THE DIGEST OR PANDECTS.

BOOK XXV.

TITLE I.

CONCERNING EXPENSES INCURRED WITH REFERENCE TO DOTAL PROPERTY.

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

Expenses are either necessary, useful, or incurred for purposes of pleasure.

(1) Those expenses are called necessary which are made through necessity. Where, however, no necessity exists, they come under another head.

(2) With reference to necessary expenses, it must be remembered that they only decrease the dowry when they are incurred on account of it. When, however, they are not incurred with reference to the dowry, they cannot be taken out of it.

(3) Labeo says that dikes built in the sea or river come under the head of necessary expenses. Where a mill or a granary, which is required, is built, it should be included among necessary expenses. Hence Falcinius says that if the husband should rebuild a house which was useful to his wife, and which was falling into ruin; or if he should replant an olive-orchard, where the trees had blown down; or if he should enter into a stipulation providing against the occurrence of threatened injury:

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

Or should expend money for the cure of slaves who are ill;

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

Or if he should plant vines, or takes care of trees or nurseries for the benefit of the land, he will be held to have incurred necessary expenses.

(1) Generally speaking, we make a distinction, and in fact there is much difference where expenses are incurred to the permanent advantage of the land, and where this is done only for the present time, or on account of the crop for the present year. In the latter instance, the expenses ought to be set off against the crop, but where they have not been incurred temporarily, they should be reckoned among those that are necessary.

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

Upon the whole the judge shall hold the husband responsible for whatever was omitted by him, to the extent that it was to the interest of his wife to have such expenses incurred, as they are included in those that are necessary, but with this difference, namely: an account of the expenses will be allowed, if the property has not been preserved, and he will not be responsible where they were not incurred, unless the property was destroyed in consequence. Therefore, if he should support a house which is about to fall, and it is burned, he can recover the expenses; but if he did not do this, and the house should be burned, he will not be liable for anything.

5. *Ulpianus, On Sabinus, Book XXXVI.*

Where it is stated that necessary expenses diminish the dowry, this (as Pomponius says) must be understood to mean not that the property itself is actually diminished, as for instance, land or any other dotal property, for it is absurd to hold that any diminution of the same can occur on account of money expended; but it signifies that the said property ceases to become dotal either wholly, or in part. Hence the husband will remain in possession of it until his claim is satisfied, for no diminution of the same is effected, by operation of law, but merely a diminution of the dowry takes place. When, therefore, shall we admit that a diminution of the dowry occurs by operation of law? This will be the case where the dowry consists of other

property than money, for it is reasonable to admit that a diminution of money can take place. Hence, if certain property, after being appraised, is given by way of dowry, the dowry will be diminished by operation of law to the amount of the necessary expenses incurred. This is said to be applicable to expenses incurred with reference to the dowry itself, but if they are made with reference to other matters they do not diminish the dowry.

(1) Where the wife pays such necessary expenses, can we say that the dowry is increased, or should it be held to remain unimpaired? Where the dowry consists of money, I have no doubt that it should be held to have increased.

(2) Where the entire dowry is paid without any account having been taken of expenses, it must be considered whether the amount which it is customary to set off against necessary expenses can be recovered by a personal action. Marcellus holds that there is ground for such action, and although many authorities deny that this is the case, still, on account of equity, the opinion of Marcellus should be upheld.

(3) Useful expenses are those which the husband incurs for the benefit of the property, and which improve the property of the wife, that is to say, her dowry.

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

For instance, where a new plantation is made on the land, or where the husband adds a bakery or a shop to the house, or teaches the slaves some trade.

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

Expenses for the purpose of pleasure are those which the husband incurs to that end, and which are an ornament to the property.

(1) Such expenses do not diminish the dowry by operation of law, as those which are useful do, nevertheless, they can be demanded.

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

Certain authorities hold that a deduction should be made on the ground of useful expenses only where they are incurred with the consent of the wife; for it would be unjust for her to be compelled to sell the property in order to pay the expenses incurred with reference to it, if she is unable to meet them otherwise. This opinion is based upon the highest principles of justice.

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

The husband is permitted to demand from his wife expenses incurred for pleasure, if she does not permit him to remove what caused them. For, if the wife desires to retain such improvements, she should refund the amount expended by her husband; or if she does not wish to retain them, she should permit him to remove them, provided they admit of separation. If, however, they cannot be separated, they should be left; for the husband is not allowed to take away any ornaments which he has added to the property, unless by doing so he can make them his own.

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

If the property on account of which the expenses were incurred is for sale, such expenses are not classed under the head of pleasure, but of utility.

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

Aristo, however, says with reference to expenses incurred for pleasure, that the husband cannot demand them, even if they have been made with the consent of his wife.

(1) Sabinus very properly holds that gifts which are prohibited between husband and wife also extend to expenses incurred on account of the dowry.

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

A judge should not pay any attention to moderate expenses incurred for the purpose of building houses, or for planting and cultivating vines, or for the treatment of slaves who are ill; otherwise a judicial decision would rather seem to have reference to the transaction of business than to matters connected with the dowry.

13. *The Same, Abridgments, Book VII.*

A husband cannot collect from his wife any tax or tribute paid on account of dotal lands, for these charges should be paid out of the crops.

14. *Ulpianus, Rules, Book V.*

Necessary expenses are those through which the dowry is diminished, as, for instance, those incurred for the building of dikes, the diversion of streams, the supporting and repairing of old houses, and the replacing of trees where others have died.

(1) Useful expenses are, for example, such as placing cattle in fields for the purpose of manuring them.

(2) Expenses incurred for pleasure are, for instance, the construction of baths.

15. *Neratius, Parchments, Book II.*

Where it is stated that necessary expenses incurred with reference to dotal property diminish the dowry, this must be understood to mean where anything is expended on such property over and above what is necessary for its preservation, that is to say, for its benefit. For a man should preserve dotal property at his own expense; otherwise, provisions furnished to dotal slaves, and any moderate repairs of buildings, or even the cultivation of the soil, would diminish the dowry; for all these things are included under the head of necessary expenses. The property itself, however, is understood to yield a certain income, so that you appear not to have expended money upon it, but, after having deducted the expenses, you have received a smaller return therefrom. It is not easy, generally speaking, to decide in accordance with this distinction what expenses should be deducted from the dowry, but they can be estimated in detail according to their nature and amount.

16. *The Same, Parchments, Book VI.*

And, by all means, any expenses incurred by the husband in harvesting the crops must be paid by him out of his own purse, even though these expenses may have been incurred for the purpose of cultivating the land; and therefore not only those made in gathering the crops are included but also such as are necessary for preserving the property itself, and the husband is entitled to no deduction from the dowry on this account.

TITLE II.

CONCERNING THE ACTION TO RECOVER PROPERTY WHICH HAS BEEN REMOVED.

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

The action having reference to property which has been removed is a peculiar one, and is brought against a woman who was formerly the wife of the plaintiff, for it was not held to be advisable that an action for theft should be brought against her; and certain authorities, like Nerva and Cassius, have thought that she did not commit a theft, because the partnership of married life rendered her, to a certain extent, the owner of the property in question. Others, such as Sabinus and Proculus, hold that she does, in fact, commit a theft, just as a daughter can steal from her father, but that no action for theft is established by law. Julianus very properly adopts this opinion.

2. *Gaius, On the Work Entitled, The Edict of the Prætor; Title, Decisions.*

For, on account of the honor attaching to marriage, an action against the wife implying infamy

is refused.

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

Therefore, if, after a divorce a woman should appropriate the same property, she will also be liable for theft.

(1) Moreover, we can bring an action for theft against a woman where her slave has committed the theft.

(2) It is also possible to bring an action for theft against a woman, if we should become the heir to the party from whom the property was stolen, or if she had stolen from us before we married her. Still, on account of the respect due to persons under such circumstances, in both cases, we hold that only an action for theft to recover the property will lie, and not a penal one based on that offence.

(3) It is also true, as Ofilius says, that all property which the woman has consumed, sold, donated, or used up in any way whatsoever, at the time of the divorce, should also be included in the suit for property appropriated by her.

(4) Where a daughter under paternal control fraudulently appropriates property, Mela and Fulcinius say that an action *de peculio* should be granted, because it was not considered advisable that she should be liable for theft, or that an action should be brought against her on the ground of property wrongfully appropriated.

If, however, a father, together with his daughter, brings an action on dowry, an action should not be granted him, unless he gives security to defend his daughter for the entire amount, in a suit for property improperly appropriated.

But where the daughter is dead, Proculus says that an action should not be granted against the father, on the ground of property wrongfully appropriated, unless to the extent that he has been pecuniarily benefited by the transaction,

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

Or where he has been guilty of fraud in order to prevent the property from coming into his possession.

5. *Papinianus, Questions, Book XI.*

All equitable actions to recover property wrongfully appropriated, which has come into his hands, can be brought against the father even during the lifetime of his daughter.

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

Atilicinus and Fulcinius say that this action can be granted to a father-in-law against his daughter-in-law.

(1) Whenever a dowry is given to a son under paternal control, the father-in-law cannot bring an action for theft, where property has been appropriated by reason of a divorce.

(2) This action for property wrongfully appropriated is also granted against the husband if he is a son under paternal control, but shall such an action be granted directly against him, or merely with reference to the *peculium?* We repeat here the same rule which we have already stated applies to a daughter under paternal control.

(3) If the husband should die after the divorce, his heir can bring the action for the recovery of property fraudulently appropriated.

(4) The heir of the woman is also liable in an action of this kind, just as he would be in one for the recovery of stolen property.

(5) Where the marriage is dissolved by the death of the husband, his heir can recover the

property either by an action for the partition of the estate, or by one for its production in court. Aristo thinks very properly that he can bring a personal action for restitution against the woman, because the property is unjustly in her possession.

(6) Where a woman appropriates property after the death of her husband, she does not commit theft, because a theft of property belonging to an estate which is not yet in the possession of anyone cannot be committed; and therefore the heir can bring suit to recover the property, or can file a petition claiming the estate.

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

A wife is entitled to an action against her husband for the recovery of property fraudulently appropriated, and she can set off the claim in her action against that made by the husband, where he brings suit for the same cause.

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

If, when the dowry is paid to the wife or security is given to insure its payment, it should not be stated that the husband shall have a right to bring an action for the recovery of property wrongfully appropriated, he can, nevertheless, bring such an action; for he has a right to do so even where there is no dowry to be returned.

(1) Sabinus says that if a wife does not return the property which she has wrongfully appropriated, judgment shall be rendered against her for the amount which her husband will swear to in court.

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

For it is not just that the husband should be compelled to sell his own property, even for its full value, if he is unwilling to do so.

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

Therefore, he should not be obliged to furnish any guarantee against eviction, because the affair took place through the obstinacy of his wife.

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

Marcellus stated in the Eighth Book of the Digest that whether a husband drove his wife, or a wife her husband, from the house, and removed the property, either would be liable to an action for the recovery of property wrongfully appropriated.

(1) Where anyone institutes proceedings for the recovery of property wrongfully appropriated, if he prefers to tender an oath, his adversary will be compelled to swear that nothing was appropriated at the time of the divorce; provided whoever tenders the oath himself or herself first takes the oath *de calumnia*.

(2) The husband, as well as the wife, is compelled to take the oath with reference to property wrongfully appropriated. But the father of him or her who appropriated the property is not obliged to be sworn, as it would be unjust for anyone to take an oath relating to the act of another. That party, therefore, is compelled to take the oath who is said to have appropriated the property, and hence the heir of him or her who is said to have wrongfully appropriated it is not compelled to be sworn.

(3) Where anyone desires to tender back the oath which has been tendered him, it has been decided that the Prætor shall not permit this to be done.

12. *Paulus, Abridgments, Book VII.*

Any more than where someone tenders an oath to a party whom he is suing to recover stolen property, in order to ascertain whether he himself is the thief.

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

Therefore, Labeo states that a woman is not permitted to tender back an oath; and the Edict of the Prætor is held to establish this.

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

In an action for the recovery of property which has been wrongfully appropriated, the husband or the wife shall be permitted to tender the oath with reference to certain property, and to confirm what has been testified to with reference to any other.

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

In a case of this kind it makes no difference whether the parties are living together or separately; since an action for property wrongfully appropriated can even be brought against a woman who has taken it into a house in which she is not living with her husband.

(1) A wife, a daughter-in-law, or the wife of a grandson can steal from her husband, her father-in-law, and the grandfather of her husband, but still she will not be liable for theft unless the son is not emancipated; for, in this instance, the daughter-in-law commits a theft against her father-in-law, and is liable to an action for theft.

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

Where the property of a husband is confiscated, the wife can only be sued for the simple value of what has been unlawfully appropriated; although, in all other cases, judgment can be rendered against her for fourfold damages.

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

Where a concubine wrongfully appropriates property, it is the practice to hold her liable for theft. Consequently, we say that whenever a marriage is void, as, for instance, where a ward marries her guardian, or where matrimony is contracted, contrary to the laws, and in any other case where it is not valid, the action to recover property wrongfully appropriated will not lie, for the reason that it can only be brought where a divorce takes place.

(1) When we speak of property wrongfully appropriated, we have reference not only to that which the woman removes when she forms the intention of obtaining a divorce, but also to such as she removes while she is still married, if, when she leaves her husband, she conceals the property.

(2) Julianus says that not only property which is in existence is included in a suit for wrongful appropriation, but also such as has already ceased to exist. He says that, under these circumstances, a personal action can also be brought for its recovery.

(3) Where a woman wrongfully appropriates property which has been given in pledge to her husband, she will be liable to this action.

18. *Paulus, Questions, Book VI.*

A personal action for the recovery of such property will also lie in favor of the owner of the same, but he is allowed to choose whether he will bring this, or a real action.

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

If a woman, at the time of the divorce, introduces thieves into the house of her husband, and removes property by their agency, even if she herself does not handle it, she will be liable to an action for its wrongful appropriation. It is therefore true, as Labeo states, that a wife is liable to this action, even if the property does not come into her possession.

20. *Marcellus, Digest, Book VII.*

Where a wife herself removes, or makes use of the services of the thief to remove property which her husband purchased in good faith, and does this with the intention of obtaining a divorce, judgment shall be rendered against her in an action for the recovery of property

wrongfully appropriated.

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

If a woman, despairing of the life of her husband, after having surreptitiously removed some of his property, should obtain a divorce, and her husband should recover, an equitable action for the recovery of property wrongfully appropriated should be granted him.

(1) Where a slave belonging to a wife removes property of her husband by order of his mistress who intends to obtain a divorce, Pedius thinks that she is not guilty of theft, since she does not obtain anything to his own advantage; nor is she held to have rendered- any aid to the slave committing the offence, as the woman herself did not commit it, although the slave should not obey his owner when ordered to commit a crime; but an action on the ground of property wrongfully appropriated will lie.

(2) Still, if a slave given as dowry steals from the husband, and the wife knew that he was dishonest, she must make good the entire loss to her husband; but if she was not aware of the bad character of the slave, she will then not be liable beyond the surrender of the slave by way of reparation.

(3) The action to recover property wrongfully appropriated is brought for reparation of the injury, even though the exaction of the dowry can only subsequently be demanded.

(4) If, where property has been wrongfully appropriated by his wife, the husband has been deprived of some advantage, this must be taken into consideration.

(5) Although this action arises from the commission of a crime, it still includes the claim for the property, and therefore is not prescribed after the expiration of a year, as is the case in a personal action for the recovery of stolen goods. Moreover, it will lie in favor of heirs.

(6) In this action, neither the husband nor the wife can obtain any benefit from insolvency, because it is based upon theft.

22. *Julianus, Digest, Book XIX.*

If a man brings an action against his wife on the ground of property wrongfully appropriated by her, and the valuation of the same is made in court, and the amount is paid, will she be entitled to bring suit to recover possession of the property, if she has lost it? A difficulty arises here, because she obtained possession by fraud. I answered that where anyone pays the amount of the appraisement of the property in court, he should be considered to occupy the position of a purchaser. Therefore, if the woman, against whom an action has been brought on the ground of property wrongfully appropriated, pays the appraised value of the same in court, she will be entitled to an exception against the husband, or his heir, if either should bring suit to recover the said property; and if she has lost possession of the same, a real action should be granted her.

(1) Where a woman wrongfully appropriated property in anticipation of the death of her husband, and he then dies, the heir can recover whatever had been appropriated by an action for the estate, or by one for the production of property in court.

23. *Africanus, Questions, Book VIII.*

Where marriage is re-established after a second divorce has taken place, it is held that a right of action continues to exist on account of property appropriated at the time of the first divorce, as well as on account of expenses incurred or donations made during the previous marriage.

24. *Ulpianus, Rules, Book V.*

The husband is entitled to an action for recovery as well as the personal action against his wife on the ground of property wrongfully appropriated by her, whether it belongs to him or is included in the dowry; and it is in his power to make use of whichever action he chooses.

25. *Marcianus, Rules, Book III.*

The action for property wrongfully appropriated is available where it was removed with the intention of obtaining a divorce, and the divorce actually followed; but if the wife appropriates the property of her husband during marriage, although this action will not lie, the husband can, nevertheless, bring a personal action to recover the said property; for, in accordance with the Law of Nations, I hold that property can always be recovered by a personal action from parties who hold possession of it unjustly.

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

The action for property wrongfully appropriated is a personal one.

27. *Papinianus, Opinions, Book IV.*

The action for property wrongfully appropriated does not differ from that in which the woman is accused of the crime of adultery.

28. *Paulus, Questions, Book VI.*

Where a wife steals property belonging to her husband from a person to whom the former lent it, the latter will be entitled to an action for theft against her, although her husband can not bring such an action.

29. *Tryphoninus, Disputations, Book XI.*

The valuation of property wrongfully appropriated should be calculated with reference to the time when it was taken, for the woman is in reality guilty of theft, although she is punished with more leniency. For this reason property thus wrongfully appropriated cannot be acquired through usucaption by a *bona fide* possessor; but where it increases in value and is not returned, the appraisement will also be increased; as is the case in an action for the recovery of stolen property.

30. *Papinianus, Questions, Book XL*

Where an action is brought against a woman on the ground of property wrongfully appropriated after the marriage has been dissolved, the action is extinguished in case the marriage should be re-established.

TITLE III.

CONCERNING THE RECOGNITION AND MAINTENANCE OF CHILDREN, PARENTS, PATRONS, AND FREEDMEN.

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

The Decree of the Senate enacted with reference to the recognition of children is in two parts, one of which has reference to the recognition of children by their parents, and the other to those who substitute spurious offspring.

(1) The Decree permits the woman herself, or her father under whose control she is, or anyone who is directed by either of them, in case she believes herself to be pregnant, to notify her husband, or her father under whose control she is, within thirty days after the divorce; or to leave the notice at his residence if there is no opportunity for personal service.

(2) We should understand the term "residence" to mean the lodging of the husband, if he lives in a city, but if he does not, but resides in a country house, or in a provincial town, the place where the parties have established their domicile during marriage.

(3) The wife should merely notify the husband that she is pregnant by him. She does not give this notice in order that her husband may send guards to watch her, for it is sufficient for her to inform him that she is pregnant. The husband should then either send persons to watch her, or should notify her that she is not pregnant by him; and it is permissible for this notification

to be made by the husband himself, or by another party in his name.

(4) The penalty of the husband, if he does not send persons to watch, or does not notify the woman that she is not pregnant by him, is that he shall be compelled to recognize the child; and if he should not do so, to be punished with extraordinary severity. Therefore, he should answer the notice, or it should be answered in his name, that the woman is not pregnant by him. If this is done, it will not be necessary for him to recognize the child, unless it is really his own.

(5) It should be remembered that the notice does not proceed from the husband, but from the woman.

(6) If, however, the husband should offer guards to watch his wife, and she should not allow this; or if she does not give him notice of her condition; or if she should give him notice, but not consent to accept the guards appointed by the court, the husband or his father is at liberty to refuse to acknowledge the child.

(7) Where a woman does not give notice of her pregnancy within thirty days, but does so afterwards, she should be heard after proper cause is shown.

(8) If, however, she should entirely neglect to give the notice, Julianus says that this does not in any way prejudice the child.

(9) We should understand the thirty days subsequent to the divorce to be continuous, and not available days.

(10) In the Nineteenth Book of the Digest by Julianus, the following nice point is suggested. If the woman should not notify her husband of her condition within thirty days, but should be delivered of a child within that period, will the Decree of the Senate apply? He says that, in this instance, the Plautian Decree of the Senate will not be applicable, because it was not considered to have reference to a child who was born within thirty days, for the Senate appointed the thirty days for the notification of the pregnancy. I think, however, that this would not in any way prejudice the child.

(11) Just as, on the other hand, if the husband, after receiving notice from his wife, should send guards, this would not cause any prejudice to himself. He will, therefore, be permitted to deny that the child is his, nor will it prejudice him, because he placed a watch over the woman.

