is insane; for where she cannot manifest opposition on account of insanity, he thinks very reasonably that she gives her consent. But where the daughter is absent, it must be said that her father does not act with her consent, and he must furnish security that she will ratify what he does. Where the daughter is in possession of her senses, we require her to have knowledge of the proceedings, in order that it may appear that she does not oppose them.

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

The consent of both father and daughter is required, not only in demanding the dowry, but also in the payment of it, as both have a common interest in the same, and neither of them can make the condition of the other worse. Where, however, the money which the daughter received comes into the hands of the father, both are deprived of the right of action on dowry.

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

Where a father collects a dowry from the husband of the daughter without her consent, and gives it to her second husband in her name, and the father, having died, the daughter brings an action against her first husband, she will be barred by an exception on the ground of fraud.

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

With reference to the division of the dowry during the year in which the divorce took place, the question arises whether the time shall be computed from the day of marriage or from that on which the property was delivered to the husband. Therefore, where the profits are to be retained by the husband, neither the day when the dowry was constituted nor the day of the marriage should be taken into consideration, but that on which the land given by way of dowry was first delivered, that is to say when possession was given.

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

If the land was delivered before marriage, the year must be reckoned from the day of the marriage to the same day of the following year. This rule must be observed for all other years until the divorce takes place, for where the land has been delivered before the marriage, and the crops have been gathered from the same when a divorce takes place, these must be returned as forming part of the dowry.

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

It is held that the profits are what remains after deducting the expenses, and Scævola applies this to those incurred by both husband and wife. For if the wife gave her dowry the day before the vintage, and, after the vintage was removed by the husband, he obtains a divorce, Scævola does not think that the profits only of the eleven months should be refunded, but that also the expenses which were incurred should be deducted before dividing the profits. Therefore, if the husband spends anything for this year, the expenses of both parties should be considered. Thus, if an account is taken of the expenses incurred by the woman during several years of marriage, it will be necessary to compute them from the first year, before the land was given by way of dowry.

(1) Papinianus, however, says in the Eleventh Book of Questions that where a divorce takes place, the profits should be divided, not from the day when the property was leased, but that an account should be taken of the preceding time during which the marriage existed. For if the land was given as dowry at the time of the vintage, and the husband leased it to be held from the *Kalends* of November, and the divorce took place on the last day of the month of January, it is not just for him to be able to retain at the same time the profits of the vintage and the fourth part of the rent for the year when the divorce took place; otherwise, if the divorce was

obtained upon the day before the vintage, the husband would retain the entire profits. Hence, if the divorce took place at the end of the month of January, and the marriage had existed for four months, the profits of the vintage and the fourth part of the rent for the present year should be consolidated, and out of this money a third part should be paid to the husband.

(2) The same rule must also be observed in the opposite case. For if a woman, immediately after the vintage has been gathered, gives a tract of land by way of dowry to her husband, and the latter rents the same land from the *Kalends* of March, and the divorce takes place on the *Kalends* of April, the husband can retain not only the twelfth part of the rent, but also a proportionate amount of the rent which will be due for the entire number of months during which the land was held as dowry.

(3) Moreover, if the crops during the year when the divorce was obtained belonged to the tenant in compliance with the terms of the lease, and the marriage is dissolved before the vintage, the money derived from the crops must be computed with reference to the expected yield of the next vintage.

(4) It is therefore apparent, from what has been stated, that those profits which the woman collected before she was married should not be included in the division.

(5) Set-offs can be made on account of donations, as well as because of what may have been appropriated out of such profits as have been collected after the divorce.

(6) What has been mentioned with reference to a year also applies to the term of six months, where two crops are gathered annually, as is the case where land is irrigated.

(7) The same rule applies where profits are collected only once in several years, as where trees are cut down.

(8) Moreover, if the lease of land is of such a character that something in addition to the annual rent must be paid at the end of five years, we must take into account the amount of the excess in proportion to the part of the five years which has elapsed.

(9) We hold that the same principle applies not only to land but also to cattle, so that the wool of sheep and the increase of flocks must be delivered. For if the husband accepts, by way of dowry, certain ewes about to have young, or which are soon to be sheared, will he be obliged to return nothing if a divorce should take place immediately after the lambs have been born, or the sheep sheared? In this instance, we must take into account the profits for the entire time during which the animals were taken care of, and not merely that when they were collected.

(10) With reference to a slave, the entire year must be taken into account if his services have been leased for that term, so that they will belong to the husband for the time previous to the divorce, but after it to the wife.

(11) The same rule also applies to the rents of urban estates as to the crops of farm lands.

(12) Where a wife gives land to her husband by way of dowry, and he cuts down the trees, if these are understood to be profits, their value in proportion to that part of the year which has elapsed must be refunded. I think, however, that if the trees which were cut down formed a thicket, or were small, they must be classed as crops. Where, however, they were not of this description, the husband should be held liable as having caused a deterioration of the land. But if the trees have been overthrown by the force of a storm, it must be said that their value should be paid to the woman, and that they should not be classed as crops, any more than when a treasure is found it is not reckoned as part of the crop, but half of it should be restored to the wife, just as in the case where a treasure is found on the land of another.

(13) If a husband should find marble quarries upon the land of his wife given by way of dowry, and they render the land more profitable, the marble which has been taken out, but not removed, will belong to the husband, but the expenses he has incurred shall not be made good to him, because the marble is not part of the yield of the land, unless it is of such a character that the stone is renewed, as is the case in certain quarries in Gaul and Asia.

(14) The yield of chalk pits, however, as well as of mines of gold or silver or any other kind of metal, or of sand pits, is considered to be part of the produce of the land.

(15) Security is sometimes given to the husband by his wife for the profits, and he retains nothing, if the woman receives the land while the crops are still standing. Sometimes the husband keeps the crops and restores nothing, which occurs where there is no more than he has a right to retain as his share. Sometimes, indeed, he must return the crops, when he has collected more than he is entitled to retain.

The same rule applies where proceedings are instituted with reference to the dowry against a father-in-law, or against the heir of either of the joint-owners of the property.