This opinion is also stated by Marcellus in the Seventh Book of the Digest, for he says that if a party denies that a woman is his wife, or that she is pregnant by him, he can, without any prejudice to himself, very properly send persons to watch her, especially if he makes protest at the time that he does so.

(12) Julianus says in the Nineteenth Book of the Digest, that it is stated in the Decree of the Senate that if the woman should notify her husband that she had conceived by him, and he, after having been notified, should not send persons to watch or examine her, and does not declare in the presence of witnesses that she is not pregnant by him, he will be compelled to recognize the child when it is born; but it does not follow from this that if he says that the child is his, he must make it his heir if it was begotten by someone else. Still, he holds that when the case is heard in court, the admission of the father will establish a strong presumption in favor of the child.

(13) He also says that, on the other hand, where the woman, after a divorce has taken place, does not comply with what was prescribed by the Decree of the Senate, the father has the right not to acknowledge the child; and that it does not follow from this that, after the child is born, it cannot be declared to be his, but merely that the father will not be compelled to support it, if it should be proved to be his own offspring.

(14) Julianus also says that if a woman notifies her husband that she is pregnant, and he does not deny it, it must not be concluded from this that the child is his, although he can be compelled to support it. It would, however, be very unjust if, where a man has been absent for a long time, and having returned, finds his wife pregnant, and for this reason repudiates her, and he neglects to comply with any of the provisions of the Decree of the Senate, the child should be his heir.

(15) It is apparent from what has been said, that the child is in no way prejudiced, if the wife should fail to observe any of the provisions of the Decree of the Senate, when the child in fact belongs to her husband — and this not merely has reference to its rights, nor indeed to its maintenance, according to a Rescript of the Divine Pius; or if the husband has neglected to do what is prescribed by the Decree of the Senate, he can certainly be compelled to support the child, but he can repudiate it.

(16) It is clear that, if, after the woman has notified her husband, he should deny that she is pregnant by him, even though he may not send persons to watch her, he cannot prevent an examination being made to ascertain whether the woman is pregnant by him, or not. If this case is brought into court, and a decision be rendered on the point as to whether or not the woman is pregnant by her husband, the child must be recognized by the husband, whether it belongs to him, or not.

2. *Julianus, Digest, Book XIX.*

This applies to all cases, and therefore the child will be related by blood to its brothers.

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

If, on the other hand, the judge should decide that the child does not belong to the husband, even though it is really his, it is settled that a decision of this kind is equivalent to law.

This opinion Marcellus approves in the Seventh Book of the Digest, and we make use of it at the present time.

(1) For the reason that the Plautian Decree of the Senate has reference to children born after a divorce, another Decree of the Senate was enacted during the reign of the Divine Hadrian, which prescribed that children born during marriage must be recognized by their parents.

(2) But what if a child should be born after the death of its father, and during the lifetime of its grandfather, under whose control it would be placed, if it should be proved that the said child is the issue of the son of the grandfather? It should be considered what must be held in this instance. The opinion should be adopted that the question of its recognition should be left to its grandfather.

(3) But what if, in this case, the question should arise whether the child was born during marriage, or subsequently? It must be said that proceedings should be taken in accordance with the Decree of the Senate for the determination of this point.

(4) And what should be done if it was denied that the woman was the wife of the alleged husband? Julianus informed Sextus Cæcilius Africanus that there was ground for a preliminary inquiry.

(5) It must be held that these Decrees of the Senate are not applicable after the death of the father, if there is no relative under whose control the child can be placed. What claim to the estate could a child in this instance assert? Could he make such a claim, whether he was begotten by the person whose estate he demands, or not? What Julianus wrote in the Nineteenth Book of the Digest is true to the extent that, if proceedings for the recognition of the child had been begun during the lifetime of the father, and the latter should die before a decision was rendered, recourse must be had to the Carbonian Edict.

(6) These decrees of the Senate also have reference to children who are born their own heirs.

The better opinion is, however, that they are not applicable where the child, whose recognition is in question, was not under the control of the party instituting the proceedings.

4. *Paulus, Opinions, Book II.*

Not only he who smothers a child is hold to kill it, but also he who abandons it, or denies it food, as well as he who exposes it in a public place for the purpose of exciting pity, which he himself does not feel.

5. *Ulpianus, On the Duties of Consul, Book II.*

Where anyone asks support of his children, or where children can be supported by their father, a judge should take cognizance of the matter.

(1) Should a father be compelled to support only such children as are under his control, or should he support those who are already emancipated, or who, for any other reason, have become independent, is a question for consideration. I think the better opinion is that even where the children are not under paternal control, they must be supported by their parents, and that, on the other hand, their parents should also be supported by them.

(2) Let us see whether we are obliged to support only our fathers, our paternal grandfathers, our paternal great-grandfathers and other relatives of the male sex; or whether we are obliged to support our mothers, and our other ascendants in the maternal line. The better opinion is, that in every instance, the judge should interpose for the purpose of giving relief to the necessities of some and the infirmities of others; and since this obligation is derived from justice, and from the attachment due to blood, the judge should carefully weigh the claims of each of the parties.

(3) It must be said that the same rule applies to the maintenance of children by their parents.

(4) Therefore we compel a mother to support her illegitimate children, and them to support her.

(5) The Divine Pius also intimates that a maternal grandfather is obliged to support his grandchildren.

(6) He also stated in a Rescript that a father must support his daughter, if it should be proved in court that he had actually begotten her.

(7) Where a son can support himself, the court should decide not to compel maintenance to be furnished him. Hence the Emperor Pius stated in a Rescript: "The competent judges and before whom you will appear, must order that you shall be supported by your father in proportion to his means; provided that you allege that you are an artisan, and that by reason of ill health, you cannot maintain yourself by your own labor."

(8) Where a father denies that a party asking for support is his son, and therefore contends that he should not furnish it; or where a son denies that an applicant for maintenance is his father, the judges must decide the case summarily, and if it is established that the petitioner is a son, or a father, they must then order him to be supported. If, however, this should not be proved, they shall not decide that maintenance shall be furnished.

(9) But it must be remembered that if the judges hold that support should be furnished, still, this does not prejudice the truth, for they do not decide that the party is a son, but merely that he should be supported. This the Divine Marcus also stated in a Rescript.

(10) If anyone should refuse to provide support, the judges must determine the amount to be furnished in proportion to his means, and if he still fails to provide it, he can be compelled to comply with the judgment by taking his property in execution and selling the same.

(11) The judge must also determine whether a relative or a father has any good reason for refusing to support his children. There is a rescript addressed to Trebatius Marinus which

states that a father can properly refuse to support his son if the latter has informed against him.

(12) It is stated in certain rescripts that a father can be compelled by a judge not only to furnish provisions, but also all other necessaries to his children.

(13) Where a son has been emancipated before arriving at puberty, he can be compelled to support his father, if the latter is in poverty; for anyone would say with reason that it is most unjust for a father to remain in want, while his son was in prosperous circumstances.

(14) Where a mother who furnished provisions to her child, brings suit against its father, she should be heard under certain conditions; for the Divine Marcus stated in a Rescript addressed to Antonia Montana: "The judges will estimate how much shall be paid to you by the father of your daughter in proportion to the amount of necessary provisions which you have furnished her for her support; but you cannot obtain as much as you would have expended for your daughter through maternal affection, even if she had been driven away by her father."

(15) Filial affection requires that parents should be supported by a son who is in the military service, provided he has the means to do so.

(16) It is stated in a rescript that, although a parent should, according to the dictates of nature, be supported by his son, still the latter ought not to be required to pay his debts.

(17) There is also a rescript which states that the heirs of the son, if unwilling, are not compelled to furnish such assistance to their father that a son while living would provide him with through motives of filial duty, unless the father is in the greatest poverty.

(18) Judges are also accustomed to decide between patrons and freedmen, where the question of their maintenance arises. Therefore, if the patrons deny that the claimants are their freedmen, the judges must make inquiry, and if it is proved that they are their freedmen, then they must order them to be supported. The decree for support does not, however, prevent the freedman (if he denies that he is such) from contending for his rights against his patron.

(19) Support must be furnished by freedmen to their patrons who are in poverty in proportion to their means. If, however, the latter are able to support themselves, the authority of the judge need not be interposed.

(20) The question may be asked whether only patrons are to be supported, or whether their children must also be maintained. I think that, upon proper cause being shown, judges should decree that the children of patrons should also be supported, not indeed as readily as patrons, but sometimes; for freedmen should show reverence not only to their patrons but also to the children of the latter.

(21) The freedman of a woman is compelled to support her children.

(22) If anyone should desire to be supported by a freedman of his freedman, or by a slave whom he has manumitted by reason of a trust, or by one whom he has redeemed from slavery with his own money, he should not be heard. For, as Marcellus says, he should be compared with one who, by exacting a reward, loses thereby the rights he has in a freedman.

(23) If the son of his patron has accused the freedman of his father of a capital crime, he denies that the latter is required to support him.

(24) A freedwoman is also obliged to support her patron.

(25) An arbiter is usually appointed to decide with reference to the support of a patron, and he must ascertain the value of the resources of the freedman, in order that the amount of the maintenance may be determined, and this must be provided as long as the freedman is able to do so, and the patron requires it.

(26) Freedmen are compelled to furnish support for the father and mother of their patron, where the patron and his children are no longer living, if they are in need, and the freedmen

have the means to do so.

6. *Modestinus, Concerning Manumissions*.

The patron, by refusing to furnish support at the request of his freedman, forfeits the privileges imposed in his favor upon the latter on account of his manumission, and he is punished by the loss of the estate of the freedman; but he is not required to furnish support, even if he is able to do so.

(1) A Constitution of the Emperor Commodus contains the following: "Where it is proved that a patron has been rudely treated by his freedman, or severely beaten by him, or abandoned while in poverty or while suffering from bodily illness; he must first be brought again under the control of his patron, and compelled to render services to him as his master, and if he does not take warning by this proceeding, he shall be sold to a purchaser under the authority of a magistrate, and his price given to his patron".

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

If he who is alleged to have been the husband of a woman denies that the marriage was contracted, for the reason that he is ready to prove that she who claims to be his wife is a slave, he shall be compelled to support her children in the meantime; but if it should be established that she was a slave, he who was charged with their support will not be prejudiced on this account.

8. *Marcellus, On the Lex Julia et Papia, Book I.*

The children of our male children are under our care, but this is not the case with those descended from females; for it is evident that a child whom a daughter brings forth is under the care of her father, and not of her grandfather, unless the father is not living, or is in want.

9. *Paulus, On the Right of Patronage*.

Patrons and their children have no right to the property of their surviving freedmen, unless they prove to the court that they are so weak or poor that they should be assisted with monthly contributions of food by their freedmen. This rule has been established by many Imperial Constitutions.

TITLE IV.

CONCERNING THE EXAMINATION OF PREGNANT WOMEN, AND THE PRECAUTIONS TO BE TAKEN WITH REFERENCE TO THEIR DELIVERY.

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

In the time of the Divine Brothers a husband appeared who stated that his wife was pregnant, but she denied it, and the Emperors having been consulted on the subject, addressed a Rescript to Valerius Priscianus, the Urban Prætor, in the following terms. "Rutilius Severus seems to ask for something extraordinary in applying for a custodian for his wife, who is divorced from him, and who asserts that she is not pregnant. Therefore, no one will be surprised if We also suggest a new plan and a remedy. If the husband persists in his demand, it will be most convenient for the house of a respectable woman to be chosen into which Domitia may go, and that three midwives, experienced in their profession and trustworthy, after having been selected by you, shall examine her. And if all of them, or only two, announce that she seems to be pregnant, then the woman must be persuaded to receive a custodian, just as if she herself had requested it. If she does not bring forth a child, her husband will know that he will incur dishonor, and that his reputation will be involved, and he will not unreasonably be held to have contrived this in order to injure his wife. If, however, all of said women, or the majority of them, declare that the woman is not pregnant, there will be no reason for the appointment of a custodian."

(1) It is perfectly evident from this rescript that the Decrees of the Senate relating to the

recognition of children will not apply, if the woman pretended that she was pregnant, or even denied that this was the case. Nor is this unreasonable, for the child is a part of the woman, or of her entrails, before it is born. After it is born, however, it is clear that the husband can, in accordance with his rights, by means of an interdict, demand that the child shall be produced in his presence, or that he shall be permitted by an extraordinary proceeding to remove it. Therefore the Emperor comes to his relief when it is necessary.

(2) In accordance with this rescript, a woman may be summoned before the Prætor and, having been interrogated as to whether she believes that she is pregnant, can be compelled to answer.

(3) What must be done in case she should not answer, or should not appear before the Prætor? Shall we apply the penalty fixed by the Decree of the Senate, namely, that the husband shall have the right not to acknowledge the child? But suppose that the husband is not content with this, and that he should prefer to be a father rather than be deprived of his son? Then the woman shall be compelled by the authority of the Prætor to come into court, and if she does come, to answer; and if she refuses, her property shall be taken in execution, and sold, or she shall be punished by a fine.

(4) But what if, having been interrogated, she should say that she is pregnant? The course prescribed by the Decree of the Senate must then be followed. If, however, she should deny that she is pregnant, then, in accordance with this rescript, the Prætor must summon midwives.

(5) It should be noted that neither the husband nor the wife is permitted to summon midwives, but they must all be summoned by the Prætor.

(6) The Prætor also must select the house of the respectable matron to which the woman must go, in order that she may be examined.

(7) What must be done if the woman will not permit herself to be examined, or refuses to go to the house? Under these circumstances, the authority of the Prætor must also be invoked.

(8) If all, or a majority of the midwives, declare that the woman is not pregnant, can she bring an action on the ground of injury committed? I think that the better opinion is, that she can bring such an action, provided, however, that her husband, by taking this course, desired to cause her injury. But if he had no intention to injure her, but, indeed, actually believed that she was pregnant, having been influenced by an extreme desire to have children, or because she herself induced him to think so, having during marriage pretended that this was the case, it will be perfectly just for the husband to be excused.

(9) Moreover, it should be remembered that no time has been fixed by the rescript, although in the Decrees of the Senate relating to the recognition of children, the term of thirty days was established for the woman to announce her pregnancy. What then should be done? Shall we say that the husband can always summon his wife before the Prætor or shall we appoint thirty days for him to do so? I think that, where proper cause is shown, the Prætor should also hear the husband after thirty days have elapsed.

(10) With reference to the examination of a pregnant woman, and the precautions to be taken at the time of delivery, the Prætor says: "If a woman, after the death of her husband, declares that she is pregnant, she must take care to notify the parties interested or their agent, twice within the month subsequent to his death, so that they may send persons to examine her, if they wish to do so. Free women to the number of five shall be sent, and all of them shall make the examination at one time, but none, while they are making the examination, shall touch the belly of the woman without her consent. The woman shall be delivered in the house of a respectable matron, whom I will appoint. Thirty days before she expects to be confined, she shall notify the parties interested or their agents to send persons to be present at her delivery, if they should desire to do so. There shall only be one entrance to the room where the woman

is to be delivered and if there are more, they shall be closed by means of boards. Before the door of this room, three freemen and three freewomen, together with two companions, shall keep watch. Every time that the said woman enters this room, or any other, or goes to the bath, the custodians can previously make an examination of it, if they wish to do so, and also search any parties who may enter therein. The custodians who are placed in front of the room may search all persons who enter it or the house, if they so desire.

"When the woman begins to bring forth her child, she must notify all the parties interested, or their agents, in order that they may send persons to be present at her delivery. Freewomen to the number of five shall be sent, so that in addition to two midwives there shall not be present in the said room more than ten freewomen, nor more than six female slaves. All those who are to be present in the room shall be searched, for fear one of them may be pregnant. There shall not be less than three lights in said room, for the reason that darkness is better adapted for the substitution of a child. When the child is born, it shall be shown to the parties interested, or to their agents, if they desire to inspect it.

"It shall be brought up by whomever its father shall designate. If the father gives no directions in this respect, or the person by whom he desires it to be brought up will not take charge of it, this shall be done by someone appointed by me, after proper cause is shown. The person by whom the child is to be reared shall produce it, after it has reached the age of three months, twice every month until it is six months old; and then once a month, and from the time it is six months old until it has attained the age of a year, it shall be produced every other month; and after it is a year old, until it can speak, he shall exhibit it once every six months, wherever he wishes to do so.

"If the parties interested are not permitted to examine the woman, and to watch her, or to be present at her delivery, and anything is done to prevent what is set forth above, I will not grant permission for the possession of the child after I have taken cognizance of the case, nor will I do so where the child is not allowed to be examined, as is hereinbefore provided. Where it seems to me that a good reason exists, I will not grant those actions which I promise to those to whom the possession of property has been given in accordance with my Edict".

(11) Although the Edict of the Prætor is perfectly clear, still its interpretation should not be neglected.

(12) Hence, the woman should give notice to the parties interested, that is to say, to those whose interest it is that she should have no children, or to those who are entitled to the entire estate or a part of the same, whether as heirs at law, or under a will.

(13) If, however, a slave has been appointed heir, and there are no children; Aristo states that in this case it is in the power of the Prætor to permit him to take not all, but some of the precautions with reference to the delivery.

I think that this opinion is correct. For it is to the interest of the public that there should be no substitution of a child, in order that the honor of persons of rank, as well as that of families, may be preserved. Therefore, where a slave of this kind has been appointed with the expectation of the succession, he should be heard; no matter what his standing is, since he is acting both in the public interest and his own.

(14) Moreover, those also must be notified who are next in the line of succession; as, for instance, the heir appointed in the first degree, but not one who has been substituted; and if the head of the family died intestate, those should be notified who hold the first place in the line of succession. Where, however, there are several who have the right to succeed at the same time, all of them should be notified.

(15) Again, where the Prætor says that he will not grant possession after having taken cognizance of the case, or that he will refuse certain actions, this has reference to a case where, through ignorance, some provision has been neglected of those which the Prætor

wished to be observed; but this does not prejudice the rights of the child. For what kind of a rule would it be if one of the trifling formalities which the Prætor declares must be observed should not be carried out, and the possession of the property be refused to the child? The custom of the neighborhood must be followed, and in accordance with it the woman must be examined, and the delivery and the child watched.

2. *Julianus, Digest, Book XXIV*.

The Edict having reference to the inspection of pregnant women conflicts with the one granted in accordance with the provisions of the Carbonian Decree.

(1) Sometimes, however, the Prætor should dispense with these formalities, where the examination of the woman does not take place, or her delivery is not watched, and this occurs not through her malice but through her ignorance.

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

Where anyone is substituted for an unborn child, or is appointed heir in case there are no children, and he wishes to have the woman watched, he should be heard.

4. *Scævola, Digest, Book XX.*

A certain man by whom it was provided that, if he died without issue, whatever came into his hands should be left in charge of his sister as trustee, died after having appointed a posthumous heir, to whom he substituted others. The question arose whether the sister or her agent should be permitted to examine the woman, and watch over her delivery, in accordance with the terms of the Edict, since the wife of the deceased declared herself to be pregnant. I answered that in a case of the kind with reference to which the inquiry was made, it could be held that the solicitude manifested by the person charged with the trust ought to be respected, and that the request should be granted, if proper cause was shown.

TITLE V.

WHERE A WOMAN IS PLACED IN POSSESSION OF THE ESTATE OF HER HUSBAND IN THE NAME OF HER UNBORN CHILD, AND THIS POSSESSION IS SAID TO HAVE BEEN FRAUDULENTLY TRANSFERRED TO ANOTHER.

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

The Prætor has most properly provided by this Edict that the possession which he promises in favor of an unborn child shall not give occasion to the depredations of others.

(1) He, therefore, establishes an action against a woman who fraudulently transfers this possession to another. For not only does he exercise his authority over the woman herself, but also over anyone under whose control she may be; that is to say, where another is allowed to obtain possession through their fraudulent acts, and he promises an action against them to the extent of the interest of the party who institutes the proceedings.

(2) The Prætor necessarily adds that where anyone has fraudulently obtained possession of the property he shall be compelled to relinquish it. He will, however, compel him to do this not through the authority of his office, or by means of his subordinates, but he attains his object better, and more in accordance with the Civil Law when, by means of an interdict, he compels the party in question to have recourse to the ordinary procedure.

(3) It is to the interest of him who institutes the proceedings, that another should not be allowed to obtain possession when the latter has consumed the income collected in good faith, or when a depredator has obtained possession, and the income cannot be recovered from him, for the reason that he is insolvent.

(4) This action will be granted even after the expiration of a year, because its object is the recovery of the property.

(5) If the woman who has committed the fraud is under paternal control, an action will be granted against her father, if any of the property has come into his hands.

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

A woman acts fraudulently who does not prevent another party from obtaining possession; or for the purpose of defrauding anyone, places another in possession clandestinely, and by means of some artifice.

(1) If fraud is proved to have been committed by the father and the daughter, an action can be brought against either of them whom the plaintiff may select; because it is granted in favor of the party in interest. Therefore he can recover anything which he may have lost from the woman who is under paternal control, but this action will not be available to him beyond the expenses incurred by the prosecution of the case.

TITLE VI.

WHERE A WOMAN IS SAID TO HAVE OBTAINED POSSESSION OF THE ESTATE OF HER HUSBAND IN THE NAME OF HER UNBORN CHILD, BY HAVING MADE A FALSE STATEMENT.

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

Where possession is demanded by a woman in the name of her unborn child, and the oath having been tendered by the heir she swears that she is pregnant, the oath must be upheld, and she will not be liable on the ground that she has obtained possession through a false statement, nor shall any compulsion be applied to her after she has been sworn.

If, however, she should bring forth a child, an inquiry can be made as to whether it is true that she was pregnant by her husband; for where an oath is taken between two persons, it cannot profit a third party, nor prejudice the rights of the others. Nor, under such circumstances, will the rights of the child be prejudiced.

(1) This Edict is based upon the same principle as the former one, for the Prætor, as it is easy to grant the woman possession of the estate in the name of her unborn child, should not fail to punish her false statement.

(2) A woman is held to have obtained possession fraudulently, who attempts to obtain possession being well aware that she is not pregnant.

(3) The Prætor promises this action within the available year, but not beyond it, because it is of the nature of a penal one.

(4) In like manner, in this instance the Prætor promises an action for the recovery of the amount of the interest of the plaintiff.

(5) The Prætor also promises this action against the father of the woman, provided it was by his act that she fraudulently obtained possession.

(6) This action can be brought by anyone whose interest it is that a woman should not be placed in possession of the estate; as, for example, either by a co-heir, who is waiting for a child to be born, or a person who has been substituted, or one who would inherit *ab intestato* if the woman should die.

(7) The interest of the plaintiff is, first of all, held to have reference to the maintenance which is claimed by the woman on the ground of her pregnancy; for nothing can be recovered on this account, unless the woman obtained possession of the estate through fraudulent representation. If, however, there was no fraudulent representation, she will not be compelled to pay anything, because she obtained support, without any reason, under the pretext of her pregnancy.

(8) Sometimes, the amount of the interest is increased, where, for instance, the heir being in

doubt as to the woman's pregnancy, is excluded from the estate. For Julianus says that this action should be granted to the heir who is excluded, if it was to his interest that the woman should not fraudulently obtain possession; because if this were not the case, the appointed heir, by entering upon the estate, would leave a more valuable inheritance to his own heir. The woman could also be blamed for the diminution of the value of the estate, as the heir did not accept it on account of the prospect of the birth of a child.

(9) Julianus also says in the Nineteenth Book of the Digest, that if an heir, who has been substituted, should die while the woman is in possession of the estate, his heir can collect its value from the woman by means of the same action.

(10) But it should be considered whether the legacies and other charges of the estate should be relinquished by the woman; and it seems to me that it can be held that the legatees have a right to avail themselves of this action against her, because it is to their interest that the estate should be entered upon.

(11) It is clear that relief must be given to slaves who have been liberated, as against the party who has brought this action in behalf of the estate; that is to say, that he shall be compelled to discharge the trust, as he has received their value.

I think, however, that the Prætor should come to the relief of those who have been directly manumitted, and by his intervention should maintain their freedom.

(12) Where fraud exists on the part of a woman under paternal control, and her father has participated in it, he will be liable in his own name.

TITLE VII.

CONCERNING CONCUBINES.

1. *Ulpianus, On the Lex Julia et Papia, Book II.*

Where a freedwoman is living in concubinage with her patron, she can leave him without his consent, and unite with another man, either in matrimony or in concubinage. I think, however, that a concubine should not have the right to marry if she leaves her patron without his consent, since it is more honorable for a freedwoman to be the concubine of a patron than to become the mother of a family.

(1) I hold with Atilicinus, that only those women who are not disgraced by such a connection can be kept in concubinage without the fear of committing a crime.

(2) Where a man keeps in concubinage a woman who has been convicted of adultery, I do not think that the *Lex Julia de Adulteriis* will be applicable, although he will be liable if he should marry her.

(3) If a woman has lived in concubinage with her patron, and then maintains the same relation with his son or grandson, I do not think that she is acting properly, because a connection of this kind closely approaches one that is infamous, and therefore such scandalous conduct should be prohibited.

(4) It is clear that anyone can keep a concubine of any age unless she is less than twelve years old.

2. *Paulus, On the Lex Julia et Papia, Book XII.*

Where a patron, who has a freedwoman as his concubine, becomes insane, it is more equitable to hold that she remains in concubinage.

3. *Marcianus, Institutes, Book XII.*

The freedwoman of another can be kept in concubinage as well as a woman who is born free, and this is especially the case where she is of a low origin, or has lived by prostitution;

otherwise if a man prefers to keep a woman of respectable character and who is free born in concubinage, it is evident that he can not be permitted to do so without openly stating the fact in the presence of witnesses; but it will be necessary •for him either to marry her, or if he refuses, to subject her to disgrace.

(1) Adultery is not committed by a party who lives with a concubine because concubinage obtains its name from the law, and does not involve a legal penalty; as Marcellus states in the Seventh Book of the Digest.

4. *Paulus, Opinions, Book XIX.*

The woman must be considered a concubine even where only the intention to live with her is manifested.

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

An official who is a resident of the province where he administers the duties of his office can keep a concubine.

THE DIGEST OR PANDECTS.

BOOK XXVI.

TITLE I.

CONCERNING GUARDIANSHIP.

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

Guardianship is (as Servius defines the term), authority and power over a free person, granted for the purpose of protecting him who, on account of his age, is unable to protect himself; and this authority is conferred or admitted by the Civil Law.

(1) Guardians are those who possess this authority and power, and they derive their name from the office itself. Therefore they are styled guardians, being as it were protectors and defenders, just as those are styled guardians of a temple, who are charged with its care.

(2) A person who is dumb cannot be appointed a guardian, as he cannot exert his authority.

(3) Many legal writers, among them Pomponius (in the Sixty-ninth Book on the Edict), hold that a deaf person cannot be appointed a guardian, because a guardian should not only be able to speak, but also to hear.

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

A minor should not be required to ask that a guardian be appointed for him, or to go in search of him.

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

Where a male or female ward has a guardian, and becomes insane, he or she will still remain under guardianship while in this condition.

This is the opinion of Quintus Mucius, and was approved by Julianus; and we adopt the rule that curatorship shall cease where the age requires guardianship. Therefore, if wards have guardians, they are not, by reason of their insanity, placed under curatorship; and if they have none, and insanity should attack them, they can, nevertheless, have guardians, because the Law of the Twelve Tables is understood not to apply to wards of either sex.

(1) For the reason, however, that we do not permit agnates to be the curators of minors, I have thought that even though a minor under the age of twenty-five may be insane, a curator should be appointed for him; not because he is insane, but for the reason that he is a minor, just as if the impediment of age existed. We make this distinction in the case of a person whose age subjects him to curatorship or guardianship, and it is not necessary to appoint a guardian for him on account of his demented condition.

This the Emperor Antoninus Augustus stated in a Rescript, since provision should be made for age rather than insanity, during a certain time.

(2) Where a ward of either sex desires to institute proceedings against his or her lawful guardian, or if the latter desires to do so along with him or her, and a demand is made for a curator, shall he be appointed on the application of the ward, or on that of his or her adversary? It should be remembered that a curator can be appointed whether a ward sues or is sued, but this cannot be done unless he for whom the curator must be appointed requests it.

Hence Cassius states in the Sixth Book that no one can be appointed a curator under such circumstances, unless he is present, and the party requesting his appointment is also in court. Therefore, a curator cannot be appointed for an infant. Cassius says that if a minor does not wish to ask for a curator, in order to prevent suit from being brought against him, he should be compelled to make application for one by the Prætor.

(3) Pomponius states in the Sixteenth Book, that a curator of this kind can be appointed at any

place and at any time.

(4) If a minor petitions for such a curator, and does not state for what purpose he wishes him, shall he be appointed for all the controversies in which the minor may be involved? Celsus says that Servius has decided that the curator should be considered to be appointed for the transaction of all business.

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

Where it is stated that the curator is appointed without distinction, he is held to have been designated for the management of all litigation, and this has reference to cases where an action is brought against a guardian for the partition of an estate, or the division of property held in common, or for the establishment of boundaries; and if the appointment thus is made in general terms, a curator is considered to have authority to act not only in cases where the ward is plaintiff, but, on the other hand, where suit is brought against him.

(1) Several curators can be asked for in the place of several guardians, or one in the place of several, or one curator in the place of one guardian, either for the management of a single lawsuit or for the conduct of several.

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

Where a curator of this kind has once been asked for, he will remain in office until the suit is disposed of, and another curator cannot be asked for in the same proceeding.

(1) And if, for example, the appointment of Titius is asked for, as against Seius, this same Titius can be appointed to conduct the case against another guardian, so that in different cases one curator will take the place of two. This may happen, indeed, with reference to the same guardian, if the same curator is appointed for the conduct of different cases at different times.

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

It is true that a guardian can be appointed for minors who are dumb, and have not arrived at puberty. But may it not be doubted whether they can be authorized by their guardian? If the guardian can authorize a ward who is silent, he can also authorize one who is dumb. It is, however, perfectly true (as Julianus states in the Twenty-first Book of the Digest), that the guardian can authorize his ward to act even if he is silent.

(1) It is settled that a guardian cannot be appointed conditionally by the governor of a province, and if one should be appointed, his appointment will be of no effect. This is also the opinion of Pomponius. But if a governor makes the appointment in the following terms: "I appoint such-and-such a man guardian, if he gives security"; this appointment does not contain a condition, but a warning that the guardianship will not be conferred upon him unless he furnishes security; that is to say, he will not be allowed to transact the business of his office without giving a bond to insure the preservation of the property.

(2) The appointment of a guardian is not an Imperial privilege, nor one attaching to magisterial jurisdiction, but only belongs to him upon whom the right has been conferred by the law, or by a Decree of the Senate, or by the Emperor himself.

(3) A guardian can be appointed for a minor who is deaf.

(4) It is clear that a guardian cannot be appointed for a minor whose father is in the hands of the enemy. If, however, one should be appointed, it may be asked whether or not the appointment may not remain in suspense. I do not think that such an appointment is valid, for, after the return of the father, the minor will again come under his control, just as if his father had never been captured by the enemy. Still, a curator should be appointed for the management of the property to prevent it from being lost in the meantime.

7. *Ulpianus, Disputations, Book II.*

Where a son under paternal control is appointed guardian by the Prætor, and his father assents to the appointment, he should be held liable for the entire amount, but if he does not assent, he will be liable only for the amount of the *peculium*. He will be considered to have approved of the appointment if he himself transacts the business of the guardianship, or consents that his son shall do so; or if he, in any way whatever, concerns himself with the office. Hence, where a man wrote to his son to administer the guardianship carefully, and said, "For you know that we are responsible"; I held that he should be considered to have approved of the appointment. It is clear that if he only advises his son, he should not be held to have given his approbation.

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

A patron, who is also the guardian of his freedman, should carry out his contracts, and if he in any way defrauds the creditors of the ward who is his freedman, the law permits his appointment to be revoked.

9. *Marcianus, Institutes, Book III.*

An extraordinary punishment is inflicted upon those who are proved to have obtained a guardianship by the payment of money; or have given their services for a pecuniary consideration in order to secure the appointment of an insolvent guardian; or, when making the inventory, have purposely diminished the amount of the property of the ward; or have alienated it evidently with fraudulent intent.

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

A man who is not a resident of the town can be appointed a guardian, provided the ward for whom he is appointed is a citizen of the place.

11. *Paulus, On Vitellius, Book III.*

If an insane person should be appointed a guardian, the appointment must be understood to have been made under the condition that he becomes of sound mind.

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

The question arose whether parties who are appointed guardians in the place of another, who is absent in the service of the government, would continue in their office if the former should die; or whether application for the appointment of others should be made? Paulus answers that where they are appointed in the place of one who is absent, and the latter does not return, they will continue to hold their office until the ward arrives at the age of puberty.

13. *Pomponius, Enchiridion, Book II.*

It is sometimes customary for a curator to be appointed for a ward who has a guardian, either on account of the ill health of the latter, or because of his old age; but he is understood to be rather a business manager than a genuine curator.

(1) The Prætor is accustomed to permit guardians to appoint an assistant in the administration of the guardianship, where they cannot satisfactorily administer it themselves, but this assistant is appointed at the guardian's own risk.

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

Where minors are arrogated or deported, they cease to have guardians.

(1) The guardianship also terminates where a ward is reduced to slavery.

(2) Guardians cease to hold office for several other reasons, for example, where either the ward or the guardian is captured by the enemy.

(3) When a guardian is appointed for a certain time, at the expiration of that time he ceases to hold his office.

(4) Moreover, a guardian ceases to hold his office where he is removed on account of being suspected.

(5) Where a guardian is appointed under a certain condition, it also happens that when the condition is fulfilled, he ceases to be a guardian.

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

Where a guardian is not captured by the enemy, but is sent in the capacity of ambassador, whether he is received or deserts, for the reason that he does not become a slave, he still remains a guardian, but, in the meantime, another guardian will be appointed by the governor.

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

Guardianship is generally an office whose duties are exercised by men.

(1) It must be understood that guardianship does not pass to another by hereditary right. The legal guardianships of parents, however, descend to children of the male sex, who are of age, but others are not transmitted.

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

Several decrees of the Senate have been enacted providing that other guardians should be appointed in the place of those who are insane, dumb, and deaf.

18. *Neratius, Rules, Book III.*

Women cannot be appointed guardians, because this is an office which belongs to men unless they obtain the guardianship of their children through an express application to the Emperor.

TITLE II.

CONCERNING TESTAMENTARY GUARDIANSHIP.

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

Parents are permitted by the Law of the Twelve Tables to appoint by will guardians for their children of either the female or the male sex, provided they are under their control.

(1) We should also remember that parents are allowed to appoint testamentary guardians for their posthumous children, grandchildren, or any other descendants, if, where such children were born during the lifetime of the testator they would have been under his control, and would not have broken the will.

(2) It should also not be forgotten that, where anyone has a son, and also a grandson by the said son, under his control, and he appoints a guardian for his grandson, he must be held to have properly appointed him, if the grandson, after his death, does not again come under the control of his father, which would be the case if his son should cease to be under his control during the lifetime of the testator.

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

It was stated in a Rescript by the Divine Brothers, that a soldier cannot appoint a guardian for his grandchildren, if they were liable to again come under the control of their father.

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

We should consider persons who are mentioned in a codicil confirmed by a will to be testamentary guardians.

(1) Those, however, who are appointed by law, should not be considered testamentary guardians.

4. *Modestinus, Differences, Book VII.*

A father can appoint a guardian for his son whether he has appointed him his heir, or

disinherited him. A mother, however, cannot do this, unless she has constituted her son her heir, as a guardian is held to have been appointed rather with reference to property than to the person. It is necessary for the party appointed by the will of the mother to be confirmed only after examination, since, where he is appointed by the father — even though this has been done with the omission of some legal formalities — he will still be confirmed without any examination, unless the reason for his appointment appears to have been changed; for instance, where from a friend he has become an enemy, or where having previously been rich, he has become poor.

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

Where anyone appoints a guardian for his daughters or his sons, he is held also to have appointed him for a posthumous daughter, because the term "posthumous" is included in the term daughter.

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

But suppose there are grandchildren, must it be held that a guardian is appointed for them under the name of "children"? The better opinion is that the guardian is also appointed for them, provided the testator made use of the word "children". If, however, he used the word "sons", they will not be included, for the term son is one thing, and the term grandson another. It is clear that if he appointed a guardian for his posthumous children, the offspring of the latter, as well as the other children, will be included.

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

Guardians do not derive their authority from the heir, but directly from the testator, and they are vested with it as soon as an heir appears; or the heir himself can be appointed guardian, and a guardian can legally be appointed after the death of the heir.

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

Where a guardian is appointed, the appointment can be revoked either by another will, or by a codicil.

(1) If a guardian is appointed under certain conditions, and the condition fails to take place, the appointment is void.

(2) Moreover, a guardian can be appointed from a certain time, and up to a certain date, as well as under a condition, and until the fulfillment of the condition.

(3) In the appointment of a guardian, must it be considered whether the condition is most easy of fulfillment, or latest; as, for instance, in the case of a legacy, where Titius is appointed guardian, when he is able to act, or where he is appointed, if a ship should come from Asia? Julianus very properly states in the Twentieth Book of the Digest, that the latest condition which is mentioned should be considered.

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

Where no one enters upon the estate, nothing stated in the will is valid. If, however, one out of several heirs enters upon it, the appointment of a guardian will be valid, and it will not be necessary to wait for all the heirs to accept the estate.

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

If an estate is not yet entered upon, and the appointment of a guardian is expected under the will disposing of it, the better opinion is that another guardian can be appointed, just as if there was none, nor any expectation of one.

(1) In testamentary guardianship, the last will of the testator is observed, and if he has appointed several guardians, we accept the last one mentioned.

(2) Where a man had a son, and a grandson by him, and appointed a guardian for the grandson, there may be a question whether an appointment under such circumstances will not be valid; for example, if one supposes that the son died during the lifetime of his father, and for this reason the grandson will become the heir to his grandfather during the lifetime of the latter. It must be positively held that such a guardianship is confirmed by the *Lex Junia Velleia*. Pomponius stated in the Sixteenth Book on Sabinus that the appointment of such a guardian is valid. For as the will is valid, the appointment of the guardian made therein will consequently also be valid; that is to say, where the grandson is either appointed heir, or expressly disinherited.

(3) Where an insane person is appointed a guardian by will, Proculus thinks that the appointment is properly made, if it is stated that he shall act when he ceases to be insane. If, however, he is appointed unconditionally, Proculus denies that the appointment is valid.

What Pomponius says is more correct, that is, that the appointment was held to have been properly made, and that the guardian can act when he recovers his reason.

(4) A slave belonging to another can be appointed a guardian, where it is stated that he shall act if he becomes free. And even if the slave should be appointed without any condition, the acquisition of his freedom is held to be a condition upon which his appointment depends. Where, however, a slave belonging to another is appointed, anyone, however, can maintain that, by doing so, the testator has bequeathed him his freedom by means of a trust. For what difference does it make whether he appoints his own slave, or that of another, since, in the interest of the ward, and in consideration of the public welfare, the freedom of him who is appointed guardian is assumed? Therefore, it can be maintained that freedom through a trust has been conferred upon the slave, unless it is perfectly clear that this was not the intention of the testator.

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

If anyone appoints a guardian under a condition or from a certain date, another guardian should be appointed in the meantime, even though the ward may already have a legal guardian; for it must be remembered that legal guardianship is not operative so long as the appointment of a testamentary guardian is expected.

(1) Where the office of guardian devolves upon one appointed by will, and the testamentary guardian is afterwards excused from serving; we can say in this instance that another should be appointed in the place of the one who was excused, and that the office does not revert to the legal guardian.

(2) We also say that, if the guardian should be removed, the same rule will apply; for he retires in order that another may be appointed.

(3) If, however, the testamentary guardian should die, the office will revert to the original guardian, because in this instance the Decree of the Senate does not apply.

(4) It is evident that if two or more testamentary guardians are appointed, and one of them dies or forfeits his civil rights, another can be appointed in his stead; but if neither of them survives, or retains his civil rights, the legal guardianship will be established.

12. *The Same, On Sabinus, Book XXXVIII.*

A guardian cannot be appointed by will for the management of certain affairs, without including the administration of property.

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

And if one should be appointed under such conditions, the entire appointment will be void:

14. *Marcianus, Institutes, Book II.*

For the reason that a guardian is appointed to have charge of the person, and not merely for the care of certain property, or the transaction of some business.

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

Where, however, a guardian is appointed for property which is situated in Africa or Syria, the appointment will be valid, for this is our practice.

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

If anyone should name a guardian as follows: "I appoint So-and-So guardian of my children", the appointment will be held to have been made for the sons as well as the daughters of the testator, for daughters are included in the term children.

(1) If a man should appoint a guardian for his son, and he has several sons, will he be held to have appointed him for all of them? Pomponius is in doubt on this point; but the better opinion is that he will be held to have made the appointment for all.

(2) Where anyone appoints a guardian for his children, or merely for his sons, he will be held to have made the appointment for any whom he may have who are held captive by the enemy, if it is not clearly established that the intention of the testator was otherwise.

(3) If anyone should appoint a guardian for his children, not being aware that Titius was his child; shall he be considered to have made the appointment only for those whom he knew to be under his control, or also for him who he did not know was his son? The better opinion is that he should not be considered to have made the appointment for the latter, although he is included among the number of his sons; but, for the reason that he did not have him in mind at the time, it must be said that the appointment does not have reference to him.

(4) Hence the same rule will apply where a man was certain that his son was dead, while in fact he was living; for he is not held to have appointed a guardian for one whom he believed was dead.

(5) Where anyone appoints a guardian for his posthumous children, and the latter are born during his lifetime, will the appointment be valid? The better opinion is that it will be valid, even though the said children should be born while he is living.