(16) Pomponius says that whatever has been expended in the cultivation and the planting of the ground is to be considered as expended for the gathering of the crops, as well as whatever has been laid out for the preservation of buildings, or in caring for a sick slave; that is to say, where any profits are obtained from the said building or slave. These expenses, however, cannot be claimed where the husband retains the entire profit for the year, because the expenses should in the first place be provided for out of the income.

It is evident that where the husband built a new house which was necessary, or rebuilt the old one which had entirely fallen into ruin without his fault, he will be entitled to present a bill for the expense. In like manner, if he uses a hoe upon the land, the same rule will apply; for such expenses are either necessary or beneficial to the property, and give rise to an action in favor of the husband.

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

Where a tract of land is given by way of dowry, and stone is taken therefrom, it is settled that the profit of the quarries will belong to the husband; because it is clear that the woman gave the said tract of land with the intention that the profit of the same should belong to him, unless she stated the contrary in the bestowal of the dowry.

(1) Whatever is expended in the sowing of grain can be deducted from the vintage, in case of the failure of the crop; because the yield of the entire year is considered to be the same.

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

If a woman should be in default in receiving her dowry, her husband shall only be responsible for bad faith, and not for negligence with reference to the matter, in order to avoid his being compelled by the act of his wife to cultivate her land indefinitely; but the crops which have come into the hands of the husband must be given up.

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

Where a married daughter who was captured by the enemy, and who had a dowry obtained from her father, died in captivity, I think it should be held that the same principle applies as if she had died during marriage; so that, even if she was not under the control of her father, the dowry will revert to him from whom it had been derived.

(1) Proculus says that where a man kills his wife, an action on dowry should be granted to her heir; and this is perfectly proper, for it is not just that a husband should expect to make a profit out of the dowry as the result of his own crime. The same rule should be observed in the opposite case.

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

If a woman should knowingly give as dowry property which belongs to another, it must be delivered to her husband, just as if she had given him something that was her own, as well as the crops for the proportionate part of the year during which the divorce took place.

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

It is established that the husband can have judgment rendered against him for the amount

which he is able to pay, but this privilege cannot be granted to his heir;

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

Because a privilege of this kind is a personal one, and is extinguished by the death of the party directly interested.

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

The case is different where a defender appears, for it is held that he properly defends the husband if he merely gives to the wife the amount which she could have recovered if she had brought suit against her husband himself.

(1) Pomponius very properly asks, in the Sixteenth Book On Sabinus, where a husband had made an agreement with his wife that judgment should not be rendered against him to the extent of his resources, but for the entire amount; whether such an agreement should be observed. He denies that it should be observed. This opinion seems to me to be correct, for it is better to hold that such an agreement was made contrary to good morals, as it is apparent that it was entered into in violation of the respect which a woman should show to her husband.

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

In order to determine the amount of the pecuniary resources of the husband, consideration must be paid to the time when the case was decided.

(1) Although the heir of the husband may have judgment rendered against him for the entire amount of the dowry, he will still be entitled to any set-off having reference to pecuniary obligations of the wife, in order to reduce his liability; as, for instance, where donations have been made by the husband of property appropriated by his wife, or expenses incurred, but he will not have the right to punish her for bad behavior.

(2) The same privilege will be enjoyed by the father-in-law; that is to say, he may have judgment rendered against him to the extent of his resources, when his daughter-in-law brings an action of dowry against him;

16. *Pomponius, On Sabinus, Book XVI.*

For the reason that a father-in-law occupies the place of a parent.

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

On the other hand, if a father-in-law is sued by the husband on his promise, the question may be asked whether he will be entitled to this same privilege. Neratius and Proculus state in the Book of Parchments that this is just.

(1) Moreover, where the wife is sued on her promise, the better opinion is that she can protect herself by an exception. Proculus also says the same thing; just as is the case where an exception is granted her when she belongs to a partnership, although she is liable under the Civil Law.

(2) Neratius and Sabinus hold that where, in an action on dowry, a judge, through ignorance of the law, renders a decision against a husband for the entire amount, he can make use of an exception on the ground of fraud, and that he will be protected by it.

18. *Pomponius, On Sabinus, Book XVI.*

Labeo says that the children of a woman who are the heirs of their father also can have judgment rendered against them only to the extent of their resources.

(1) Although in matters relating to the dowry, a husband is not only liable for fraud but also for negligence; still, when, in an action on dowry inquiry is made as to his pecuniary responsibility, fraud is only taken into consideration, because in the management of his own affairs he is not liable for negligence. I think that, although fraud can only affect him if he is

not solvent, this merely applies to his inability to pay the amount due to his wife, and not to the fraud of which he may have been guilty toward anyone else.

Ofilius, however, says that if the dotal property should be lost through the bad faith of the husband, and he is in other respects insolvent, even though he has not committed fraud to render himself insolvent, still, judgment should be rendered against him solely for the amount of the dotal property with respect to which he has acted fraudulently; just as if it was by bad faith that he had rendered himself pecuniarily responsible. If, however, the husband was not guilty of either fraud or negligence with reference to the loss of the dotal property, only those rights of action to which the husband would be entitled on this ground should be assigned to his wife; as, for instance, those for theft, or unlawful damage.

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

But if a woman obtains a divorce, and issue is joined in an action on dowry, and she returns to her husband, the marriage having been re-established, the action will be terminated, and everything will remain in its former condition.

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

Although a woman may have received her dowry during marriage not for the purpose of paying her debts, or buying certain desirable lands, but in order that she might assist her children by a former husband, or her brothers, or her parents, or ransom them from the hands of the enemy, for the reason that these objects are just and honorable, the dowry will not be held to have been improperly received, and therefore, in accordance with justice, it was rightly paid to her.

This rule also must be observed with reference to a daughter under paternal control.

21. *Ulpianus, Disputations, Book III.*

Where a husband has expended money belonging to the dowry for the purpose of ransoming from robbers any slaves necessary for the service of his wife, or in order that the woman may release from imprisonment one of her necessary slaves, he will be liable for what has been expended; and if only a portion of the dowry has been used, he will be liable for that portion, but if all of it has been consumed, the action on dowry will be extinguished.

This rule applies with much more force where a father-in-law brings an action on dowry, for an action must be rendered for what has been expended for his benefit, whether the husband himself has done this, or whether he gave the money to the daughter in order that she might do it. If, however, the father should not institute proceedings, but, after his death, his daughter alone brings an action to recover her dowry, it must be held that the same rule will apply; for since an exception on the ground of fraud is included in an action on dowry, as in other *bona fide* actions; for it may be said (as is also held by Celsus) that this expense is included in an action on dowry, especially if it was incurred with the consent of the daughter.

22. *The Same, On the Edict, Book XXXIII.*

Where a father gives the dowry, or a stranger who does so contracts for it subject to a certain contingency, as for instance, if a divorce or death should take place, it must be said that the woman will, in any event be entitled to the action which was not mentioned in the agreement.

(1) If, after the marriage has been dissolved, the wife, being under paternal control, uses up the dowry jointly belonging to herself and her father without the consent of the latter, the father will be entitled to an action to obtain the delivery of the dowry to himself, whether his daughter be living or dead.

This rule also applies where the dowry is given to a woman who is likely to waste it. If, however, it was given for good reasons to one who will not be likely to squander it, no action will lie, and after the death of the father, neither his heirs nor the woman can institute proceedings to recover it.

(2) If, after the marriage has been dissolved, the woman, having been deceived, accepts by novation a debtor who is insolvent, she will, nevertheless, be entitled to an action on dowry.

(3) Where a father, during the absence of his daughter, institutes proceedings to recover the dowry, even though he fails to give security for the ratification of his act, the right to sue should be denied the daughter, whether she becomes her father's heir, or whether she receives from him, by way of legacy, an amount equal to her dowry. Therefore, Julianus stated in several places, that what was given her by her father should be set off against her dowry, and that it would be to her profit if she received as much from him as was due from her husband as dowry, and which he had paid her father.

(4) If the father should not be permitted to remain at Rome, where the suit is brought for the dowry, on account of some sentence imposed upon him, the amount of the dowry must be paid to the daughter, provided she furnishes security that her father will ratify her act.

(5) It is necessary for the daughter to give her consent to her father bringing the action, at the time when issue was joined. In accordance with this, if she says that she consents, and, before issue is joined she should change her mind, or even be emancipated, the action brought by her father will be of no effect.

(6) We also agree with Labeo that sometimes an action should be refused the father, if his character is so degraded that it is to be feared that he will squander the dowry after receiving it; therefore the authority of the judge should be interposed, as far as he can do so, to protect the best interests of both daughter and father. If, however, the daughter conceals herself in order to avoid giving her consent to a father of this kind, I certainly think that an action should be granted the father, but only after proper cause has been shown. For what if the daughter, through motives of filial reverence, should agree with her father to be absent, why should we not hold that an action should not be granted him? But if the father is such a person that his daughter ought by all means to give her consent, that is to say, is a man of an excellent reputation, and his daughter is a woman of fickle character, or very young, or too much under the influence of an undeserving husband; it must be said that the Prætor should rather favor the father and grant him an action.

(7) Where either a husband or a wife becomes insane during marriage, let us consider what should be done. And, in the first place it should be observed that there is no doubt whatever that the one who is attacked by insanity cannot send notice of repudiation to the other, for the reason that he or she is not in possession of their senses. It must, however, be considered whether the woman should be repudiated under such circumstances. If, indeed, the insanity has lucid intervals, or if the affliction is perpetual but still endurable by those associated with the woman, then the marriage ought by no means to be dissolved. And where the party who is aware of this fact, and of sound mind, gives notice of repudiation to the other who is insane, he will, as we have stated, be to blame for the dissolution of the marriage; for what is so benevolent as for the husband or the wife to share in the accidental misfortunes of the other?

If, however, the insanity is so violent, ferocious, and dangerous that no hope of recovery exists, and it causes terror to the attendants; then, if the other party desires to annul the marriage either on account of cruelty which accompanies the insanity, or because he has no children and is tempted by the desire of having offspring, the said party, being of sound mind, will be permitted to notify the other, who is insane, of repudiation; so that the marriage may be dissolved without reproach attaching to either, and neither party will suffer any damage.

(8) Where, however, the woman is affected with the most violent form of insanity, and the husband, through crafty motives, is unwilling to annul the marriage, but treats the unfortunate condition of his wife with scorn, and shows no sympathy for her, and it is perfectly evident that he does not give her proper care, and makes a wrongful use of her dowry; then, either the curator of the insane woman or her relatives have the right to go into court in order to require the husband to support her, furnish her with provisions, provide her with medicine, and omit nothing which a husband should do for his wife, according to the amount of the dowry which

he received.

If, however, it is evident that he is about to squander the dowry, and not enjoy it as a man ought to do, then the dowry shall be sequestered, and enough taken out of it for the maintenance of the wife and her slaves, and all dotal agreements made between the parties at the time of the marriage shall remain in their former condition, and be dependent upon the recovery of the wife, or the death of either of the parties.

(9) Moreover, the father of the woman who has become insane can legally begin an action for the restoration of the dowry to himself, or to his daughter; for although she, being insane, cannot give notice of repudiation, it is certain that her father can do so.

(10) If after the marriage has been dissolved, the father should become insane, his curator can bring suit to recover the dowry with the consent of his daughter; or, where there is no curator, his daughter will be allowed to bring it, but she must give security for the ratification of her act.

(11) It must also be held that, where the father is taken captive by the enemy, an action to recover the dowry should be granted to the daughter.