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

It is perfectly certain that testamentary guardians should not be compelled to give security for the preservation of the property of their wards. Still, when one of several offers to furnish security that he will administer the office alone, he should be heard, as is provided by the Edict. Moreover, the Prætor very properly inquires of the others whether they also are willing to give security, for if they are ready to do so, they should not be excluded by the offer of the first one; but if security is furnished by all, all can administer the trust, so that any of them who prefers to receive security rather than administer it will be rendered safe.

(1) By no means, however, is a guardian who offers to give security always to be preferred. For what if he was a suspicious person, or one who is infamous to whom the guardianship should not be entrusted, even if he gave security? Or, if he had already been guilty of many crimes in the administration of the guardianship, should he not rather be dismissed and expelled from his office, than be allowed to administer it alone? Those who do not give security should not rashly be rejected, because, generally speaking, persons who are of good repute, solvent, and honest, should not be excluded as guardians, even if they do not furnish security, nor, indeed, should they be ordered to furnish it.

(2) Therefore the examination instituted by the Prætor is twofold in its nature; on the one hand, it must be ascertained who, and what kind of a person he is who offers to give security; and on the other, the character and qualifications of his fellow guardian should be investigated. For it is necessary to learn what their standing and honesty are, so that they may

not be subjected to the insult of being compelled to give security.

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

Where several guardians are prepared to furnish security, the most solvent of them should be given the preference; so that comparison may be made between the guardians and their sureties.

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

If none of the guardians volunteer to give security, but a certain person who is not a guardian appears, and requests that the guardians furnish it, or, if they do not do so, that the guardianship should be given to him, he being ready to provide security; he should not be heard. For guardianships ought not to be entrusted to a stranger, and testamentary guardians should not be compelled to give security contrary to law.

(1) This Edict with reference to the furnishing of security applies to testamentary guardians. Where, however, guardians are appointed after an examination, Marcellus says that this Edict is also applicable to them, and this is also indicated by an Address of the Divine Brothers. They therefore come under the same rule, hence if the majority of the guardians so decide, he shall administer the guardianship whom the majority may select, although the terms of the Edict specifically apply to testamentary guardians.

(2) Where a guardian is appointed by will for a posthumous child, he cannot administer the office until the posthumous child is born. An action on the ground of voluntary agency will, however, be granted to the substituted ward as against the guardian. But where the child is born, and the guardian is removed from office before he discharges any of its duties, he will be liable to this same action. If, however, he transacts any business after the child is born, he will be liable to an action on guardianship with reference also to any matters which he has previously attended to, and his entire administration will be included in this action.

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

A man whose name or condition is uncertain cannot be appointed a guardian.

(1) We can appoint any person whomsoever a guardian by will, even if he be Prætor or Consul, because this is authorized by the Law of the Twelve Tables.

21. *The Same, Abridgments, Book VIII.*

Those can be appointed testamentary guardians who are competent to take under the will.

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

If anyone should appoint a slave the guardian of his son, thinking that he was free, when, in fact, he was a slave; he shall neither become free, nor act as guardian under the provisions of the will.

23. *Africanus, Questions, Book VIII.*

The appointment of a guardian is not legally made in the following terms: "Titius shall be the guardian of such-and-such of my children, whichever he prefers". For what could we say if Titius refused to decide for which one of the children he preferred to be the guardian?

(1) A guardian can, however, be properly appointed in the following terms: "I appoint Titius to be the guardian of So-and-So, my son, if he is willing".

24. *Javolenus, On Cassius, Book V.*

Where there are several guardians, it is superfluous to petition the Prætor to appoint a curator for the purpose of conducting a lawsuit against one of them, because the ward can begin the action with the authority of another guardian.

25. *Modestinus, Pandects, Book IV*.

Where a guardian is appointed for two minors, even if he can excuse himself from the guardianship of one of them, he will still remain the guardian of the other, if the property of the minors is separate.

26. *Papinianus, Opinions, Book IV*.

In accordance with our laws, the guardianship of their common children cannot be left to the mother by the father's will, and if the Governor of the province, through ignorance, should decide that the will of the father shall be carried out, his successor cannot properly adopt his decision which is not permitted by our laws.

(1) A guardian is not considered to be an honorary one that the father appointed for the purpose of receiving accounts from other guardians, whom he directed to transact the business of his children.

(2) Where a son, who is disinherited, was provided with a guardian by the last will of his father, and desires to institute proceedings against the will as inofficious, the appointment of the guardian must be confirmed by the Prætor; and the result of the action will establish whether he received his authority from the will of the father, or from the decree of the Prætor.

27. *Tryphoninus, Disputations, Book XIV*.

The same rule applies where the defence is set up in the name of the ward that his father died intestate, or where the allegation that the will is forged is made in the name of the ward; and if a paternal uncle is living, he will become the legal guardian *ab intestato*, because a guardian cannot be appointed for a ward who is already provided with one.

It is, however, more convenient that the guardian mentioned in the will should be appointed by the Prætor, so that the legal guardian may authorize the ward to proceed without any prejudice to the case.

(1) Where a paternal uncle, whom the ward declares ought to be his lawful guardian, accuses him of being a supposititious child, and claims that the estate lawfully belongs to him; Julianus is of the opinion that application for the appointment of another guardian should be made.

28. *Papinianus, Opinions, Book IV*.

Where a testamentary guardian is unwilling to undertake the duties of the office, and gives reasons for which he should be excused, he shall be deprived of any legacies which may been bequeathed to his children by the will; provided the latter have deserved these legacies not through special affection, but for the sake of their father.

(1) When a slave has been manumitted under the terms of a trust, he cannot legally be appointed a guardian by will. Hence, after his freedom has been granted him, he may be called to the guardianship in accordance with the desire of the testator.

(2) A patron cannot appoint a guardian for his freedman by will, but the Prætor can carry out his wishes if, after examination, he finds the character of the appointee to be suitable.

29. *The Same, Opinions, Book XV*.

According to the terms of the Libonian Decree of the Senate, a person cannot act who appointed himself the testamentary guardian of a ward. For as the intention of the father is not doubtful, since he stated it in an instrument in his own hand, I gave the opinion that he should be appointed curator, even though there may be other guardians. In this instance, the excuse to which he would be entitled by law should not be admitted, since he is held to have bound himself, nor can he be removed on the ground of suspicion.

30. *Paulus, Questions, Book VI.*

Two persons are named Titius, father and son; Titius is appointed guardian, but it does not appear which one the testator meant. I ask what is the law in the case? The answer was, that he should be appointed whom the testator had in his mind. If his intention is not apparent the law is not defective, but the evidence is lacking. Therefore neither of them can act as guardian.

31. *Scævola, Questions, Book IV.*

If a father should appoint guardians for a daughter whom he has disinherited, and the will should be declared to be broken on account of the birth of a posthumous child, it will be best for the said guardians to be appointed for the ward, for the purpose of claiming the inheritance of the intestate.

32. *Paulus, Opinions, Book IX.*

I ask whether anyone can appoint as testamentary guardians citizens who do not reside in the same town as the ward. Paulus answered that he can do so.

(1) Paulus also gives it as his opinion that a man who has been appointed guardian on account of his knowledge of certain matters, can legally be sued with reference to everything pertaining to the administration of the office, just as other guardians appointed by the same will.

(2) Lucius Titius appointed his minor children his heirs, and appointed guardians for them in the following words: "Gaius Mævius and Lucius Eros shall be the guardians of my children". But he did not bequeath his freedom to Eros, who was a slave. The latter, however, was under the age of twenty-five years, and I ask whether he could claim his freedom. Paulus gave it as his opinion, that as it had been decided that a slave who was appointed a guardian by his master is considered to have deserved his freedom, he also, with respect to whom the inquiry is made, should be considered to be in the same position, and therefore should be free as soon as the estate was entered upon, and should be entitled to the guardianship when he attained lawful age.

33. *Javolenus, On the Last Works of Labeo, Book VIII.*

Certain guardians were appointed as follows: "I appoint Lucius Titius guardian, and if he should not be living, I then appoint Gaius Plautius". Titius lived and administered the guardianship, and afterwards died. Trebatius denies that the guardianship belongs to Plautius; Labeo holds the opposite opinion, and Proculus agrees with him; but I have adopted the opinion of Trebatius because the words of the testator have reference to the time of death.

34. *Scævola, Digest, Book X.*

A testator appointed other guardians by a codicil because those whom he had appointed by will were either dead, or had offered good excuses for declining to accept the trust. Shall the surviving guardians, who were not excused, still remain in office? The answer was that there was nothing in the facts stated to prevent them from continuing in office.

TITLE III.

CONCERNING THE CONFIRMATION OF A GUARDIAN OR A CURATOR.

1. *Modestinus, Excuses, Book VI.*

In order that we may not leave anything having reference to the confirmation of guardians undiscussed, we will make a few observations on this subject.

(1) Certain guardians are properly appointed by will, that is to say, where this is done by those who have a right to do so and for those who must accept them, and in the manner and at the place where this should be done. A father can lawfully appoint a guardian for his children or his grandchildren who are under his control, but he must do this by will. Where, however, a

person makes the appointment who cannot do so, as for instance, a mother, a patron, or a stranger, or where a guardian is appointed for anyone illegally; for example, when a father appoints a guardian for his son or daughter who is not under his control, or if he should say: "I request you to take charge of the affairs of my son", or if he should appoint a guardian or curator by a codicil which is not confirmed by a will; in these instances, the Imperial Constitutions permit anything that may be lacking to be supplied by the consular authorities, and the guardians to be confirmed in accordance with the intention of the testator.

(2) And if, indeed, the father should appoint a guardian without making any complete and thorough investigation as to his character and qualifications, he shall be confirmed without ceremony. Where, however, anyone else appoints one, inquiry shall be made whether he is fit for the place.

(3) It is also necessary to know that, while a curator cannot legally be appointed by will, still, if he is appointed, it is customary for him to be confirmed.

2. *Neratius, Rules, Book III.*

A woman cannot legally appoint a guardian by will, but if she should do so, he shall be confirmed by the decree of the Prætor or the Proconsul, after an examination has been made; and he shall not be required to give security to the ward for the preservation of his property.

(1) If a curator should be appointed by the will of a mother for her children, the appointment will be confirmed by a decree after an investigation has been made.

3. *Julianus, Digest, Book XXI.*

Where a guardian is appointed by a father in a will which is not regular, or which does not conform to the law, he must be confirmed for the purpose of administering the guardianship, just as if he had been appointed guardian under the will; that is to say, he will be excused from giving security.

4. *Paulus, On the Excuses of Guardianship*.

When a patron or a stranger appoints a guardian for a minor whom he has named as his heir, and the ward has no other property; it is well to hold that his wishes should be carried out, as he was acquainted with the person whom he wished to be the guardian, and he was so much attached to the minor that he made him his heir.

5. *Papinianus, Questions, Book XI.*

The Prætor orders magistrates to confirm guardians appointed by the will of a paternal uncle. They should also take security, nor will the wishes of a party who could not appoint a guardian excuse the negligence of the magistrate. Finally, the Prætor cannot issue his decree before the guardians, by means of an examination, shall have been declared eligible. Whence it follows that if they should not be solvent at the time the guardianship was established, an action will be granted against the magistrates for the amount which cannot be made good out of the property of the guardians.

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

Where a father appoints a guardian for a son who has arrived at puberty, or appoints a curator for one who has not yet done so, the Prætor should confirm him without any inquiry.

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

A guardian cannot legally be appointed by a father for his natural son, to whom nothing has been left, nor can he be confirmed without an investigation.

(1) Where the question is asked whether a guardian is legally appointed after an examination, the following four matters should be taken into consideration, namely: whether the party who made the appointment had a right to do so; whether he who was appointed has accepted;

whether the power of appointing the other party was vested in him; and whether the decree of confirmation was rendered in court.

8. *Tryphoninus, Disputations, Book XIV*.

In the case of confirmation of a guardian, the Prætor should ascertain whether the intention of the father continued to exist. This is readily done where the latter illegally appointed either guardians or curators, at the time of his death; for if he appointed them several years before, and, in the meantime, a diminution of the property of the parties illegally appointed by him has taken place, or their bad character previously concealed, or unknown, has been discovered, or where hostility against the father has arisen;

9. *Paulus, Concerning Judicial Inquiries*.

Or where they have incurred some liability to the Treasury through a contract,

10. *Tryphoninus, Disputations, Book XIV*.

The Prætor shall consult the interest of the wards, and not inflexibly adhere to the terms of the will or the codicil, as he should consider the intention of the father, where he was not ignorant of those things which the Prætor himself has learned concerning the guardians. Finally, what if, after the father has illegally appointed a guardian by a will or codicil, he should say that he was unwilling for him to act as guardian? Then, indeed, the Prætor should not carry out the first wishes of the father which he subsequently abandoned.

11. *Scævola, Digest, Book XX.*

A grandmother appointed a curator for her grandchildren, after having bequeathed them certain property in trust. The question arose whether the curator could be compelled to act? The answer was, that he was not a lawful curator, but, as something was given him by will, he would be liable under the trust, even if he should not undertake the curatorship, unless he refused to accept what had been given him, or was ready to surrender it.

(1) The question also arose whether such a curator was obliged to give security to the grandchildren. I answered that he was not; but, as the surrender of the trust could be demanded of him, he should furnish security for its faithful administration.

TITLE IV.

CONCERNING LEGAL GUARDIANS.

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

By the Law of the Twelve Tables, legal guardianships are granted to agnates and blood relatives, as well as to patrons, that is to say, to those persons who can be admitted to lawful inheritance. This rule has been established most wisely, in order that those who expect the succession may protect the property to prevent it from being wasted.

(1) It sometimes occurs that the expectation of the succession belongs to one person and the guardianship to another; as, for instance, where there is a female blood-relative of the guardian, for the inheritance, in fact, belongs to a female agnate, but a male agnate is entitled to the guardianship.

The same rule applies in the case of freedmen, where there is a female patron and the son of a male patron, for the latter will obtain the guardianship, and the former the estate. This is also the case where there is a daughter of the patron and a grandson of the latter.

(2) Where a brother of the ward is in the hands of the enemy, the guardianship is not granted to an agnate of the next degree; and if the patron is in the hands of the enemy, the guardianship is not granted to the son of the latter, but a temporary appointment is made by the Prætor.

(3) Sometimes, also, guardianship is established without inheritance, and sometimes inheritance without guardianship; as, for instance, in the case of a party who conceals himself after he has been asked to manumit his slave, for the Divine Pius stated, as a general rule, in a Rescript to Aurelius Bassus, that a party would not be entitled to the right of patronage, in the following words: "It is clear that the reluctance of persons who wish to avoid the grant of freedom prescribed by a trust, shall be punished by not being permitted to acquire the right of patronage over him whom they do not wish to be free."

The same rule will apply where a freedman is assigned to the daughter of the patron, for the guardianship will remain with her brothers, as Marcellus states, and the lawful inheritance will belong to their sister.

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

There is no doubt that legal guardianship is lost by a change of the civil status of the ward, even if he should not have lost his citizenship.

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

Legal guardianship, which is granted to patrons by the Law of the Twelve Tables, is not, indeed, granted expressly or specifically, but as the result of the right of succession conferred upon patrons by this same law.

(1) Therefore a man who has manumitted a slave becomes a guard-

ian by the Law of the Twelve Tables, whether he acted voluntarily, or whether he manumitted him, having been obliged to do so by the terms of a trust.

(2) But even if he purchased a slave for the purpose of manumitting him, under this law, and by virtue of a Constitution of the Divine Marcus, addressed to Ofilius Victorinus, he should obtain his freedom, he must be held to be the guardian of said slave.

(3) It is evident that if a slave should obtain his freedom in accordance with the Rubrian Decree of the Senate, he will not have as guardian the person charged with his manumission, but, having been liberated by the will of his master, he will belong to the family of the latter. In this instance, the guardianship which does not belong to the patron will belong to the children of the latter.

This rule applies to all freedmen manumitted by will.

(4) Where two or more persons manumit a slave, all become his guardians. If, however, a woman should be among those who manumitted him, it must be held that the males alone will be his guardians.

(5) Where one of several patrons dies, the guardianship remains with the survivors, even though the deceased may have left a son.

If, however, a patron is taken by the enemy, his fellow-patrons remain sole guardians until he is released. In like manner, if one of them is reduced to slavery, it is evident that the others remain guardians.

(6) If, however, all of the patrons should die, the guardianship will then vest in their children.

(7) Hence, if one of two patrons leaves a son, and the other a grandson, shall the guardianship vest in the son alone, or also in the grandson, for the reason that the latter is the next of kin in the family of his father? This point should be settled in accordance with the rule governing legal inheritances, for a legal inheritance belongs to the son alone, and therefore the guardianship descends to the son alone, and after the son to the grandson.

(8) It may be asked whether the guardianship should be granted to the grandson, where the son of the patron is either removed or excused from serving. Marcellus states that he is of the opinion that the grandson cannot succeed, and therefore that he must be excluded from the

guardianship, and another appointed in his stead, in order that succession may not be permitted in such cases.

(9) Succession should be permitted in legal guardianship not only where death occurs, but also where forfeiture of civil rights takes place. Wherefore, where the nearest relative loses his civil rights, he who is next in degree succeeds to the administration of the guardianship.

(10) Where a father emancipates his son or his daughter, his grandson or his granddaughter, or any other descendants under age whom he has subject to his authority, he occupies the place of their legal guardian.

4. *Modestinus, Differences, Book IV*.

Where a man dies leaving children who have attained their majority, they become the fiduciary guardians of their brothers or sisters.

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

No one appoints legal guardians, for the Law of the Twelve Tables constitutes them such.

(1) While, however, it is certain that they should be compelled to give security, many authorities hold that even a patron and his son, as well as his other descendants, can be forced to give bond for the preservation of the property of their wards. It is better to leave it to the judgment of the Prætor, after proper investigation, whether the patron and his children should furnish security or not; so that if the party in question is honest, the security may be remitted, and especially if the estate is of small value. Where, however, the patron is of inferior rank, or of doubtful integrity, it must be held in this case that there is ground to exact security, if either the amount of the responsibility, or the rank of the person, or any other good reason should require it to be given.

(2) The question arises in the case of legal guardians, and in that of those appointed by magistrates, whether the guardianship can be granted to one of them alone. Labeo says that guardianship can be properly granted to one of them, for it may happen that the others are either absent, or insane. This opinion should be accepted on account of its utility, and the administration of the guardianship granted to one of the parties.

(3) Can these guardians then institute proceedings against one another, in accordance with the rule above stated? The better opinion is, that if all of them did not give security, or if the time for giving it has expired (for sometimes security is not required of them, or it has not been sufficient or the municipal magistrates by whom they were appointed either could not exact it, or were unwilling to do so), it may be said with respect to them, that proceedings can be instituted where security has not been furnished.

(4) Can the same be said with reference to patrons, especially where security is not given? I think that, in the case of patrons, proceedings cannot be instituted, unless where there is good cause for it, in order that no one may lessen the expectation of succession. For if guardianship should not be granted to one patron, he will still be liable for any loss caused by his co-patron who alone improperly administers the affairs of the ward.

(5) Where a legal guardian forfeits his civil rights, it must be said that he no longer has a right to act, and that the guardianship having been terminated, there is ground for the appointment of a guardian by the court.

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

Where a parent dies intestate, guardianship is granted to his next of kin. A person, however, is held to die intestate, not only where he did not make a will, but also where he did not appoint guardians for his children, as in this instance, he dies intestate, so far as guardianship is concerned.

We hold that the same rule applies where a testamentary guardian dies while the ward is still

under the age of puberty, for, in this case, his guardianship vests in the next of kin on the father's side.

7. *Gaius, Institutes, Book I.*

Those are agnates who are connected by relationship to persons of the male sex, just as cognates on the father's side; as, for instance, a brother begotten by the same father, the son of a brother, or a grandson sprung from the latter; and, in like manner, a paternal uncle, the son of the latter, or a grandson descended from him.

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

If I leave a son under the age of puberty, my brother and a grandson by another son will both be guardians of my said son, if they have arrived at full age, because they are in the same degree of relationship.

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

Where there are several agnates, the next of kin among them will obtain the guardianship, but where there are several in the same degree, they will all be entitled to it.

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

A woman who is next of kin on the father's side, cannot prevent another relative in a more remote degree from obtaining the guardianship of a child who has not arrived at puberty; and therefore a paternal uncle will be the legal guardian of the son of his brother even though the latter may have left a sister. Nor can a paternal or a maternal aunt prevent a great uncle or his nephews from becoming guardians.

(1) A person who is deaf and dumb cannot become a legal guard-

ian, nor can he be designated by will, or in any other manner whatsoever, so as to render his appointment valid.

TITLE V.

CONCERNING GUARDIANS AND CURATORS WHO ARE APPOINTED BY THOSE WHO HAVE A LEGAL RIGHT TO DO SO, AND WHO CAN BE APPOINTED EXPRESSLY, AND UNDER WHAT CIRCUMSTANCES.