(12) Let us now pass to another subject, and inquire against whom the action on dowry will lie. It is clear that it will lie against the husband himself, whether the dowry was given to him, or to another with his consent, whether the latter was subject to his control or not. Where, however, the husband is subject to paternal authority, and the dowry is given to his father-in-law, then suit must be brought against the father-in-law. It is evident that if it was given to the son, or has been given by the direction of his father-in-law, the latter will still be absolutely liable. But if it is given to the son, but not by the direction of the father, Sabinus and Cassius gave it as their opinion that an action could, nevertheless, be brought against the father, because the dowry is held to have come into the hands of him who has the *peculium*. It will, however, be sufficient for judgment to be rendered against him for the amount of the *peculium*, or to the extent to which the property of the father has been benefited.

If, however, the dowry has been given to the father-in-law, he cannot institute proceedings against the husband unless the latter becomes the heir of the father.

(13) When a woman makes *a* mistake as to the condition of her husband, and thinks that he is a freeman while, in fact, he is a slave, some preference must be shown her with respect to the property of her husband; for example, if there are other creditors, she must be preferred in case an action *de peculio* is brought, and if the slave owes anything to his master, the woman shall not be preferred to him, except with reference to what was either given by way of dowry, or purchased with money forming part of it, since property of this kind is dotal.

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

And where anything has been expended on property belonging to the dowry, and no account is given of the same by the woman, an exception on the ground of bad faith will be available.

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

If, during the existence of the marriage, the wife desires to institute proceedings on account of the impending insolvency of her husband, what time must we fix for her to claim the dowry? It is settled that it can be demanded from the time when it is perfectly apparent that the pecuniary resources of the husband are not sufficient for the delivery of the dowry.

(1) If the wife should institute proceedings after her husband has been disinherited, the better opinion is that the demand for the dowry should begin to date from the time that the heir entered upon the estate of the father of her husband.

(2) Whenever security should be given to a wife for the payment of her dowry, after a certain date, if her husband cannot furnish security, then the advantage arising from the enjoyment of the dowry during the intermediate time having been deducted, judgment should be rendered

against him for the remainder. If, however, the husband should refuse to give security when he is able to do so; Mela says judgment should be rendered against him for the entire amount, and no account should be taken of any deduction growing out of the benefit obtained during the intermediate time.

It is, therefore, a part of the duty of the judge to release the husband if security is furnished, or to render judgment against him, after having taken the set-off into consideration. This, indeed, is the practice at present, nor is a woman permitted to say that she prefers to suffer delay rather than submit to a reduction in the amount to be paid.

(3) Whether the dowry is at the risk of the husband or the wife, the husband must, nevertheless, pay it within the time established by law.

(4) Where a husband, with the consent of his wife, manumits slaves forming a part of the dowry, even if his wife intended to donate the slaves to him, he will not be liable for the expenses incurred in giving them their freedom; but if this was a business transaction carried on between them, he will be compelled by the court to give security to restore to his wife anything which comes into his hands from the property or the obligations of the freedmen.

(5) If the husband should be cruel to the dotal slaves, let us see whether an action can be brought against him on this account. And, in fact, if he is only cruel to the slaves of his wife, it is settled that he will be liable on this account; but if he is by nature cruel to his own slaves, it must be said that his immoderate severity should be checked by an order of court; for although a wife cannot require from her husband greater diligence than he employs in his own affairs, still, such cruelty as is reprehensible when exhibited with reference to his own property must be restrained with reference to that of others, that is to say, with respect to the slaves composing the dowry.

(6) Where a wife lends property belonging to her husband, and it is lost, it should be considered whether she must permit this to be set off against her dowry; and I think that if her husband forbade her to lend it, the deduction should at once be made; but if he did not permit her to do so, the judge can grant her a reasonable time to return it, if she gives security.

(7) When a portion of the property of a wife should be confiscated, she will have a right of action to recover the remainder of her dowry. I also hold that if a portion of the dowry has been confiscated alter issue has been joined, it will be sufficient for the judge to issue an order compelling the husband to restore the remainder. If, however, the entire dowry has been confiscated, the right of action will be extinguished.

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

Where a dowry is given to a son under paternal control without the order of his father, an action *de peculio* will lie; but where expenses have been incurred by the son, or an account of property given by him, or because of articles belonging to the *peculium* having been appropriated by the wife, the *peculium* is increased; as the father acquires a right of action derived from the person of his son, and hence everything included in the *peculium* must be given to the wife, if there still remains anything due to her.

(1) The husband, when restoring the dowry, must furnish security against fraud and negligence. If he has acted fraudulently to avoid making restitution, judgment shall be rendered against him for the amount which the woman swears to in court, because no one should retain property belonging to us against our consent.

(2) If the dotal property becomes deteriorated after a divorce, and the husband is in default in returning the dowry, he shall, under all circumstances, be liable for the depreciation in value.

(3) Where slaves that constitute part of the dowry take to flight, the husband must give security to pursue them, as a good citizen should do, and to restore them.

(4) Where a husband rents a tract of dotal land for five years, and after the first year a divorce takes place; Sabinus says that he is not obliged to return the land to his wife, unless she gives

security to indemnify her husband if judgment should be rendered against him for anything that occurs after the first year of the lease; and he must give security to his wife to pay to her everything which he obtained under the lease, except the rent of the first year.

26. *The Same, On the Edict, Book XXXVII.*

Where the husband has once been in default, and his wife refuses to accept a dotal slave after he has been tendered by him, and the slave afterwards dies; neither the husband nor his heir will be liable for the value of said slave, nor will he be liable for damages, because his wife refused to accept the slave after her husband had tendered him.

27. *Gaius, On the Provincial Edict, Book XL*

If the wife should die after a divorce, and her heir should bring an action for the dowry against her husband, or his father, it is held that the same rules will apply with reference to the restoration of the dowry, as are ordinarily applicable where the woman herself institutes proceedings.

28. *Ulpianus, Institutes, Book I.*

It is held that the husband can also act when he has a right to recover anything from his wife; for instance, if he has lost money on her account either because he has expended it for her, or paid it out under her direction. But if he has not lost anything thus far, for example, where he is conditionally liable, he is not yet considered qualified to proceed.

29. *The Same, Disputations, Book III.*

Whenever a father gives a dowry and stipulates for its return, he does not transfer the right of action for the dowry to her person unless it was agreed that this shall be continuous. But if he intended to stipulate for the intervening time, he cannot do so without the consent of his daughter, even though she may be under his control; because he cannot make the condition of the dowry worse unless she consents. It is clear that if he gave the dowry before marriage, he can stipulate with reference to the interval, even before marriage, and without the consent of his daughter.

(1) Where anyone gives a dowry in behalf of a woman, and agrees that it shall be paid to him when the marriage is dissolved, no matter in what way this is done, and the husband afterwards pays the wife her dowry, it is most justly held that an action for the recovery of the dowry will, nevertheless, lie against the husband in favor of the party who gave it.

30. *Julianus, Digest, Book XVI.*

A woman who is married a second time is not prevented from instituting proceedings against her first husband for the recovery of her dowry.

(1) Whenever, through the fault of the husband, it happens that the dowry is not demanded from the father-in-law, or from anyone else who promised it in behalf of the wife; or where the daughter died during marriage, or where, having become the mother of a family, she appointed as heir the party who promised the dowry for her; it is well settled that the husband is not liable for anything more than to release them from the obligation.

31. *The Same, Digest, Book XVIII.*

If the husband has been convicted of a criminal offence, and a part of his property is confiscated, the Treasury must pay his creditors, among whom his wife is included.

(1) Where a father, having promised two hundred *aurei* to his daughter as a dowry, agreed that no more than a hundred should be demanded of her, and the marriage having been dissolved, he brings suit for the hundred *aurei*, concerning which the agreement was made that they should not be claimed, they are not understood to form part of the dowry. Where, however, after the death of the father, the husband brings an action against his heir, this sum will also be included in the dowry.

(2) If an agent appointed by the father should bring an action for the dowry with the consent of the daughter, and the father should die after a judgment has been obtained, the right of action to enforce the judgment will vest to the daughter rather than in the heirs of the father.

(3) Where the dowry has been given to the father, and one of the sons of the latter has been appointed heir to a certain portion of his estate under a condition, and while the condition is pending his co-heirs pay the dowry to the woman in proportion to their respective shares, the said son will be released from liability for payment of his part of the dowry, as he will not be entitled to an action against his co-heirs for the recovery of his share of the money.

(4) Where a woman receives a tract of land as her dowry, but no account of the crops have been taken in proportion to the time during the year when she was not married, she can, nevertheless, bring the action, because she received by way of dowry less than she was entitled to, for this has reference to an increase of dowry; just as if she had not received the offspring of slaves, or any legacies or inheritances, which had been acquired by her husband through dotal slaves after a divorce had taken place.

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

If a former husband, as a debtor of his wife, should promise the delivery of the dotal property to her second husband by way of dowry, the amount of the dowry will not be any more than the pecuniary resources of the first husband will justify.

33. *Africanus, Questions, Book VII*.

A woman promised a certain sum of money by way of dowry, and produced parties who stipulated that a portion of it should be paid to them, in case the marriage was dissolved. The woman died before any dowry had been given, after appointing her husband her heir, and he entered upon her estate, which proved to be unprofitable. He will, nevertheless, be liable to the parties with whom the stipulation was made, as, by entering upon the estate of the woman who was his debtor he is understood to have repaid himself; and it makes no difference, so far as he is concerned, that the estate was insolvent, since he is liable to the other creditors.

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

Titia obtained a divorce from Seius. Titius stated that she was under his control, and demanded that the dowry should be delivered to him, while she asserted that she was her own mistress, and wished to bring an action for the recovery of the dowry. The question arose what course the judge ought to take. I answered that he should refuse an action to the father, unless he could prove that his daughter was not only under his control, but had also given her consent to the suit, just as he should be refused even though he was able to prove that his daughter was under his control.

35. *Marcianus, Institutes, Book X*.

A freedwoman, who is divorced from her patron with his consent, can bring an action against him for the recovery of the dowry which she gave him.

36. *Paulus, On Adultery, Book II*.

Where the husband is not pecuniarily able to pay the dowry and it is confiscated, judgment should be rendered against him in favor of the Treasury for the amount which he is able to pay, in order that the woman may not be punished to the injury of the husband.

37. *Ulpianus, Opinions, Book II*.

A father is held to have received the dowry with the consent of his daughter, when the latter has no good reason to advance in opposition to his claim, and especially if she has afterwards been endowed by him with a larger sum.

38. *Marcellus, Opinions*.

Lucius Titius, while under paternal control, married Mævia with the consent of his father, and

the latter received the dowry. Mævia then served notice of repudiation on Titius, and his father afterwards, in the absence of his son who had been repudiated, entered into an engagement of betrothal with her in the name of his said son. Mævia then served notice of the repudiation of the betrothal, and married another man. I ask if Mævia should bring an action for the recovery of her dowry against Lucius Titius, her former husband, to whom the dowry was left as heir to his father, and it should be proved that the marriage was dissolved through the fault of the woman, whether the dowry could be retained by the husband on the ground that she was to blame? Marcellus answered that even if Lucius Titius should be sued as the heir appointed by his father, still, if he had not consented to the betrothal, the fault of the woman should be punished by a fine.

39. *Papinianus, Questions, Book XL*

Where a husband and a wife accuse one another in court of bad conduct, and the judge declares that both of them have given cause for repudiation, the decision should be understood to mean that, as both had treated the law with contempt, neither can claim its benefit, as the offence of each is atoned for by that of the other.

40. *The Same, Questions, Book XXVIII.*

After the dowry was given and the marriage contracted, the father, with the consent of his daughter, stipulated that the dowry should be returned to him in case of divorce. If the condition of this stipulation was complied with, and the daughter should afterwards die without issue, the father would not be prevented from suing on the stipulation; but if he wished to do so during the lifetime of his daughter, he could be barred by an exception.

41. *The Same, Questions, Book XXXVII.*

Where a father, ignorant that his daughter has been divorced, pays the dowry to her husband in compliance with his promise, the money can be recovered, not by the action for the payment of what was not due, but by the action on dowry.