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

A Proconsul, a Governor, and the Prefect of Egypt, or one who holds the office of Proconsul of a province temporarily, either on account of the death of the Governor, or because the administration of the province has been committed to him by the latter, can appoint a guardian.

(1) In accordance with a Rescript of the Divine Marcus, the deputy of a Proconsul can also appoint a guardian.

(2) Where, however, the Governor of a province is permitted to appoint a guardian, he can only do so for those who were born in said province, or have their domicile therein.

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

Where certain guardians are appointed, and some of them are not present, the Divine Pius stated in a Rescript that a temporary guardian should be appointed to perform the duties of the office.

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

The right to appoint guardians is conferred upon all municipal magistrates, and this is our practice; but the person appointed must be a resident of the same municipality, or of its territory and be subject to its jurisdiction.

4. *The Same, On the Lex Julia et Papia, Book IX.*

The Prætor cannot appoint himself a guardian, just as a judge cannot appoint himself to a judicial office, or an arbiter be created by his own decision.

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

It has always been settled that a Governor can appoint a guardian, whether the latter be absent or present, for a ward who is either present or absent;

6. *Ulpianus, On All Tribunals, Book VIII.*

Even though the ward should be ignorant of the fact, and unwilling.

7. *The Same, On All Courts, Book I.*

Not only must a curator be appointed for a girl about to be married, for the bestowal of her dowry; but one must also be appointed for a minor who is already married. A curator is also appointed for the purpose of increasing the dowry, or in order that some change may be made with reference to it.

8. *The Same, On All Tribunals, Book VIII.*

Another person cannot appoint a guardian, even under the direction of a Governor.

(1) Where the Prætor or the Governor of a province appoints a guardian while he is insane or demented, I do not think that the appointment will be valid; for, even though he may still continue to be Prætor or Governor, and his insanity does not deprive him of his magistracy, still, the appointment made by him will be of no force or effect.

(2) A guardian can be appointed upon any day whatsoever.

(3) A guardian or a curator can be appointed by a Prætor or a Governor for a person of either sex who may have become insane, and for one who is dumb and deaf.

9. *Marcianus, Institutes, Book IX.*

Where proper cause is shown, a guardian may be appointed for a minor who has not arrived at puberty, for the purpose of permitting him to enter upon an estate.

10. *The Same, Rules, Book V.*

When a petition is filed for the appointment of a guardian for a minor who has one that is absent, the appointment, made as if he did not have any, is void. For whenever, through ignorance of the facts, such a petition is filed for the appointment of a guardian, the appointment will not be valid, especially since the promulgation of a Constitution of the Divine Brothers relative to this subject.

11. *Celsus, Digest, Book XL*

A curator shall not be appointed for a male or a female minor, if his or her guardian should be present.

12. *Ulpianus, On the Office of Proconsul, Book III.*

The Proconsul must appoint a curator for those persons who are in such a condition that they cannot manage their own affairs.

(1) There is no doubt that a son can be appointed the curator of his father, although the contrary is stated by Celsus, and many other authorities, who hold that it is unseemly for a father to be subjected to the authority of his son; still, the Divine Pius, addressing Justius Celerius, and also the Divine Brothers, stated in Rescripts that it was better for a son who was well-behaved to be appointed the curator of his father, than that a stranger should be.

(2) The Divine Pius granted the request of a mother for the appointment of a curator for her

spendthrift children in the following words: "There is nothing novel in the fact that certain persons, even though they appear to be of sound mind so far as their conversation is concerned, yet squander their property in such a way that, unless relief is granted them, they will be reduced to poverty. Therefore, someone should be chosen who may control them by his advice, for it is just that we should take care of those who, so far as relates to their property, act like persons who are insane."

13. *Papinianus, Questions, Book XI.*

Where freedom and an estate are granted to a slave under the age of puberty by means of a trust, and the appointed heir refuses to accept the estate, the Senate decreed that he can be forced to do so, if this is demanded in the name of the minor; just as a guardian may be appointed for a male or female minor by someone who has the right of appointment, and he will retain the guardianship until the estate is delivered, and security given by the heir for the preservation of the property.

The Divine Hadrian subsequently stated in a Rescript that the same rule should be observed in the case of a slave to whom freedom had been directly bequeathed.

(1) Although security for the preservation of the property of a minor can not readily be exacted from a patron; still, the Senate desired that he should be considered as a stranger who had deprived the minor slave of his freedom, so far as it was in his power, and that he should not be deprived of the right over the freedman which he possessed because he manumitted him in compliance with the terms of the trust; but that the guardianship should not be entrusted to him without the execution of a bond. But what if he did not give security? There is no doubt that the patron would not be allowed to retain the guardianship.

(2) When a girl has completed her twelfth year, the guardian ceases to exercise his authority; still, as it is customary for guardians to be appointed for minors when they request it; if she should desire her patron to be appointed curator, his good faith having been ascertained by an inquiry, shall take the place of a bond.

14. *The Same, Questions, Book XII.*

A freedman cannot be compelled to become the guardian for the children of anyone but those of his patron or patroness, unless they have expectations of succeeding to the rights of the latter.

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

A curator should be appointed for the management of the entire business of the minor, instead of his guardian, where he is absent on business for the State.

16. *The Same, On the Edict, Book LXXIII.*

The guardian does not cease to hold his office under these circumstances. This is the law with reference to all guardians who are temporarily excused.

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

Pomponius states that a guardian can be appointed for a minor who is engaged in litigation, for the purpose of establishing his civil status. This is correct, but the appointment will only be valid if the minor should be ascertained to be free.

18. *The Same, On the Edict, Book LXI.*

Where an, investigation is made with a view to the appointment of a guardian, this should also be done in the case of a senator who is to become the guardian. This opinion Severus stated in a Rescript.

19. *Paulus, On Plautius, Book XVI.*

Where those authorities who have a right to appoint guardians are absent, the Decurions are ordered to appoint them, provided the majority agree. There is no doubt that they can appoint one of their own number.

(1) There is no question that one of two municipal magistrates can appoint his colleague a guardian.

20. *Modestinus, Differences, Book VII.*

A guardian cannot be appointed for an unborn child by the magistrates of the Roman people, but a curator can be; for this is provided by the Edict relating to the appointment of a curator.

The rule of law does not prevent another curator from being appointed for a person who already has one.

21. *The Same, Excuses, Book I.*

The magistrates should be informed that they cannot appoint women the curators of minors.

(1) If a mother should appoint her children her heirs under the condition that they shall be free from the authority of their father, and they should become free and heirs for this reason, their father cannot be appointed their curator, even if he should desire it; in order to prevent what the testatrix was unwilling to take place from being done. This rule was established by the Divine Severus.

(2) Where anyone has been forbidden to be a guardian by the parents of the minor, he cannot be appointed by the magistrates, and if he should be appointed, he can be prevented from acting as guardian without prejudice to his reputation.

(3) Magistrates cannot appoint as guardians or curators persons who are on an embassy; because during the time that they are so employed, the responsibility of guardianship does not attach to them.

(4) If a chief magistrate at Rome appoints as guardian a man of a province who is employed in the business of an embassy, he shall be discharged.

(5) It is necessary for a magistrate, among other things, to inquire into the morals of the parties to be appointed guardians, for neither their means nor their rank are sufficient to establish their integrity, or take the place of benevolent intentions and affable manners.

(6) The magistrate should be especially careful not to appoint those who thrust themselves forward for that purpose, or who offer bribes; for it has been established that such persons are liable to punishment.

22. *The Same, Excuses, Book V.*

Those who are not of consular or senatorial dignity can be appointed guardians for persons of that rank; just as persons of consular or senatorial dignity can be appointed for those who are not of that rank.

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

Several guardians may be appointed at the same time.

24. *Paulus, Opinions, Book IX.*

The Divine Marcus and Verus to Cornelius Proculus: "Whenever suitable persons to be appointed guardians cannot be found in the city of which the minors are natives, it shall be the duty of the magistrates to make inquiry in the neighboring towns for persons of excellent reputation, and send their names to the Governor of the province, but they cannot themselves claim the right to appoint them."

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

Where a curator is appointed for a minor for any reason whatsoever, he will continue to exercise his curatorship until the minor arrives at the age of puberty. After that time, the minor should request that another curator be appointed for him.

26. *Scævola, Opinions, Book II.*

By a decree of the Prætor, a guardian was appointed for Seia, who had passed the age of twelve years, after an investigation had been made, just as in the case of a minor. I ask whether he should be excused? I answered that, according to the facts stated, an excuse was not necessary, and that he could not be held liable for not assuming the guardianship.

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

The Prætor can appoint a guardian for the transaction of business at Rome, where the minor has property in the province, as well as at Rome; and the Governor of the province can appoint one for the administration of his affairs in the province.

(1) Freedmen should be appointed guardians for other freedmen, but even if a freeborn man should be appointed, he will continue to be guardian, unless he can give a good reason for being excused.

28. *Paulus, Decrees, Book II.*

Romanius Appulus took an appeal from a judge, alleging that his colleague should not have been appointed with him in the guardianship, for the reason that the latter had been appointed by him while he was acting magistrate, on his own responsibility, to avoid his being subjected to a double liability, growing out of a single guardianship. The Emperor decreed that the same party could be surety for a guardian, and, nevertheless, be appointed a guardian. Therefore, he was retained in the guardianship.

29. *The Same, Concerning Judicial Inquiries.*

If persons who are appointed guardians or curators are at a distance; the Divine Marcus stated in a Rescript that they should be notified by the magistrates of their appointment, within thirty days.

TITLE VI.

CONCERNING THOSE WHO MAY DEMAND GUARDIANS OR CURATORS, AND WHERE THIS CAN BE DONE.

1. *Modestinus, Differences, Book VII.*

The petition of a mother for the appointment of a guardian for her children, but not for the appointment of a curator for them, shall be considered; unless where the appointment of a curator is requested for a child under the age of puberty.

2. *The Same, Excuses, Book I.*

Where minors have no one who can legally act for them as defenders, and they require guardians on account of their age, they can request that their next of kin, or those who are connected with them by affinity, or members of the family of their male or female relatives, be appointed their guardians, and the friends of their parents and the teachers of the children themselves can ask that this be done.

(1) Therefore, strangers can voluntarily ask for the appointment of guardians, but there are certain persons who are required to apply for this to be done; as, for instance, the mother and freedmen, for the former would suffer loss, and the latter be liable to punishment, if they should not request the appointment of those who can act as defenders under the law. For the mother would be excluded from the lawful succession of her son because, having neglected to have a guardian appointed for him, she would be considered unworthy to legally inherit his estate.

And not only would this be the case if she did not request the appointment at all, or if, merely to satisfy the requirements of the law, she should ask the appointment of one who is liable to be discharged, and afterwards he should be discharged or removed; and she did not then ask for the appointment of another, or intentionally sought the appointment of persons of bad character.

Moreover, freedmen who on this account are accused before the Governor can be punished, if it should appear that, either through negligence or malice, they did not request the appointment of a guardian.

(2) What has just been stated with reference to a mother is set forth in an Epistle of the Divine Severus, the terms of which are as follows: "The Divine Severus to Cuspius Rufinus. I desire all persons to know that I pay special attention to the relief of wards, as this is a matter which relates to the public welfare. And, therefore, where a mother does not apply for the appointment of suitable guardians for her children, or where those who have been previously appointed have been excused or rejected, and she does not immediately ask for the appointment of others; she shall not be entitled to claim the property of any of her children who may die intestate."

(3) Where anyone, for instance, a creditor or a legatee, or any other person, finds it necessary to institute proceedings against a minor, he himself cannot ask that a guardian be appointed for said minor; but he can make the request of those who can apply for such an appointment, and if they neglect to do so, he can then appear before the Governor and state the facts to him, so that the legal requirements having been observed, he can proceed against the aforesaid minor.

(4) So much with reference to guardians. Minors can themselves apply for the appointment of curators, if they are present; but if any of them should be absent, he can make the application by means of an attorney.

(5) The question arises whether another party can apply for the appointment of a curator for a minor. The distinguished Ulpianus states that another cannot make such an application, but that the minor himself must make it. And it is stated by Paulus in the Ninth Book of Opinions, that the appointment of a curator cannot legally be requested by a guardian, where a female ward is ignorant of the fact, or does not direct this to be done; and that he who makes such an application shall very properly be compelled to be responsible for the business transacted by the illegally appointed curator.

In another part of the same book, he gives it as his opinion that, if the Emperor, on the application of a mother, should appoint a guardian for her daughter, she must assume the responsibility for his administration of the curatorship.

(6) Those who are discharged from guardianship, on account of any excuse whatsoever, are not required to apply for another guardian for their wards; as is stated in the Constitution of Severus and Antoninus.

3. *Paulus, Opinions, Book X.*

I gave it as my opinion that the magistrate himself can be appointed by a resolution of the Decurions.

4. *Tryphoninus, Disputations, Book XIII.*

It must be held that a woman comes within the scope of the constitution, when she does not ask that guardians legally appointed for minor children by a will or codicil of their father, shall be confirmed by a magisterial decree.

(1) Where, however, several suitable guardians have been appointed, and one of them either dies or is excused, and the mother does not apply for the appointment of another in his stead,

because the number of those remaining is sufficient for the administration of the guardianship; this, indeed, comes within the scope of the constitution, but she will be excused where the spirit of the same is considered.

(2) Where a guardian is accused on account of being suspected, and a decree has been rendered that other guardians shall be associated with him, the mother should make the application for this to be done, and if she does not do so, she will be liable under the said constitution.

(3) Such a mother shall be excluded from claiming any of the property of her children who may die intestate. Where, however, her husband charged his son with a trust, and his mother does not ask for the appointment of a guardian, the condition being if he should die without children or if he should die intestate; she does not forfeit the right to claim under the trust, because this is derived from the act of another party.

(4) Where, however, a mother does not allege that a guardian is suspicious, she does not incur liability to punishment according to either the letter or the spirit of the constitution, because to arrive at such a conclusion and opinion is the province of a masculine mind; and a mother can even ignore the offences of a guardian, for it is sufficient for her to have applied for the appointment of one who, after investigation by the Prætor, seemed to be suitable, and therefore her judgment is not sufficient to enable her to select a guardian, but an inquiry must be undertaken even if she should have appointed a guardian for her children by will for the administration of her entire estate.

TITLE VII.

CONCERNING THE ADMINISTRATION AND RESPONSIBILITY OF GUARDIANS AND CURATORS, WHETHER THEY HAVE TRANSACTED THE BUSINESS OF THEIR TRUSTS OR NOT, AND CONCERNING ACTIONS AND SUITS WHICH CAN BE BROUGHT AGAINST ONE OR ALL OF THEM.

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

A guardian can be compelled by extraordinary proceedings to carry on and administer the guardianship.

(1) From this the guardian may ascertain that, if he delays to exercise his functions after he has been appointed, he does so at his own risk. For it was decided by the Divine Marcus that where a party knows that he has been appointed a guardian, and does not, within the time prescribed by law, offer a reasonable excuse, if he has one, he will be responsible for his failure to act.

(2) It is sufficient for a guardian to completely defend his ward, whether he undertakes to do this himself, or under the instructions of the latter. Guardians should not be compelled to give security in order to conduct the defence of their wards. They are, therefore, permitted to institute proceedings themselves, whether they prefer to do so on their own responsibility, or to produce their wards in court; but they can only proceed themselves in cases where their wards are infants, or are absent; but where they have passed their seventh year, and are present, they can be authorized to act by their guardians.

(3) In the case of minors, those who bring actions against them can either summon the minor himself to court, for the purpose of suing him with the consent of his curator; or they can proceed against the curator himself to the end that he may conduct the case. Where, however, the minor is absent, proceedings must, in every instance, be instituted against his curator.

(4) In the discharge of their duty, however, the right to bring personal actions against the debtors of wards or of minors should not be refused to either guardians or curators, nor should they be denied the right to give their consent to the former to bring such actions.

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

If the guardian should gain the suit, or should lose it, the action to enforce the judgment should be granted in favor of, or against the ward; and this is especially the case where the guardian did not appear voluntarily in court, or where he could not authorize his ward to act, either on account of the absence of the latter, or because of his youth; and this rule the Divine Pius stated in a Rescript. It is also set forth in many rescripts that an action to enforce the judgment should always be granted against the ward, where the guardian has lost the case, unless the ward rejected the estate of his father; for then it has been repeatedly laid down in rescripts that this cannot be done, either against the guardian or the ward, and that the property of the guardian cannot be taken in execution.

(1) Marcellus goes still farther in the Twentieth Book of the Digest, and says that if the guardian gives security, and the ward subsequently rejects the estate, relief must also be granted his sureties. Where, however, the ward does not reject the estate, relief must be granted the sureties to the same extent as to the guardian himself, especially if he has given security on account of the absence or infancy of his ward.

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

Where several curators have been appointed, Pomponius states in the Sixty-eighth Book on the Edict that even what has been done by any one of them should be ratified. For in the case of the curators of an insane person, the Prætor can grant the administration of the curatorship to one of them, to avoid the loss of any advantage to the person who is insane, and he will ratify any transaction of his which is not fraudulent.

(1) Where a grandfather, or a father of the person under his control, designates by will which of the guardians shall administer the guardianship, the Prætor held that the latter should do so. And it is reasonable that the wishes of a parent should be considered, who have merely consulted the best interests of his son.

The Prætor follows the same rule with reference to those whom a parent has designated in his will, and he himself confirms them in their office; so that if a parent should mention the person whom he wishes to administer the guardianship, he alone shall administer it.

(2) Therefore, the other guardians will not administer the guardianship, but they will be what we commonly call "honorary guardians".

But let no one think that no responsibility attaches to them, for it is established that suit can be brought against them also after the property of the administering guardian has been exhausted; for they have been appointed to act as the observers and supervisors of his acts, and they will be liable if they do not denounce him as suspicious, when, at any time, they perceive that he is conducting himself improperly. Therefore, they must assiduously exact an accounting from him, and carefully pay attention to the manner in which he conducts himself, and if there is money to be deposited, they must see that this is done, for the purpose of purchasing land. Those persons deceive themselves, who think that honorary guardians are not in any respect responsible, for they are liable in accordance with what we have above stated.

(3) Although the Prætor may state that he will certainly confer the guardianship upon the party designated by the testator, still, he sometimes avoids doing so, as, for instance, where the father has acted without proper consideration; or where he was a minor under twenty-five years of age; or where, at the time he made the appointment, the guardian appeared to be a man of good and thrifty habits, but was afterwards guilty of bad conduct, of which the testator was ignorant; or where the trust was conferred upon a party on account of his prosperous circumstances, and he was afterwards deprived of his property.

(4) Then, where the father only appointed one guardian, sometimes curators are associated with him. For our Emperor, together with his father, stated in a Rescript that, where anyone

appoints as guardians his two freedmen, one for the administration of property in Italy, and the other for the administration of property in Africa, curators should be associated with them; the wishes of the father were not complied with.

(5) What has been stated with reference to guardians should also be observed in the case of curators whom the father appointed by will, and who should be confirmed by the Prætor.

(6) Therefore it is apparent that the Prætor should be careful to avoid having the guardianship administered by several persons; for although the father may not have designated any certain individual to administer it, still, the Prætor must provide that this be done by one person alone. For, indeed, it is more easy for a single guardian both to bring actions and defend them, and that the administration of the guardianship be not distributed among several individuals.

(7) Where a guardian has not been selected by the testator, or where he is unwilling to act, then he shall administer the trust who shall be appointed by the majority of the guardians. The Prætor must therefore order them to assemble, and if they do not do so, or, having assembled, do not come to any conclusion; after proper investigation, he himself shall determine who shall administer the guardianship.

(8) It is clear that if the guardians do not accept the decision of the Prætor, but all of them desire to administer the guardianship, because they have no confidence in the person who has been selected, and are not willing that a stranger should be substituted at their risk; it must be held that the Prætor can permit all of them to administer the trust.

(9) Moreover, if the guardians desire to divide the guardianship among themselves, they shall be heard, in order that the administration of the same may be distributed among them.

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

This can be done either in shares, or by districts. Where it is divided in this manner, any one of them can be barred by an exception having reference to the share, or the district in which he does not administer the guardianship.

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

There is only ground for the deposit of money, (if it can be collected), where it is available for the purchase of land; for if the guardianship can be readily proved to be of so little pecuniary importance that land cannot be purchased for the ward with the money collected, the deposit need not be made. Therefore, let us consider what should be the value of the property subject to guardianship to justify a deposit. And, when the reason for the deposit is stated to be to purchase land for the wards, it is evident that this should not be held to have reference to insignificant sums of money. The amount cannot be stated in general terms, since it is more easy, where proper cause is shown, for an investigation to be made in individual instances. For the power of asking sometimes for the deposit of even small amounts should not be taken away, if the guardians appear to be liable to suspicion.