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

Where a father who has given a dowry for his daughter is banished to an island, an action for its recovery can be brought by the daughter. Moreover, if the father has been convicted after a divorce has taken place, the action on dowry can also be brought by the woman, where the father has not already brought it with her consent.

(1) It is held that the crops of land given by way of dowry and gathered in good faith, and which have been used to pay the expenses of marriage, before the question as to the freedom of the wife has been raised, even though it should afterwards be established that she was a slave, cannot be recovered. It is proper that expenses which are necessary and useful, and which have been incurred with reference to land which appeared to belong to the dowry, should be set off against the profits, and that anything in excess should be restored.

(2) Where a father, after the death of his daughter during marriage, brings an action under a stipulation, to collect the interest on money which has been paid by way of dowry, it is held that his son-in-law, who stipulated for the interest on the remaining part of the dowry, can justly claim a set off against the amount which is due, if he supported his wife at his own expense; otherwise, if she was supported by her father, the stipulation for the interest, being void, will not secure to the son-in-law the benefit of the set-off.

(3) If, after a divorce, the wife returns to her husband, the judgment obtained on a stipulation which a stranger who gave the dowry entered into will not be annulled, nor can a release be ordered by the court.

43. *Scaevola, Questions, Book II.*

Where a husband has judgment rendered against him for a sum which he is able to pay, and he has claims equal to, but not greater than the amount of the dowry, he will not be compelled to

assign his rights of action.

44. *Paulus, Questions, Book V.*

If a father-in-law, appointed heir by his son-in-law, enters upon his estate, and the father dies, his daughter can bring an action on dowry, so Nerva and Cato hold; and this opinion is also stated by Sextus Pomponius in the Fifth Book of the Digest of Aristo. Pomponius, in the same place, agrees with Aristo. I, however, will say that if the father should emancipate his daughter, he also can be sued by her.

(1) Lucius Titius promised Gaius Seius a hundred *aurei* by way of dowry for his daughter, and it was agreed between Gaius Seius and Lucius Titius, the father of the woman, that the dowry could not be demanded of the husband during the lifetime of Lucius Titius, that is, the father of the woman. The marriage was afterwards dissolved by a divorce through the fault of the husband, and the father of the woman, having died, appointed other heirs, after disinheriting his daughter. I ask whether the husband could collect the dowry from the heirs of his father-in-law since he was obliged to return it to the woman?

I answered that since the daughter was entitled to an action to recover her dowry, as other heirs had been appointed by her father, her husband would be required either to surrender the actual dowry to her, or assign her his rights of action, and that the heirs of the father-in-law would not have a right to plead an exception against him; since it would be absurd for a party to be considered guilty of bad faith when he demands a sum of money to be refunded, not to him whom he sued, but to another.

On the other hand, if the divorce had taken place after the death of the father, and before the dowry had been demanded, the husband would be excluded from bringing an action for the dowry, which should not be admitted. But even if the daughter had been appointed heir to a part of her father's estate, the husband should bring suit against her co-heirs for their individual proportions of the dowry, and either return to the woman what he collects, or assign to her his rights of action.

45. *The Same, Questions, Book VI.*

Gaius Seius, the maternal grandfather of Seia, who was under paternal control, gave a certain sum of money by way of dowry to Lucius Titius, her husband, and inserted in the dotal instrument the following agreement and stipulation: "If a divorce should take place between Lucius Titius, the husband, and Seia, without her fault, all the dowry shall be returned to Seia, his wife, or to Gaius Seius, her maternal grandfather".

I ask, if Seius, the maternal grandfather, should die immediately after making this agreement, and Seia should subsequently, without being to blame, be divorced during the lifetime of her father, under whose control she was, in favor of whom an action would lie under the agreement in the stipulation, the heir of the maternal grandfather, or of his granddaughter. I answered that the stipulation would seem to be void, so far as the granddaughter personally was concerned, as the maternal grandfather made the stipulation in her favor; for, since this is true, a right of action would be held to lie in favor of the heir of the stipulator, whenever the woman was divorced.

It must be said, however, that the dowry can be paid to Seia, even though no action will lie directly in her favor; just as if her grandfather had stipulated that it should be given to him, or to someone else. The granddaughter ought, however, on account of the agreement of her grandfather, to be permitted to bring an equitable action to prevent her from being defrauded of the benefit of the dowry; or recourse to this proceeding should be had because of the favor conceded to marriage, and especially on account of the affection existing between the parties.

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

Where a person promised a dowry to a wife by a stipulation, and bequeathed certain property to her by a will, but under the condition that she should not claim the dowry from his heir, she

was unable to receive the property bequeathed to her. I answered that an action on dowry against the heirs should not be denied the woman.

47. *Scævola, Questions, Book XVII*.

Where a woman commits adultery through the agency of her husband, he can retain none of her dowry; for why should a husband disapprove of acts which he himself either previously corruptly caused, or subsequently assented to? If, however, anyone should maintain that, according to the spirit of the law, a husband who afforded an opportunity to his wife to prostitute herself cannot accuse her, his opinion must be held to be correct.

48. *Callistratus, Questions, Book II*.

If it was stipulated in the dotal instrument that the dowry should remain in the hands of the husband for the benefit of the children, it can also be retained by him for the benefit of the grandchildren.

49. *Paulus, Opinions, Book VII*.

Mævia, among other property constituting her dowry, also delivered to her husband an instrument calling for ten *solidi*, which a certain Otacilius had executed in favor of the said Mævia, stating that he would give her ten thousand *solidi* when she was married; and the husband made no claim to this obligation because he could not do so. The question arose if the dowry should be demanded of the husband, whether he could be compelled also to refund that sum which was included in the said obligation. I answered that the husband could sue the debtor, as his wife's rights of action had been transferred to him, but that if he could not claim the money without being guilty of bad faith or negligence, he could neither be sued on account of the dowry, nor in an action on mandate.

(1) A tract of land, after having been appraised and given by way of dowry, was taken by a prior creditor on account of its having been pledged. The question arose whether the woman, in case she claimed the value of the dowry from her husband, should be barred by an exception; for it is held that she is not bound, because her father gave her the dowry for herself and she was not his heir. Paulus answered that where the land was evicted without either the bad faith or negligence of her husband, the latter could interpose an exception on the ground of fraud against the woman, claiming the amount of the dowry, as it would evidently be unjust for her to recover the value of the land, as the fraud of the father should only injure the daughter herself.

50. *Scævola, Opinions, Book II*.

Certain property, after having been appraised, was given by way of dowry, and an agreement was drawn up stating that if the dowry was to be returned for any reason whatsoever, the identical property should be given up, and an account taken of its increase or diminution in accordance with the judgment of a good citizen; and so far as any property which was no longer in existence was concerned, its value should be estimated in accordance with its original valuation.

The question arose whether, in case certain property which the husband had sold was still in existence, it should belong to the woman in accordance with the agreement. I answered that if such property was in existence, and had been sold without the consent of the woman or her subsequent ratification, it must be returned; just as if no appraisement had taken place.

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

Where property has been appraised, it is at the risk of the husband, even though it may have become deteriorated by the use of the wife.

52. *Tryphoninus, Disputations, Book VII*.

A husband, after a divorce, through mistake paid a dowry which he had not received. He can recover it, because he can prove that it had not been paid to him, for it can not be exacted

from him.

53. *The Same, Disputations, Book XII*.

If a dowry should be given to a son under paternal control, he himself will be liable to an action on dowry; his father, however, will be liable to one to the amount of the *peculium*. It makes no difference whether or not the party has the property in the *peculium*, or holds it as dowry, but judgment should be rendered against him to the extent of his ability to make payment. It is understood, however, that his ability to pay is dependent upon the amount of the *peculium* which he had at the time the judgment was rendered against him.

But if an action is brought against the father, whatever the son owes the latter or other persons under his control must be deducted from the *peculium;* but if an action is brought against the son himself, no deduction can be made of any other debt, when taking into consideration the amount that the son is able to pay.

54. *Paulus, On Individual Rights*.

The ability of a husband to pay is estimated without the deduction of any debt; and the same rule applies to a partner, a patron, and a parent. Where, however, anyone is sued on account of a donation, her pecuniary resources are estimated after all his debts have been deducted.

55. *The Same, On Plautius, Book III*.

When a woman brings an action for the recovery of her dowry, after her marriage has been dissolved, she must indemnify her husband where he has given security against the infliction of threatened injury, if she wishes to recover her dowry, so that she may secure her husband against any risk.

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

If anyone stipulates with a husband as follows: "If, for any reason, Titia ceases to be your wife, you must surrender her dowry"; by this general statement the stipulation becomes effective, whether the woman is taken captive by the enemy, or whether she is banished or reduced to slavery, for in such a clause all such accidents are included.

If, however, the terms of the stipulation are strictly construed, will this apply where the woman dies, or is divorced? It is held to be more equitable that it should apply in case of death.

57. *Marcellus, Digest, Book VII*.

Where an usufruct is given by way of dowry, and a divorce takes place, the ownership of the property will not vest in either the husband or the wife, and where the restitution of the dowry is to be made, the husband must give security that, as long as he lives, the woman and her heirs will be allowed to enjoy the usufruct. I doubt whether this addition with reference to the heirs is correct, for it makes a difference in what way the usufruct was given, as dowry; since if the woman is to have the profits, the usufruct at her death will pass to her husband, to whom the ownership of the property belongs, and she will leave no right in the same to her heir, for the usufruct will then be due to her husband; as it is not customary for it to pass to the heir.

But if the woman granted the usufruct with the land to her husband, it must be restored by him to her heirs, since it passes along with property to her heirs, if her husband was not in default in surrendering it. But, if the property has been alienated, or anyone had given the usufruct of his land, by order of the wife, to her husband as dowry, it must first be considered in what way it can be restored to the woman. This may be accomplished either by means of security given by the husband, or he can assign his rights to his wife as far as he is able to do so, and allow her to enjoy the property; or he can make some arrangement with the owner of the same, so that, with the consent of the latter, the usufruct can be transferred to the woman, as he can either grant her the usufruct of the land or give her something instead of it, as may

be agreed upon between them. For, suppose that the woman should sell the usufruct to the owner of the property; in this instance, it would not be inequitable for the husband to be compelled to transfer the usufruct, since he can even be sued by the heir of the woman, for if he had not been in default in making the transfer, she could have left the price of the usufruct to her heir. If, however, she did not have the power to sell the usufruct to the owner of the property, the husband would be forced to allow the heir to gather the crops, which privilege he was obliged to grant to the woman herself.

58. *Modestinus, On Discoveries*.

Where a dotal slave is appointed heir by anyone, he can either enter upon the estate, or reject it, by order of the husband. But in order to avoid the husband from being liable to an action on dowry, either through too readily rejecting an estate, or rashly accepting it, when its condition is unknown, it is advised that the woman should be asked, in the presence of witnesses, whether she wishes to reject or accept the estate. If she should say that she rejects it, the slave can very readily repudiate it, by the order of her husband. If, however, she prefers to accept it, the slave must be restored by the husband to the wife under the condition that when, by her order, he enters upon the estate, he shall again be transferred to her husband. In this way provision is made for any anxiety the husband may experience, and the wish of the wife will be complied with.

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

The husband of my daughter, who was emancipated, and ill at the time, sent her a notice of repudiation, so that, after her death, he could the more readily deliver her dowry to her heirs than to me. Sabinus said that an equitable action should be granted me for the recovery of the dowry, and Gaius holds the same opinion.

60. *Proculus, Epistles, Book V*.

Where a daughter under paternal control, who was married, dies, and her father pays her funeral expenses, he can immediately recover them by means of an action, even though the son-in-law was obliged to return the dowry after a certain date; and after he has received the expenses of the funeral, the remainder of the dowry can be paid at the time agreed upon.

61. *Papinianus, Questions, Book XI*.