(1) A guardian is held to have exercised his functions where he has acted in any manner which at all concerns his ward, even though it should be unimportant; and, in this instance, the interference of those who are accustomed to compel guardians to administer their trusts is not required.

(2) Where, after a guardian has once acted, he ceases to discharge his duties, he can be proceeded against as being suspicious.

(3) When anyone directs the guardianship to be administered in his behalf, and this is done by the party who has been directed to do so, there will be ground for an action on guardianship; for he himself is considered to have administered it who administers it by another. Where he to whom the direction was given does not act, the guardian can be sued by means of a prætorian action.

(4) Where the debtor of a father administers the guardianship of the son, he will be liable to an action on guardianship, even on account of what he owed the father.

(5) If a guardian should not notify his ward, who had arrived at puberty, to apply for curators for himself (as he who has administered a guardianship is ordered to do by the Sacred Constitutions), will he be liable to an action on guardianship? I think the better opinion is that the action on guardianship will be sufficient, as the necessity to give notice is a part of the duty attaching to the guardianship, even though it may be given after puberty.

(6) If, after the minor has reached his twenty-fifth year, accounts have not been rendered, nor the documents relative to an action already begun have been produced, it concerns the good faith and probity of the curators to proceed with the action instituted by their advice. Therefore, if they fail to attend to these things which are required of them, I think that the better opinion is, that a suit based on voluntary agency will be sufficient, even though the time of the curatorship has expired; provided no account of this matter has been rendered.

(7) Julianus proposes the following in the Twenty-first Book of the Digest. A certain man, at his death, appointed guardians for his children, and added: "And I desire that they be not required to render an account."

Julianus says that these guardians should be held liable, unless they had shown good faith in the administration of their trust, although it was stated in the will that they should not be accountable; nor, as Julianus says, should anyone be prosecuted on this ground because of the trust. And this opinion is correct, for no one can by means of provisions of this description release another from the application of the public law, or change the form established in ancient times. Anyone, however, can bequeath to another, or leave him by means of a trust, an indemnification for some wrong which he has suffered on account of guardianship.

(8) Papinianus stated the following case in the Fifth Book of Opinions. A father directed the guardianship of his children to be administered by the advice of their mother, and, with this end in view, released the guardians. The duty of the guardians will not, for this reason, in any way be lessened, but it is proper for good citizens to adopt the beneficial counsel of the mother, although neither the release of the guardians, nor the wishes of the father, nor the intervention of the mother, will, in any way, diminish their responsibility.

(9) Guardians are permitted to disregard the directions of the father to a certain extent; as, where the latter provided that none of his property should be sold, or that none of his slaves or his clothing, or his houses, or any of his effects, which were perishable, should be disposed of; they can take no account of this wish of the father.

(10) The guardian is hereby notified that the responsibility of the trust will attach to him from the time that he knows that he is a guardian. It is sufficient if he has obtained the information in any way whatsoever, and it is not necessary for him to be notified in the presence of witnesses; for, if he has learned the fact from any source whatever outside of the will, there is no doubt that the responsibility will attach to him.

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

The ward, however, must prove that the guardian was aware of his appointment.

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

The guardian who does not make out a schedule of the property, commonly called an inventory, is considered to have acted fraudulently, unless some necessary and just cause can be alleged for his not doing so. Therefore, if anyone fraudulently fails to make an inventory, he is in a position to be liable to indemnify the ward for his entire interest in the matter, which can be ascertained by an oath taken in court. Hence the guardian should not transact any business before the inventory has been made, unless there is something which cannot admit of even slight delay.

(1) Where a guardian is guilty of delay in the sale of perishable property, he does this at his own risk, for he should at once perform the duties of his office. But what if he says that he was waiting for his fellow-guardians, who have either failed to appear, or wished to excuse themselves; should he be excused? He will not be readily excused, for he should perform his duties, not indeed precipitately, but without any unnecessary delay.

(2) An action on guardianship will lie against guardians, if they have made an injurious contract; for instance, if, through corruption or favor, they have purchased property which was not in good condition. But what if they had not acted dishonestly, or shown undue favor, but merely did not select property which was in good condition? One could very properly say, in this instance, that they ought only to be responsible for gross negligence.

(3) If, after the deposit of the money, guardians should neglect to purchase real estate, they begin to be liable for interest. For, although they must be compelled by the Prætor to make the purchase; still, if they fail to do so, they should be forced to pay interest on account of the delay, unless they are not responsible for the failure to purchase the property.

(4) Guardians must pay legal interest on money belonging to their wards which they convert to their own use, but only in case it is clearly established that they have employed it for their own purposes. But where a guardian did not lend the money at interest, or did not deposit it, he is not held to have converted it to his own use. The Divine Severus promulgated a decree to this effect, hence it must be proved that the guardian converted the money to his own use.

(5) We do not consider that a guardian has converted money to his own use who, being the debtor of the father of his ward, did not afterwards make payment to him; for he will be liable in this case for the same interest which he promised to pay to the father.

(6) Where a guardian lends the money of his ward at interest in his own name, he can only be compelled to pay the interest which he himself collected, if the ward is willing to assume the risk of other loans.

(7) Where it was necessary to deposit money for the purchase of land, and this took place, interest will not run. Where, however, this was not done, and no direction was given to make the deposit, then only the interest due on money belonging to the ward must be paid, but if such direction was given, and the ward neglects to follow it, it should be considered what rate of interest will be payable.

The Prætors are accustomed to warn guardians that if the deposit is not made, or if it is made after the time prescribed, lawful interest can be collected. Therefore, if this warning has been given, the judge having jurisdiction of the case, at any time, must follow the decree of the Prætor.

(8) The Prætors are accustomed to give the same warning with reference to those guardians who deny that they have anything in their hands for the support of their wards; so that, if it should be established that they did have anything, higher interest may be paid; and it is clear that the judge must pursue this course in addition to the infliction of another penalty.

(9) The guardian must pay interest on all sums of money remaining in his hands.

(10) It should be understood what the interest is which is designated "pupillar". It appears that this rate of interest is the legal one which the guardian must pay on money which he has converted to his own use; but where he denies that there is any money in his hands, and the Prætor renders a decision against him, he must pay the legal interest; or where he has been guilty of delay in depositing the money and the Prætor has rendered a decision against him for legal interest. But where he denies that any money of the ward is in his hands, and he imposes the necessity of borrowing money at legal interest upon the ward for the purpose of meeting his expenses, the guardian will be liable for legal interest.

The same rule applies where he collects legal interest from the debtors of the ward. He will

also be liable for interest for other reasons, according to the custom of the province; that is, for either five per cent, or four per cent, or for any lower rate, if this is the practice in the province.

(11) Interest is not exacted from guardians immediately, but its collection or investment should be required after a certain time, that is to say, two months. It is customary to observe this rule in an action on guardianship. This delay or indulgence should not be granted to those who convert the money of wards or minors to their own use.

(12) Where a guardian or a curator retains for his own use interest which he has collected, he should be liable for the said interest, for it certainly makes very little difference whether he misappropriates either the principal or the interest of his ward.

(13) The heirs of a curator will be liable for the interest of money deposited in a chest, until they make application for the appointment of another curator in the place of the deceased.

(14) Where a guardian has judgment rendered against him on account of the acts of his fellow-guardian, the question arises whether he shall also be required to pay interest. It is established, as is stated in many rescripts, and as Papinianus holds in the Twelfth Book of Questions, that he must be also required to pay interest, if he has failed to denounce his fellow-guardian as suspicious. And, indeed, he should be compelled to pay the interest to which he is liable on account of his administration.

(15) It should be noted that a guardian owes interest on money remaining in his hands after the termination of his office, until the day on which he relinquished the guardianship.

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

Where the ward, whose guardianship is being administered, brings an action on guardianship, it must be said that he should sometimes wait for a certain date for the payment of money loaned; for instance, if he lent money in the name of the ward, and the day for collecting the same has not yet arrived. It is evident that this only has reference to money which the guardian could, and should have lent, but if he should not have lent it the ward will not be required to wait.

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

Whenever a guardian lends money belonging to a ward at interest, a stipulation should be entered into in the following manner: the ward, or one of his slaves, should stipulate for the payment of the money. Where, however, the ward is not of an age to be able to stipulate, and has no slave, then the guardian under whose control he is should make the stipulation.

In this instance, Julianus very properly states than an equitable action should be granted to the ward. If, however, the latter should be absent, there is no doubt that the guardian can stipulate in his name.

(1) Where the head of a family gives to his son, as guardian, a person for whom he has become security, it is the duty of the guardian to pay the debt to his creditor when the day of payment arrives; therefore, if he fails to do so, and his ward, having passed his minority, should pay the debt on account of the security given by his father, he can proceed against his guardian, not only by an action of mandate, but also by one on guardianship; for the guardian is responsible for non-payment of the debt.

If, however, the guardian only became indebted after the expiration of a certain time, it is held by some authorities that this does not come within the scope of an action on guardianship, provided the day of payment did not arrive until after the termination of the trust. But if the day arrives during the existence of the guardianship, they hold that undoubtedly it will be embraced in the action.

I am of the opinion that both these decisions are correct, where the guardian is in a fair way to

become insolvent, but if he should be solvent, it will not come within the scope of the action of guardianship. Nor should anyone think that this will be of no effect; for if it should be said that it is included in the action, and there is ground for the claim to be preferred, the sureties will be liable if an undertaking has been given for the preservation of the property.

(2) Moreover, if the guardian should be liable to a suit which will be barred by lapse of time, it must be said that there is ground for the claim being included in the action on guardianship, in order that the action may become perpetual.

(3) And, generally speaking, with reference to what a guardian is liable for to his ward as against a third party, he is also liable as against himself, where he owes the debt, and perhaps even more so; for he cannot make others pay against whom he has no right of action, but he can do this where he himself is concerned.

(4) Where a guardian owes money to the father of his ward at a higher rate of interest than the pupillar rate; it must be considered whether he is liable to him for anything. And, indeed, if he has paid the principal, he is not liable for anything, for he was able to pay and not burden himself with interest; but if he did not make payment of the principal, he can be compelled to pay the interest which he should exact from himself.

(5) Just as the guardian should pay what he owes, so also he can collect from the ward what is due to him, if he is the creditor of the father of the former; for he can pay himself, provided there was any money in his hands with which to do so; and if the interest due to him should be at a higher rate, the ward will be discharged from liability for it, because the guardian could have paid himself, just as he could, and should have paid others.

(6) It is not necessary, in case he is sued, for him to pay after judgment is rendered; and therefore if the case of the ward is not well founded, he should notify him of the fact. Hence the Emperor Antoninus and his father prohibited guardians from rendering a ward liable for expenses, if they set up a useless defence, where suit was brought by a creditor; for guardians are not forbidden to acknowledge a *bona fide* claim.

(7) Not only can a guardian pay himself, but he can also make a record of money loaned to himself, as Marcellus states in the Eighth Book of the Digest; and he can render himself liable for money borrowed from his ward, by stating in his register that it was lent to himself.

(8) It is established that where a guardian is appointed with reference to the increase of an estate (as, for instance, on account of a subsequent accession to the estate of his mother, or with reference to any other augmentation), it is not customary for him to administer the property belonging to the former guardianship. If, however, he has failed to denounce the first guardian as suspicious, or to require security from him, he shall be punished.

(9) On the other hand, however, where a guardian or a curator is merely appointed for a minor, he will be responsible for any increase of the property which may afterwards take place, although it is customary for a curator to be appointed to have charge of the increase; which is not done for the reason that the said increase has no connection with the care of what has already been acquired, for so far as this is concerned, the general interest of the ward should also be taken into consideration. Therefore, where a new curator is appointed, the responsibility is shared with the guardian, or if one is not appointed, the former appointee is necessarily held liable for the proper administration of the trust.

10. *The Same, On the Edict, Book XLIX.*

Generally speaking, a ward is not held to have been properly protected when there is not done in his name what any good head of a household would do. Therefore, if a guardian neglects to make payment of a debt, or does not discharge his duty in the defence of a legal action, or in a stipulation, he is not considered to have properly protected his ward.

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

The Divine Pius stated in a Rescript with reference to a ward whose guardian was judicially decided to be a slave, that the owner of the latter was not entitled to the privilege of deducting what was due to him from property which the slave had purchased with the money of the ward. This rule also should be observed in the case of a curator.

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

Where several guardians administer a guardianship, an action in the name of a ward cannot be granted to any of them against his fellow-guardians.

(1) According to the Rescripts of Trajan and Hadrian, the transaction of all business by a guardian in good faith should be ratified. Therefore, a ward cannot bring an action to recover property which has been legally sold by his guardian, for it should not be to the advantage of a ward if the administration of the property should not be approved, for under such circumstances no one would purchase anything. Nor does it make any difference whether the guardian is solvent or not, for if the transaction was a *bona fide* one, it should be approved; but if it was fraudulent, the transfer will not be valid.

(2) It would be too much to grant permission to a guardian to pay expenses out of the property of his ward, on the ground of preserving the reputation of the latter, where he could not honorably pay such expenses out of his own property.

(3) As a guardian is appointed not only to care for the property of his ward, but also to exercise supervision of his morals, he should, in the first place, pay his instructors not the smallest salaries that he can, but in proportion to the value of the estate, and the rank of the ward; and he should furnish support for his slaves and freedmen, and sometimes for those of strangers, if this will be to the advantage of the ward. He can send the customary presents to his parents and relatives, but he cannot give a dowry to a sister who is the issue of another father, even though she otherwise would not be able to marry; for while this may be done honorably, it nevertheless is a display of liberality which should depend upon the will of the ward.

(4) Where a guardian was unable to lend money belonging to his ward, because there was no one to whom he could lend it, the ward must bear the loss of the interest.

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

A guardian should apportion the number of slaves who are to be in attendance upon his ward, in accordance with the rank and means of the latter.

(1) A guardian should not be heard when he alleges that he has not invested the money of the ward because he could not find a suitable place to do so, if it is proved that he has invested his own money profitably during that time.

(2) In the payment of legacies and the discharge of trusts, the guardian should be careful not to pay anyone to whom nothing is due. Nor should he give marriage gifts to the mother or sister of his ward. It is another thing, however, for the guardian to furnish the mother or sister of his ward with the necessaries of life, where they are unable to support themselves, for this should be ratified; as there is much difference where money is spent for this purpose, and where expense is incurred for presents or legacies.

14. *Paulus, Abridgments, Book VIII.*

One guardian is responsible for the acts of another if he could and should have denounced him as suspicious, and sometimes if he could have compelled him to give security; but if one who is solvent should suddenly lose his property, no blame can attach to his colleague.

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

Where a person who is appointed a guardian does not bring suit against those whom he ascertains to be the debtors of his wards, and on this account their solvency is affected; or if

he does not invest the money belonging to his ward within six months after his appointment, he himself may be sued for the money due, as well as for the interest on that which he did not invest.

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

When, in an action on guardianship, the question arises what loans made by the guardian for the ward should be acknowledged; Marcellus thinks that if the guardian lent money belonging to his ward, and stipulated in his name, the claims which are considered to be good will belong to the ward, and those which are bad and improperly contracted will belong to the guardian.

It is, however, held to be the better opinion for the guardian to leave the choice to the minor, in order that the latter may either accept or reject all which was done by the guardian with reference to the claims, so that it will be the same as if the guardian had transacted the business for himself.

This rule also applies where the guardian lent money in the name of his ward.

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

Where a guardian is ordered to administer the guardianship by someone who has authority to do so, and he fails to comply with the order, he should indemnify his ward from that date, and not from the time when he was appointed guardian.

18. *Ulpianus, Digest, Book XXI.*

Where a guardian has transacted the business of his ward, even though he may not have authorized him to act in any matter, there is no doubt that he will be liable to an action on guardianship; for what can prevent such a disposition being made of the estate of the ward,

that it will not be necessary for any business to be transacted in which the authority of the guardian should be interposed?

(1) Where there are two guardians, and an action is brought against one of them, the other will not be released from liability.

19. *Ulpianus, Opinions, Book I.*

A curator is not compelled to render an account of his acts to his associate, but where he does not share the administration with him, or does not discharge his trust in good faith, he can be denounced as suspicious.

20. *The Same, Concerning the Office of Proconsul.*

A guardian, or a curator whose appeal has been pronounced to be unreasonable, or where it has not been accepted, will be liable from the time when he should have undertaken the administration of his office.

21. *Marcellus, Opinions.*

Lucius Titius appointed Gaius Seius, who was under paternal control, the guardian of his son by will. Gaius Seius administered the guardianship with the knowledge and consent of the father. I ask whether, after the death of Gaius Seius, an action on guardianship will lie against his father, and if this be true, for what amount. Marcellus answered that, according to the facts stated, the father will be liable to an action *de peculio*, as well as to one for property employed for his benefit; and that, in this instance, it does not appear that the knowledge and consent of the father will have the effect of rendering him liable for the entire amount, unless a fellow-guardian or some other party desiring to render him suspected, should appear and assume the risk.

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

A guardian can renew an obligation for the benefit of his ward, and can bring a case into court, but donations made by him do not prejudice the ward.

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

It is generally conceded that a guardian need not give security that the ward will ratify his act, for the reason that he himself has a right to bring the matter into court. But what if it should be doubted whether he was a guardian, or would continue to be such, or whether the business had been entrusted to him? It is just that his adversary should not be deceived.

The same rule applies in the case of a curator, as Julianus has stated.

24. *Paulus, On the Edict, Book IX.*

It is customary for an agent to be appointed at the risk of the guardian, by a decree of the Prætor, whenever the business of the guardianship is widely distributed, or where the rank, the age, or the health of the guardian demands it. Where, however, the ward is not yet able to speak for himself, and appoint an attorney, or where he is absent, then an agent must necessarily be appointed.

(1) Where the guardianship has been entrusted at the same time to the administration of two guardians, either by a parent, fellow-guardians, or magistrates, it should be understood that one of them will be allowed to act, because two cannot do so at the same time.

25. *Ulpianus, On the Edict, Book XIII.*

When a minor, with the aid of his curators, files a claim against his guardians, for a smaller amount than he was entitled to, and, for this reason he then sues his curators, and judgment is rendered against them for the amount of the interest which he had in not having the guardians condemned through the negligence of the curators; cannot restitution be obtained from the said guardians? Papinianus says, in the Second Book of Opinions, that restitution can still be made. Hence, if the curators have not yet paid the judgment, and they take an appeal, they can be met by an exception on the ground of fraud, to compel them to assign their rights of action against the guardians.

But what should be done if the curators have already paid the judgment? This will be an advantage to the guardians, since, in this instance, the minor will lose nothing, as he will appear to be more solicitous for gain than for the reparation of his injury; unless, indeed, he is ready to assign his rights of action to his curators.

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

Proceedings can be instituted against a curator, and one occupying the place of a guardian, even during the continuance of his administration.

27. *The Same, On Plautius, Book VII.*

A guardian who is administering his trust should be considered as occupying the place of an owner, with reference to whatever concerns the interests of his ward.

28. *Marcellus, Digest, Book VIII.*

A guardian, who is summoned to court, gives security in the usual form. If, in the meantime, the boy arrives at puberty, he cannot be compelled to conduct the case.

(1) A guardian who has relinquished the administration of the affairs of his ward, after the latter has reached the age of puberty, is not liable for interest on money in his hands which he has already tendered. However, it seems more just to me that he should not be compelled to pay interest if he was not responsible for failure to surrender the guardianship, when it was demanded of him. (Ulpianus says that it is not sufficient for him to have tendered the money, unless he deposited it, sealed up, in some safe place.)

29. *The Same, Digest, Book VIII.*

This is especially true in the case of the heir of a guardian, for it would be extremely unjust that anyone who has passed the age of twenty, or who is older, should take it into his head to claim what is due to him under the guardianship, and also to demand interest.

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

The principal duty of a guardian is not to leave his ward without protection.

31. *Modestinus, Excuses, Book I.*

"The Divine Severus and Antoninus, Emperors, to Sergius Julianus: The rule under which individual guardians are sometimes liable in full, to the extent that each one has administered the guardianship, only applies before the age of puberty is reached, and is not available if the administration continues after that time."

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

A guardian died without leaving an heir. I ask when a curator was appointed for his ward, and no inventory, nor any other document has been produced by the surety, whether the said surety can be sued on the stipulation, for the amount of the interest of the ward? Modestinus answered that the surety may be sued for the same amount for which an action can be brought against the guardian.

(1) Modestinus was of the opinion that the guardian would in no way be responsible where he was not guilty of negligence, if the ward should suffer any injury because receipts for taxes paid were not found.

(2) Modestinus held that a guardian should render an account to his ward for any income which he could have collected in good faith from land belonging to her.

(3) He also stated that if a guardian collected less from a slave placed in charge of land, than he should have collected in good faith, he could, for this reason, retain as much of the *peculium* of said slave as he was liable for to the female ward, and that this would be an advantage to the said guardian; provided he had not entrusted the management of the property to a wasteful slave.

(4) A minor, with the consent of his curator, sold a tract of land to Titius, and afterwards, having ascertained that he had been cheated, obtained complete restitution, and was ordered to be placed in possession of the property. I ask, since he did not profit by the said sale, and it was not proved that any advantage had been obtained by him with reference to his property, whether the price should not be returned to the purchaser? Modestinus answered that as the price of the land sold by the curator did not add to his pecuniary resources, and nothing had been decided with reference to it at the time when restitution was ordered by the court, the purchaser would present his claim in vain.

(5) He also gave it as his opinion that the minor should not be obliged to account for any expenses incurred by the purchaser for the sake of ornament; but if the improvements could be detached from the building in such a way that it could be left in its former condition (that is, as it was before the sale), the purchaser must be allowed to remove them.

(6) Lucius Titius was the co-heir and curator of his sister, and as he was a resident of a district in which it was customary for the owners of land, and not the lessees, to sustain the burdens of taxation, as well as temporary contributions, he, having followed this practice and custom, which had always been observed, paid the taxes for the common and undivided estate. I ask whether, when his accounts were rendered by the curator, objection could be taken to them that he did not incur said expenses legally, so far as the share of his sister was concerned. Modestinus answered that the curator had a right to render an account to the minor for what was complained of, because she herself would have been compelled to make the said payment

if she had been managing her own affairs.

(7) Two guardians, after having made a sale of property belonging to their ward, divided the money among themselves; and, after this division, one of them was sent into exile during the existence of the guardianship. The question arose whether, if the exile appointed an agent, his fellow-guardian could make a demand on him for his share of the money belonging to the ward. Modestinus answered that: "If the question was whether, in case a guardian is exiled, his fellow-guardian can bring an action on guardianship; I am of the opinion that he can do so."

33. *Callistratus,' Concerning Investigations, Book IV.*

The same diligence is required of the guardians and the curators of minors with reference to the administration of their affairs, as the head of the family should conscientiously exercise in the transaction of his own business.

(1) The duties of a guardian terminate with the appointment of a curator; and therefore all matters which have been begun are entrusted for completion to the curator. This the Divine Marcus, together with his son Commodus, stated in a Rescript.

(2) The heirs of wards have the same right to choose against what guardians they may prefer to proceed, just as those whose guardianship is being administered can do.

(3) It is stated in the Imperial Constitutions that an account shall be rendered of any expenses incurred in good faith during the administration of the guardianship, but, not such as the guardians have incurred for themselves; unless a certain compensation was fixed by the party who appointed them.

34. *Julius Aquilia, Opinions*.

The slave of wards should be interrogated for the information of the court, and the promotion of the interest of the wards.

35. *Papinianus, Questions, Book II.*

A guardian or a curator is compelled to accept from a former guardian or curator, any credits which he may not think to be good, but he is not obliged to assume the risk of their collection.

36. *The Same, Questions, Book III.*

Guardianship is divided among guardians. Equity which has introduced the mere right of compensation does not cease to be applicable on account of the office and personality of the guardian who brings an action; for the division of the guardianship is not a matter of law, but one of jurisdiction, and establishes the measure of administration, but it applies only to guardians themselves, and should not be an obstacle to parties who desire to institute proceedings against a ward.

37. *The Same, Questions, Book XL*

Sabinus and Cassius hold that a guardian, who is administering the guardianship, becomes liable for his individual acts at different times, just as in various instances he is liable.

(1) In accordance with this opinion, where a slave is appointed to sell the property, or to collect the debts of his master, and after becoming free, he continues in the same employment; a suit based on voluntary agency can legally be brought against him on account of past transactions; even though he could not be held liable during the time he was in slavery (at least with respect to such matters as were connected with those that he transacted after obtaining his freedom), for it is held in the case of a ward, that he can bring an action on guardianship on account of any business which has been done after he arrived at puberty, where the recent acts are connected with the former ones, and that they cannot be divided so as to be placed in separate accounts.

(2) Hence the question arises which is usually discussed with reference to a son under paternal control for whom a guardian has been appointed by will, and he having been emancipated after the termination of the guardianship, the guardian continues to administer his office. It follows, from the opinion of Sabinus and Cassius, that the said son can be sued for the entire amount which relates to the business transacted after his emancipation; but so far as what took place before this time is concerned, whether he was not deprived of his *peculium*, or whether he was deprived of it, he will only be liable for the amount which he is able to pay.

If the ward should prefer to bring an action *de peculio* against his father, based on the former administration (for the available year will be computed from the time when the guardianship began), in order that the father may not be taken advantage of by the computation of the entire period, only the time during which the son under paternal control administered the guardianship will be included.

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

Where there are several guardians, who did not administer the guardianship, and all of them are solvent; will the ward have the right to select which one he will sue, because no administration of the trust has taken place; or should all the guardians share the responsibility in common, as being debtors for the same sum of money? The latter opinion is the more reasonable one.

(1) If some of the said guardians are not solvent, the others will undoubtedly be liable; nor is this unjust, since, through his contumacy, each one of them becomes responsible for the entire loss sustained by the ward.

(2) Wherefore, the question arose whether the ward is obliged to assign all his rights of action to the guardian, whom alone he has sued, or, at least, a part of them? But, as the contumacy of each one should be punished, with what propriety can this be demanded?

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

Guardians who, after the determination of the guardianship, continue, through mistake, to retain the management of its affairs, will not be compelled to be responsible for any claims which were good after the ward arrived at puberty, as they cannot bring an action to collect them.

(1) A curator appointed by will by a father, through mistake, busied himself with the affairs of a minor. Afterwards, other guardians having been appointed by the Prætor, the former will not incur any liability, if he did not transact any business after their appointment.

(2) A testamentary guardian, illegally appointed, transacted the affairs of the minor in compliance with the wishes of his father. The mistake having been discovered, the best course to be pursued will be to have another guardian appointed by the Prætor, to avoid the condemnation of the former on the ground of fraud or negligence, if he should abandon the administration which he had already begun.

The same rule does not apply where anyone voluntarily undertakes the management of another's business, because it is entirely proper for the interests of the owner to be attended to by the exertions of a friend in any single transaction.

(3) An heir was appointed without a substitute, and before he entered upon the estate, which he was obliged to deliver to a minor, died. As the estate was situated in Italy, and the appointed heir died in a province, the guardians charged with the administration of property within the province should, in my opinion, be condemned on the ground of negligence, if, being aware of the terms of the will, they failed to look after the interests of the minor; for if the trust had been discharged in the province, the rights of the heir would have been protected, and the management of the estate would have devolved upon those who had undertaken the administration of the guardianship in Italy.

(4) The right of action against a guardian must not be denied a creditor who made a contract with the guardian himself, where the latter caused his ward to reject the estate; even though the guardian may have used the money for the benefit of the minor.

(5) The curators of a minor gave security to one another with reference to their common liability, and delivered reciprocal pledges for that purpose. If they should be solvent at the time when they are discharged from office, the security given will have no further effect, and it will be evident that the pledges will be released.

(6) A party who was appointed guardian appealed against his own appointment. His heir, having subsequently defeated the latter, will be responsible for any losses previously sustained, for the reason that it is held to be a slight degree of negligence to, in violation of law, refuse to accept the office of guardian, after anyone has been directed to assume it.

(7) Guardians who have the care of property situated in a province, and are transacting business connected with the appeal of minors in a city, should apply for the appointment of curators for the property of the said minors in Italy, as this is their duty. If they do not do so, before they return to the province, the court should render judgment against them on account of their fraud or negligence in this respect.

(8) A paternal uncle was appointed the testamentary guardian of his brother's son, while he resided in Italy, and he assumed responsibility for the administration of the property in Italy, as well as of that in the province, and he then transferred the money obtained from sales of property at Rome into the province, and placed it to the credit of the ward. If another guardian should be substituted for him at Rome, he cannot be compelled to undertake the administration of this money, which does not belong to the assets of his guardianship.

(9) Where curators or guardians, improperly appointed by will, who have not been confirmed by a decree of the Prætor, transact business; they will be compelled to assume responsibility for one another for any losses which may take place, since they voluntarily assumed the office without the support of the law; and any one of them who is solvent should apply to the Prætor for a decree appointing curators or guardians.

(10) Where guardians who are solvent die, their heirs will not be liable for one another on account of anything which did not take place during the existence of the guardianship.

(11) It is established that an equitable action can be granted against a guardian who refuses to discharge the duties of his office, after others, who have discharged them have been sued. Still, if the loss sustained on account of the guardianship is not attributable to those who transacted the business, but occurred through the negligence of all; then the responsibility will equally attach to all, without considering any order of substitution.

(12) Certain guardians, after their ward had arrived at puberty, because of their familiarity with the facts of the case prosecuted an appeal which had been begun by order of the Consuls. If they should not be able to obtain the execution of the judgment, they will not be liable for negligence.

(13) Where a ward is unable to enjoy the benefit of restitution, his claim based on the alleged negligence of his guardian can be released by agreement; and this is not held to be a gift, but a business transaction.

(14) Where the loss of certain claims bearing a high rate of interest, and which were obtained by a father, is imputed to the negligence of guardians, a female ward will be compelled to assign her rights of action to them; but she can retain, without any compensation, all interest which may have been collected during the term of the guardianship.

(15) Where a minor, having sued his guardians, was unable to collect from them all that was due to him, he will be entitled to a right of action for the entire amount against the curators who, through negligence, did not transfer the guardianship to themselves; nor will the right be

held to have been extinguished by the judgment on guardianship, for the reason that the ward has a cause of action against those holding another office.

(16) A guardian who refuses to bring suit in the name of his ward against the heir of a former guardian, who was solvent, will be held responsible for any loss; just as where one neglects to denounce as suspicious his fellow-guardian who has become insolvent.

(17) Execution of a judgment on the guardianship should, therefore, not be postponed for the reason that the same guardian is administering, at the same time, the guardianship of the brother and co-heir of the ward.

(18) The amount of the *peculium* of a slave who is acting as an agent, and whom a minor manumitted and retained, or could have retained after he had begun the administration of his affairs, must be accounted for by the curator when his statement is filed in court.

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

A centurion appointed a curator for his son who was a minor, but his appointment was not confirmed by a decree of the Prætor. If the curator did not transact any business, he cannot be held responsible for either contumacy or negligence; for the privilege of soldiers does not extend to wrongs committed against another, and ignorance with reference to others is not pardonable where the last wills are concerned, except in the case of the property of soldiers. The guardianship of children is, in fact, governed by the right of paternal control, and not by the advantage attaching to military service.

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

Where a ward, who has more than one guardian, forbids one of them, who is insolvent, to render an account; this does not act as a release of the others with reference to what he, fraudulently, may have collected, or contracted for during the guardianship, and his fellow-guardians who neglected to denounce him as suspicious can legally be sued on the ground of negligence; for a testamentary guardian is not liable for negligence from which he was released by the will.

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

A judge decided that one guardian out of several was liable for the entire amount. He who was the subject of the decree can act as attorney with reference to his own affairs, but he will not be entitled to the privilege of a ward, since this is not conferred even upon the heir of a ward, and relief is given, not to the case, but to the person of the ward, who is deserving of a special favor.

43. *Paulus, Questions, Book VII.*

A guardian is released from liability where a claim becomes uncollected after the death of the ward.

(1) A man who was the curator of his brother's daughter promised to give forty *aurei* by way of dowry to her husband. I ask whether he would be entitled to relief, if afterwards debts of the ward should be discovered, and the promised dowry found to be in excess of the amount of her estate; as it was set forth in the document that So-and-So, uncle and curator, promised a certain amount to the stipulator? The difficulty results from the fact that the curator did not expect to give the dowry out of his own property, but made the promise at a time when he believed the means of the ward to be sufficient for it to be dispensed with. Moreover, it can be considered whether, if the curator made the promise while aware that her property was not sufficient, he should be held to have donated the amount; or, as he acted fraudulently, whether he is entitled to relief. I answered that I do not think that, since the curator, going outside of his duty, voluntarily rendered himself liable, relief should be granted him by the Prætor, any more than if he had promised to pay money to the creditor of the girl.

But if the party who is the subject of the discussion promised the dowry, not with the intention of making a gift of it, but merely as a matter of business, he could hold the woman liable; and it might be said that she would be bound during the continuance of the marriage, while she has the dowry, as is the case in the contribution of property; and she would certainly be liable after divorce, whether the dowry had been paid, or whether the claim for it still existed; because, in this instance, the result would be his release from liability for the same.

But if the woman is unable to reimburse her curator for what he promised to give, by way of dowry, in excess of the assets of her estate, the curator can be released from liability for the amount in excess, by means of an exception; and the woman should give a bond to her husband for this amount, so that if she becomes wealthier during marriage, she can pay the remainder of the dowry to her husband. 44. *The Same, Questions, Book XIII*.

Those who accept claims which have been approved by former curators or guardians, assume liability for their payment.

(1) Where a ward receives the account of his guardian after he arrives at puberty, and, having sued him for a balance, accepts interest, he does not lose his right to any property of his guardian which may have been sold, for the Prætor should preserve this right for him.

45. *The Same, Questions, Book XIV*.

Where a ward, after arriving at puberty, discharged one of his guardians, he will be guilty of a dishonorable act if he attempts to call the other to account for the acts of the former whom he discharged.

We say that the same rule applies in the case of two magistrates who are colleagues, and the government brings suit against one of them. I have reference, in this instance, to a case where two magistrates are jointly liable, as the principle is not always applicable, for if both of them are solvent, there is no ground for a choice in instituting proceedings. A party who is released by lapse of time is not like one who has nothing, because he has the means of opposing the party bringing suit on the claim.

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

Lucius Titius, the curator of Gaius Seius, during the time of his curatorship, leased the Cornelian Estate to Sempronius, who failed to pay the rent. The minor, having attained his majority, appointed the former lessee, Sempronius, his agent. I ask if because he acted as agent the minor is considered to have assumed the entire debt, and therefore released his curator. Paulus answered that, for the reason that the party, after having attained his majority, desired to have his former tenant act as his agent, he should not be considered to have released him from liability for the balance due on his rent.

(1) The State, by order to the Governor, took possession of the property of Sempronius, who, on account of a promise, had become a debtor of his native city and the magistrates of the latter appointed three curators, who are called by the Greeks επιμεληται, and who afterwards on their own responsibility, and without the consent of the municipality, divided among themselves the administration of the property of Sempronius. One of them became insolvent, and the others who were solvent, relinquished the administration of the trust at the same time. Afterwards, the heir of Sempronius, who was a minor, and who had rejected the estate, obtained from the Emperor the restitution of his father's property.

I ask whether the minor should be indemnified out of the property of the curators who were solvent, since individual responsibility for the curatorship had been imposed upon them by the magistrates. Paulus answered that if it should be decided that an action might be granted the ward against the curators, he must sue the magistrates for the share of the curator who was not solvent, as the administration of guardians is one thing, and that of those who have charge of the business of the government is another.

(2) A guardian who has lent the money of his ward, even though he does so in his own name, is not held to have acted in opposition to the constitutions which forbid the money of a ward to be converted to the use of a guardian.

(3) The question arose whether a guardian should be compelled to pay interest on the money of his ward, which he had used after the termination of his guardianship until the day judgment was rendered against him. Paulus answered that after his administration was at an end, the interest should be computed in the same way as in a judgment on guardianship.

(4) Paulus also gave it as his opinion that where a surety was given by a guardian for the preservation of the property of his ward, he would not be liable for any acts performed by the guardian after the ward arrived at puberty, which were not due to necessity, but to choice.

(5) A guardian having been sued in an action on guardianship, produced his account, and judgment being rendered against him, he made payment in accordance with its terms; and afterwards, when the ward desired to collect money due from certain debtors of his father, whose names did not appear in the book of accounts, receipts of the guardian were produced by the said debtors.

The question arose whether an action would lie in his favor against the guardian, or against the debtors. Paulus answered that if the debtors had paid the guardian during the time he was administering the trust, they would be released from liability to the ward by operation of law; but if an action was brought against the guardian, the ward could also bring one on guardianship against him, and avail himself of a reply on the ground of fraud, in opposition to an exception based upon a previous decision of the case.

(6) Where two testamentary guardians were appointed for a ward, and one of them died, upon the application of the mother of the ward another was appointed in his stead by the magistrates, under the direction of the Governor of the province, and from the latter guardian the magistrate exacted security for the preservation of the estate. The testamentary guardian denounced the other, subsequently appointed, as being suspicious. The question then arose as to what extent he could be held liable. Paulus answered that the testamentary guardian should be sued for the share of the property which he had administered; and that, with reference to the share of his fellow-guardian, proceedings should first be instituted against those who had become his sureties, and afterwards against the magistrates who appointed him. Then, if the ward was unable to obtain all to which he was entitled, an investigation should be made of the conduct of the other guardian, for the purpose of ascertaining whether he should be declared suspicious, especially as he was said to have accused the second guardian of acting suspiciously.

Under other circumstances, however, where magistrates appoint several guardians, a ward has no recourse against them, before the property of all the guardians has been exhausted. In the case stated, where one guardian has been appointed by the magistrates, it is not held to be advisable that the testamentary guardian who accused the other of being suspicious should be sued before his colleague; hence each should be considered as having been appointed guardian for the administration of half the estate.

(7) Guardians are permitted to collect money due from the debtors of their wards, in order that they may be legally discharged; but they cannot present them with their claims, nor make any arrangement with them for the purpose of diminishing them. Therefore, where a debtor pays a smaller sum to a guardian than is due, he can be sued by the ward for the balance.

47. *Scævola, Opinions, Book II.*

A certain man appointed Titius and Mævius guardians, and added the following provision: "I wish and I request that everything be done with the advice of my brother Mævius, and that anything which is done without it be void". Titius alone collected the debts from the debtors; were the latter released from liability? I answered that if the testator committed the entire

administration to Mævius, payment was not legally made.

(1) "Marina and Januaria shall fix an amount which will be sufficient for the daily expenses of my son." I ask whether the guardians should be satisfied with the judgment of these two women. I answered that the amount of the expense should be established by the judgment of some good citizen.

(2) Guardians appointed for the administration of an estate in Italy found at Rome certain obligations of debtors resident in the province, for the payment of the money at Rome, or anywhere else that it might be demanded. As the debtors were not in Italy, nor any of their lands situated therein, I ask whether the collection of these claims was a part of the duty of the guardians of the estate in Italy. I answered that if the contract had been made in the province they were not concerned in it; but that it was part of their duty not to permit those entrusted with the administration of the estate in the province to remain in ignorance of the existence of said claims.

(3) Where a testamentary guardian, appointed by a mother, considering himself to be a genuine guardian, sold both the maternal and the paternal estates of the ward and died insolvent, the question arose whether the ward could bring an action for the recovery of the property. I answered that if the property still belonged to the ward, it could be recovered by him.

(4) The prefect of a legion inserted the following provision into his will: "I wish it to be left to the discretion of the guardians of my son to determine whether only one per cent interest per annum shall be paid on the money belonging to my estate, in order to prevent it from being dissipated". I ask, if it should be ascertained that the money was lent at interest by the said guardians, whether they would only be liable in an action on guardianship for the interest at one per cent, or for the rate for which they had stipulated. I answered that if they chose to pay the amount of interest in accordance with the will of the deceased, and had not lent the money at interest in the name of the ward, they would merely be liable for the amount mentioned by the testator.

(5) Lucius Titius borrowed money from a guardian, and gave him in pledge property to which he was entitled by inheritance, and three years afterwards, the ward, whose guardianship was being administered, having arrived at puberty, the estate of the deceased was confiscated, because his heir did not avenge his death. The question arose whether the ward could refuse to consider the above-mentioned claim. I answered that, according to the facts stated, liability for the said claim did not attach to the guardian.

(6) One of two brothers, associated in the partnership of property and business, having died, left his son his heir; and the uncle of the latter, who was his guardian, after having sold all the merchandise belonging to the firm, purchased it himself, and conducted the business in his own name. The question arose whether he would be obliged to make good to the ward his share of the profits of the business, or merely the interest on the money. I answered that, in accordance with the facts stated, he must pay the ward interest, and would not be obliged to give him a share of the profits.

(7) The guardian of an estate in Italy, having been sued by a provincial creditor, paid him in the place where the ward had property. The question arose whether he could include this in an action on guardianship. I answered that there was nothing in the facts stated to prevent him from doing so.

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

There is a great difference between the curator of property without an owner, and of an unborn child, and the curator of an insane person, a spendthrift, or a ward, since with reference to the latter it is evident that there is an actual administration; but to the first two merely the custody and sale of property which is liable to be deteriorated is entrusted.

49. *Paulus, Opinions, Book II.*

Where a guardian is not in a condition to make reparation for injury by his obstinacy in not placing the money of his ward at interest, or because of his failure to purchase land, he shall be punished with unusual severity.

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

Where the property of a ward is lost through an attack of robbers, or where a banker, to whom money was entrusted by the guardian at a time when he was in high repute, cannot repay all of it, the guardian will not be held liable for anything under these circumstances.