A husband manumitted a dotal slave without the consent of his wife. He was then appointed sole heir by the freedman to a share of

the estate which he could, and should have acquired as patron, and ought have returned to his wife; the remaining portion, however, she will be entitled to recover by means of a dotal action, provided she was opposed to the manumission of the slave.

62. *Ulpianus, On the Edict, Book XXXIII*.

If a husband should manumit dotal slaves with the consent of his wife, it is just as if she intended to donate them to him, and he will not be liable to any claim on account of having given them their freedom.

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

In this instance, the slave ceases to be a part of the dowry, as where anyone is permitted to donate a slave for the purpose of manumitting him, it is the same as if the slave was donated, because permission was given to manumit him.

64. *Ulpianus, On the Lex Julia et Papia, Book VII*.

Where, however, a husband who is transacting the business of his wife, with her consent, manumits a dotal slave, with her permission, he must restore to his wife whatever may have come into his hands through the said slave.

(1) If he imposes any conditions upon the slave in consideration of his freedom, he must be

responsible for this to his wife.

(2) It is evident if any services should be performed by the freedman for the husband, and no appraisement of them should be made, it will not be just for the husband to pay anything to the wife on this account.

(3) But if any charge was imposed upon the freedman after manumission, this must be accounted for to the wife.

(4) Where, however, the freedman is the debtor of the husband, or has rendered himself liable for any other obligation, he must assign the claim which he holds against him to his wife.

(5) He is also compelled to deliver to his wife any of the property of the freedman, which may come into his hands, provided he acquired it in the capacity of patron. If, however, he acquires it in any other way, he is not compelled to transfer it, for he is not liable to his wife for anything which the freedman gives to him gratuitously, but only for what he acquires, or can acquire under his rights as patron.

It is evident that if he is appointed heir by the freedman to the greater portion of the debt which the latter owes him, he will not be responsible for the excess; and if the freedman should constitute him his heir when he is not indebted to him, he will not be bound to give anything to his wife.

(6) He must, however (as the law declares), give "whatever may come into his hands". We understand this to mean whatever he collects, or can collect, because a right of action to do so is granted him.

(7) It is added in the law that the husband shall be liable where he has committed any fraudulent act to prevent the property from coming into his hands.

(8) If a patron disinherits his son, and the property of the freedman should be obtained by the latter, it must be considered whether the heir will be liable on this ground. And, also, where nothing comes into the hands of the patron himself, or into the hands of his heir, how can be become liable on this account?

(9) The law only speaks of the husband and his heir. Nothing is mentioned in it with reference to a father-in-law and his successors; and Labeo notices this as having been omitted. In these instances, therefore, the law is defective, and not even a prætorian action can be granted.

(10) Where the law says that the husband shall give up the money which he has received, it is evident that it did not intend that he should surrender the estate itself, but only the value of the same, or of the property of the freedman; unless the husband should prefer to surrender the property itself, and this should be admitted as the more favorable construction.

65. *Scaevola, Questions Publicly Treated*.

This action can be brought by the wife even during marriage.

66. *Javolenus, On the Last Works of Labeo, Book VI.*

Servius says that the husband is responsible for fraud and negligence with reference to all the property belonging to the dowry, which he has received, excepting money. This is also the opinion of Publius Mucius, for he decided in the case of Licinnia, the wife of Gracchus, whose dotal property had been lost in the sedition in which Gracchus was killed; as he held that the property should be restored to Licinnia, for the reason that Gracchus was to blame for the sedition.

(1) A husband gave money to his wife's slave for the purchase of clothing, and this having been procured, a divorce took place within a year. It was held by Labeo and Trebatius that the clothing should be returned to the husband in the condition in which it was after the divorce. The rule of law would be the same if the husband had purchased the clothing and given it to the slave. If, however, the clothing should not be returned, the price of it can be set off by the husband against the dowry.

(2) A father ordered his daughter, who was under his control, to return her dowry to her father-in-law, a divorce having taken place; and after a part of the dowry had been paid, the father died. Labeo and Trebatius think that the remainder, if it had not been delegated or promised to be renewed to the father-in-law, should be paid to her; and this is correct.

(3) You received, by way of dowry, certain slaves whose value had been appraised, and an agreement was then entered into that, in case of a divorce, you should return slaves of equal value, but no mention was made of the offspring of female slaves forming part of the dowry. Labeo says that this offspring will belong to you, because it should be yours on account of the risk of losing the slaves which you are obliged to assume.

(4) A woman had a hundred *aurei* in the hands of her husband, as dowry, and a divorce having taken place, she stipulated through a mistake of her husband that he should be liable to her for two hundred. Labeo thinks that her husband will only be responsible for the dowry, whether the woman stipulated for the amount honestly or dishonestly. I adopt this opinion.

(5) A wife, after her divorce, received part of her dowry, and left part in the hands of her husband, and afterwards married another man, and then, having become a widow, she returned to her first husband, to whom she gave a hundred *aurei*, by way of dowry, without mentioning the money which remained out of the former dowry. If another divorce should occur, Labeo says that the husband will be compelled to return the remainder of the first dowry, under the same terms that he would have returned it if the first divorce had not taken place between them, as the remainder of the former dowry was transferred to the obligation of the second one. This I think to be correct.

(6) When a husband, without the order of his wife, during marriage, releases his father-in-law from the dowry which he had promised, Labeo says that this will be at the risk of the husband, even though it was done on account of the poverty of the father-in-law. This is true.

(7) Where anyone promises a dowry to a husband in behalf of his wife, and then, after having appointed the woman his heir, dies, Labeo says that the woman must assume the risk of that part of the dowry for which the husband was liable, for the reason that it would not be just for her to be enriched at the expense of her husband, and to hold him responsible for what he could not have exacted from her. I think that this is correct.

67. *Pomponius, Epistles, Book XX.*

Whatever a husband must restore to his wife out of the *peculium* of a slave will form part of the dowry which is to be given up, and therefore the husband will be liable for fraud and negligence in the acquisition or preservation of the said *peculium;* and the profits obtained from the same, just as those of any other dotal property will belong to the husband.