51. *Vemdeius, Stipulations, Book VI.*

Where two or more guardians are administering a guardianship, the stipulation of the surety of each one will render him liable for the entire amount. But if the guardianship is divided among them by districts, which is generally done, and one of them attends to the business in the city, and the other to that outside of it, then the stipulation will bind, or will not bind either surety, according to the liability of either principal; for although they are all guardians, and are administering

the guardianship, still, if either of them is sued with reference to property which is outside of his district, or is brought into court, the stipulation will not bind him unless the administration of the guardianship has been entirely entrusted to him. Where the administration of the entire trust has not been committed to a guardian, the effect is the same as if it had not been given to him with reference to the property which is in question.

52. *Neratius, Opinions, Book I.*

A curator not only should give a dowry for a minor, but should also pay the expenses incurred by the marriage.

53. *Paulus, Decrees, Book II.*

Æmilius Dexter neglected to require security from guardians appointed during the time of his magistracy, and some of them having been excused, Dexter himself was appointed guardian by other magistrates who succeeded him. After his appointment, an action was brought against him for the entire amount, for two reasons; first, because he had appointed guardians at the time when he was a magistrate; and second, because he did not require security from them.

On the other hand, it was said that although security was not required, still, the guardians were solvent at the time when the guardianship was terminated, and that the negligence of the curators should not be a source of injury to guardians. It was held that if the guardians were solvent at the time when the guardianship came to an end, even if security was not required, the responsibility will attach to the curators, otherwise, it will attach to the guardians and magistrates; that is to say, that he will be responsible who did not denounce his colleague as suspected, or did not require security when, on the expiration of the trust the guardian was found to be insolvent.

54. *Tryphoninus, Disputations, Book II.*

I do not think that a guardian should be liable for a higher rate of interest, who has borrowed money belonging to his ward from his fellow-guardian and has given security, and promised a rate of interest which other debtors usually pay to wards, because he did not appropriate the money to his own use, and did not secretly or prodigally squander said money as if it was his own, and if the loan had not been made to him at this rate by his fellow-guardian, he could have obtained it elsewhere. It makes a great deal of difference where a guardian publicly and openly renders himself a debtor to his ward, just as any stranger would do; and where, under the pretext of administering the guardianship for the benefit of his ward, he secretly profits by

the money of the latter.

55. *The Same, Disputations, Book XLII.*

Three guardians were appointed for a ward; one of them administered the guardianship, and became insolvent; the second committed it to the charge of Titius, who transacted some of the business; and the third did not, in any way, concern himself with the administration. The question arose, to what extent was each of them liable. As a common responsibility attaches to guardians in the administration of their trust, all of them would be liable for the entire amount. It is clear that if money belonging to the ward was distributed among them, each will not be liable for a larger sum than he received.

(1) Where, however, the guardians themselves have stolen the property of the ward, let us consider whether each one of them will be liable for the entire amount, in the action for double damages established by the Law of the Twelve Tables. And, even though one of them may have paid double the value of the property, still the others will also be liable; for where there are several thieves who have stolen the same article, the others are not released from the penalty for the reason that it has been exacted from one of them. Guardians, however, on account of their having been entrusted with the administration, are rather held to have acted perfidiously than to have taken the property without the consent of the owner.

Finally, no one can say that one guardian is liable for double damages in an action of this kind, and, as it were, by means of a species of action for recovery also be compelled either to surrender the property itself, or to pay its value.

(2) Therefore, a guardian is not only considered to have administered the guardianship, where he directed another to do so for him; but also where he took security from his fellow-guardian for the preservation of the estate, and then entrusted to him the administration of the entire guardianship. Nor can he defend himself by means of the constitution which directs that the party who administered the trust shall be sued first.

(3) Moreover, where no one has attended to a part of the business of the administration, he who has administered other affairs pertaining to it will not be liable for what has been neglected, but responsibility for all will attach to the guardians in common. Responsibility for other things which he did not attend to cannot, however, be required of one alone, unless they are of such a character that, after having been begun, they should have been finished by him, or where they have been so connected with those of which he had charge that they should not have been separated from them.

(4) But when it is said that guardians are responsible where a fellow-guardian becomes insolvent, or was not solvent at the time of his appointment, let us see how this should be understood; that is to say, whether it will be sufficient if the resources of their fellow-guardian were not diminished to any extent from the time of his appointment, but the amount of his paternal estate remained the same? Or, even though nothing happened subsequently which would manifestly cause a diminution of the estate, should a guardian, nevertheless, investigate the property of his fellow-guardian? This, however, should receive another construction dependent upon the standing of the person, and the time which had elapsed since the execution of the will; for where the party is a notorious spendthrift, or one whose property has been sold, he should not be permitted by his fellow-guardian to administer the trust, even though, having taken the Prætor unawares, the latter appointed him by a decree, and his father had ignored any accident which may have happened to him after the execution of the will, or intended to change his will, but did not do so.

56. *Scævola, Digest, Book IV.*

A guardian sold property and animals belonging to his ward, but retained and kept in his possession some of the animals, for the reason that the purchasers did not pay for them; and he entered the price as paid in the accounts of the guardian. Other animals were produced by

these, and the guardian having died, his heir administered the same guardianship, and kept the animals in his possession for several years.

The question arose whether the minor, whose guardianship was the subject of administration, could legally claim the said animals after he was fourteen years old? The answer was that, according to the facts stated, the ward could not claim them.

57. *The Same, Digest, Book X.*

The written obligations of certain debtors having been destroyed by fire, can the guardians sue the said debtors for the payment of the money on account of the obligations having been mentioned in the inventory; or can they compel them to renew them, even where they have done this under similar circumstances with other debtors, but have neglected to do so with reference to those of the ward, and if they have injured the latter in any way, on account of this failure to act, can proceedings be taken against them in an action on guardianship? The answer was that, if it should be proved that the guardians have failed to act through fraud or negligence, they will be responsible to the ward on this account.

(1) A ward, with the authority of his guardians, purchased a tract of land from a party who had been banished, and whose property had been confiscated by a decree of the Governor, and he having obtained permission of the Emperor to appeal, the judge declined to entertain the appeal, and it having been pronounced ill-founded he was deprived of the land. The question arose, could the ward recover the price of the land from his guardians in an action on guardianship. The answer was that if they knowingly made the purchase from one who was in such a condition as to be liable to the former decree, they could be held responsible in an action on guardianship.

58. *The Same, Digest, Book XI.*

A certain man transacted his business through the agency of Pamphilus and Diphilus, his former slaves, and afterwards his freedmen, and by his will appointed them guardians of his son, providing that the business should be carried on in the same way that it had been done during his lifetime; and the said guardians administered the trust, not only during the minority of the son of their patron, but also after he had arrived at puberty. Diphilus rendered his account together with a statement of the profits of the business; Pamphilus, however, thought that it was not necessary to present an account of the profits, but merely to calculate the amount of interest ordinarily recovered in an action on guardianship. The question arose whether Pamphilus should have rendered his account in the same way as Diphilus, in order to comply with the intention of the testator. The answer was that he should have done so. Claudius Tryphoninus says that he should have done this in order not to obtain any pecuniary advantage from the guardianship. (1) One of two guardians having died before his ward had arrived at puberty, the other, having brought an action against his heir in the name of the ward, recovered with interest all that had come into the hands of the deceased guardian from the guardianship.

The question arose whether, in an action on guardianship which was brought by the ward after arriving at puberty, interest should be paid merely upon that portion of the money which had come into the hands of the deceased guardian by means of the guardianship, from the beginning; or whether interest on the principal as well as on the interest which had accumulated in the hands of the survivor, after the death of the former, should also be paid, and transferred with the principal. The answer was that if the guardian had used the money for his own benefit, interest on the entire amount should be paid; but if the money remained in the accounts to the credit of the ward, that only should be paid which he collected, or could have collected in good faith, and having been able to lend it at interest, neglected to do so; because if the guardian had received the principal and interest from any other debtor, all would, or should, constitute principal in his hands.

(2) In a case where the will appeared to have been broken, the testamentary guardians ceased to act in the administration of the trust, and a guardian for the ward was appointed by the Governor. The guardians appointed by will were, however, ordered to administer the guardianship conjointly with the one who was selected by the Governor to act in this capacity. The question arose whether the same testamentary guardians would be liable during the time which preceded the appointment of the other guardian, from the day when the will was opened, or from the date when they were ordered to take part in the administration. The answer was that they were in no way liable for acts performed during the time preceding the said appointment.

(3) A father having appointed his son, who was a minor, his heir, bequeathed two thousand *aurei* to his disinherited daughter, and appointed the same guardians for both of them. The question arose whether the guardians of the female ward would be liable in an action on guardianship for interest on the amount from the day on which the said two thousand *aurei* could have been separated from the other assets of the estate if they neglected to invest it. The answer was that they would be liable.

(4) The question arose whether the interest on money belonging to a ward which is due from guardians should be reckoned as principal when transferred to a curator, and whether the curator would be liable for interest on the entire amount. The answer was that all the money which comes into the hands of curators is subject to the same rule because all of it becomes principal.

59. *The Same, Digest, Book XXVII.*

Where the estate of a father was burdened with debts, and the property appeared to be in such a condition that a female ward ought to refuse to accept the succession; one of the guardians made an agreement with several creditors that they would be satisfied with a certain amount of what was due them, which they received. The curators of the girl, after her arrival at puberty, made the same arrangement with certain creditors, who also received the money. The question arose whether, if one of the guardians happened to be a creditor or the father of the ward, and paid himself the entire amount due him with interest out of the ward's property, he could be compelled by the curators of the minor to contribute in the same proportion as the other creditors had done. The answer was, that a guardian who had induced others to diminish their claims, should be satisfied with the same percentage of his.

60. *Pomponius, Epistles, Book VIII.*

Where the heir of a guardian has concluded a transaction which was commenced by the latter, he will be liable to an action on guardianship on this account.

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

It is stated by Aristo that, where a ward loses possession of any part of an estate through the fault of his guardian, there is no doubt that he will be liable for the amount in an action on the estate, if security has been given to the ward. Moreover, security is held to have been given, even if the guardian is solvent, so that the ward can recover from him the amount for which judgment is rendered against him in an action. Where, however, the guardian is not solvent, it should be considered whether the damage will be sustained by the ward or by the claimant of the estate; hence it must be held to be just as if the property was lost by accident, and just as if the ward himself who is free from blame had diminished, destroyed, or lost any property belonging to the estate. The inquiry can also be made with reference to a possessor who is insane, where any of the property is lost on account of his insanity. What is your opinion on this point? Pomponius says, "I think that the opinion of Aristo is correct. But why are you in doubt as to who should suffer the loss, if the guardian should prove insolvent; for as it can very properly be said that the ward can only be compelled to transfer the rights of action which he has against the guardian to the vendor of the property, so also the heir or the

possessor of the estate, if through no fault of his (for instance, if he should be forcibly ejected from land belonging to the estate, or a slave forming part of it should be wounded by anyone without the fault of the possessor), he would only be obliged to assign the rights of action to which he was

entitled on this ground. It must be said that the same rule will apply where any loss takes place through the negligence or fraud of the guardian of an insane person, just as in the case where a guardian or a curator entered into a stipulation, or sold property belonging to an estate. I also think that it should be admitted that anything which happens through the insanity of anyone, should remain unpunished; just as if it had been caused by some accident, and without the act of the party sued."

TITLE VIII.

CONCERNING THE AUTHORITY AND CONSENT OF GUARDIANS AND CURATORS.

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

Although it is a rule of the Civil Law that a guardian cannot be appointed for the transaction of his own business, still, a guardian can use his authority to induce his ward to accept an estate which is indebted to him; even though, by doing so, the ward will become his debtor. For the first reason for the exertion of his authority, in this instance, is that his ward may become the heir, consequently will become indebted to him. He cannot, however, by the exercise of his authority, compel his ward to enter into a stipulation with him. Where anyone employs his authority to induce his ward to make a stipulation with his slave, the Divine Antoninus Pius stated in a Rescript that the ward would not be legally liable, but an action would be granted against her for the amount which she profited by the transaction. If the guardian causes anything to be given by the ward to his son, such an exertion of his authority will be void, for it is evident that he acquires the property by his own act.

(1) Where a guardian is compelled forcibly and against his will to remain, any act which he performs will not be valid; for his mere corporeal presence is not sufficient, as he might be considered to have given his consent where he was silent on account of being asleep, or because he was attacked by epilepsy.

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

There is no difference in the cases where the authority of a guardian is not interposed, and where it is improperly exerted.

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

Where a guardian performs an act without being asked to do so, the exertion of his authority will be valid, if he says he approves what takes place, for this is to empower it to be done.

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

Although where there are several guardians, the authorization of one is sufficient; still, if it should be granted by one who has not been

entrusted with the administration of the guardianship, it should not be ratified by the Prætor. Therefore, I think that the better one is the opinion of Ofilius, who held that if I make a purchase from a ward by the authority of the guardian who is not administering the trust, being aware that another was administering it, I cannot become the owner of the article sold. The same rule applies if I should make such a purchase with the authority of a guardian who has been removed from office, for such a transaction should not be ratified.

5. *Ulpianus, On Sabinus, Book XL.*

A ward cannot legally bind himself to his guardian by the authority of the latter. It is clear that,

when there are several guardians, it must be held that the authority of one of them is sufficient to enable the ward to bind himself to another, whether he lends him money, or enters into a stipulation with him. Where, however, there is only one guardian, and he lends money to his ward, or enters into a stipulation with him, he will not be bound to the guardian, but he will be naturally liaable to him for the amount by which he has been pecuniarily benefited. For the Divine Pius stated in a Rescript that an action should be granted in favor of the guardian against the ward, and indeed against anyone else, for the amount by which he was enriched at his expense through the transaction.

(1) A ward who makes a purchase or a sale without the authority of his guardian will only be liable for the amount by which he profits pecuniarily.

(2) Moreover, a guardian cannot contract the obligation of either buyer or seller with his ward. Where, however, he has a fellow-guardian, the authority of the latter will undoubtedly be sufficient to empower him to make a purchase. But if the transaction is fraudulent it will be of no effect, and hence the property cannot be acquired by usucaption. If, however, the ward, having attained his majority, confirms the purchase, the contract will be valid.

(3) If a guardian should buy property of his ward through the interposition of a third party, the purchase made under such circumstances will be void, because the transaction does not appear to have been concluded in good faith. This was also stated in a Rescript by the Divine Severus and Antoninus.

(4) If, however, he should make the purchase openly, and give another name, not fraudulently, but without concealment, as persons of rank are accustomed to do who do not wish their names to appear on the records, the purchase will be valid. But where he makes the purchase craftily, it will be the same as if he had made it by the agency of another person.

(5) If the creditor of the ward should sell his property, his guardian can purchase it in good faith.

(6) If the son of a guardian, or any other person under his control, should purchase the property, it will be the same as if he himself had purchased it.

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

It has been decided that guardians upon whom the administration has not been conferred by a decree, can legally purchase property from a ward, just as strangers can do.

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

When we say that a guardian cannot grant authority to his ward to transact business with him; this is only true where the stipulation is acquired by him, or by persons under his control. But there is nothing to prevent his authority from being exercised in the transaction of any business by which his ward will be benefited.

(1) Where there are two creditors, and one of them stipulates for the payment of the debt by a ward, under the authority of one guardian, and the other stipulates for its payment by the ward with the authority of another guardian, it must be held that the stipulation is valid, provided the authority of one guardian is sufficient; but if it is not sufficient, it must be said that the stipulation is void.

(2) Where a father and his son, who is under his control, are both guardians, and the father stipulates with the authority of the son, the stipulation will be of no effect, and this is the case because the son cannot authorize any transaction in which his father is concerned.

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

Even where the contract with a ward is conditional, the consent of the guardian should be absolute; for his authority must be not conditionally, but absolutely interposed, in order that a conditional contract may be confirmed.

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

A ward cannot be rendered liable by any contract without the authority of his guardian; he can, however, acquire property for himself by means of a stipulation, as well as by delivery, without the authority of his guardian, but he cannot bind himself by lending money, because he cannot alienate anything without the authority of his guardian.

(1) With reference to the rule that a ward cannot alienate any property without the authority of his guardian, it is evident that he cannot manumit his slaves without his consent, and even if he should manumit a slave with the authority of his guardian, he must, in accordance with the *Lex Ælia Sentia*, give a good reason for doing so, in the presence of the Council.

(2) Where a ward, for any reason, makes a payment without the authority of his guardian, his act is void, because he cannot transfer the ownership of anything. Where, however, the creditor, in good faith, spends the money repaid by the ward, the latter will be released.

(3) A ward cannot enter upon an estate without the consent of his guardian, even though it may be advantageous to him, and he suffers no loss by doing so.

(4) Under the Trebellian Decree of the Senate, a ward cannot receive an inheritance without the consent of his guardian.

(5) The guardian ought to be present and authorize the transaction, and his consent will be of no effect if subsequently given, or communicated by letter.

(6) Even if the party who makes a contract with a ward does not know that the authority of the guardian was granted, still, if this can be proved by written evidence, the transaction will be valid; for example, if I sell or rent anything by letter to a ward who is absent, and he gives his consent, after having been authorized by his guardian.

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

A guardian who, on account of sickness, absence, or any other good reason, cannot authorize his ward to perform some act, will not be liable.

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

Where a ward or an insane person is entitled to the possession of an estate for the purpose of expediting matters, it is established that the wishes of the guardian or curator must be consulted in the acceptance or the repudiation of the estate; and it is clear that if he does anything contrary to the interest of the said ward or insane person, he will be liable to an action on guardianship or curatorship.

12. *Julianus, Digest, Book XXI.*

If a slave owned in common by you and Titius should receive any property by delivery from your ward with your consent, Marcellus states that its ownership will vest solely in Titius; for where anything cannot be acquired by all the owners of a slave, the ancient authorities have held that it will belong in its entirety to the one by whom it can be acquired.

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

Minors are bound by the authority of their guardians, even though they themselves remain silent. For when they borrow money even though they may say nothing, they will be liable, if the authority of their guardian is interposed. Hence, where money which is not due is paid to such persons, even if they should keep silent, the interposition of the authority of their guardian will be sufficient to render them liable to a personal action for its recovery.

14. *The Same, Digest, Book XXXI.*

It does not make much difference whether a guardian is absent when any business is transacted with his ward, or whether, if he is present, he is not aware of what is being done.

15. *Marcianus, Rules, Book II.*

The same guardian can grant his authority to two wards in a case where one is plaintiff and the other defendant. In case, however, he should act in this twofold capacity, will a single authorization be sufficient, under these circumstances, for both the wards? Pomponius is in doubt on this point, but it may be strongly maintained that a single authorization will suffice.

16. *Paulus, On the Lex Ælia Sentia.*

Even if a guardian should become blind, he can authorize the performance of acts by his ward.

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

Where a guardian is unwilling to grant authority to his ward, the Prætor should not compel him to do so; in the first place, because it would be unjust, even if it was not expedient, to force him to give his consent; and then, even if it was expedient, the ward can bring an action on guardianship on account of the loss he has sustained.

18. *The Same, On Plautius, Book I.*

A ward, with the consent of his guardian, can transfer his debtor to Titius. Where, however, a guardian is indebted to his ward, it must be said that he cannot be transferred, nor can an agent be appointed to act against the guardian, with the authority of the latter; otherwise, the guardian would be released from liability by his own act.

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

A curator can even be appointed for anyone under the age of puberty, but a guardian is required for the settlement of all matters which involve the formalities of law.

20. *Scævola, Digest, Book X.*

A division of the estate of their father was made by certain wards in the presence of their guardian, who, however, did not sign the instrument of partition. The question arose whether they must abide by it. The answer was, if the guardian authorized it, the partition must stand, even if he did not sign the instrument.

21. *The Same, Digest, Book XXVI.*

A ward, having had judgment rendered against him on account of a contract made with his father, after having been defended by his guardian, received a curator, between whom and the creditor the following transaction took place in the presence of the Steward of the Emperor: Priscus, the Imperial Steward, said: "Let the judgment be executed"; Novellius, the curator, said: "I order the ward to reject the estate"; Priscus, the Steward of the Emperor, said: "You are answered, you know what you have to do". The question arose whether, in consequence of this proceeding, the minor should be considered to have rejected the estate of his father. The answer was that, in accordance with the facts stated, he should be held to have rejected it.

22. *Labeo, Probabilities, Book V.*

If anything which the ward does would tend to release his guardian from liability to him, the guardian cannot legally consent for him to do it.

TITLE IX.

WHEN MINORS CAN SUE OR BE SUED ON ACCOUNT OF THE ACTS OF THEIR GUARDIANS OR CURATORS.

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

Aristo says that a ward who is in possession can have judgment rendered against him on account of the fraud or negligence of his guardian; but I do not think that the damages should be fixed at the amount to which the plaintiff will make oath in court. Nevertheless, this would

be the case if the ward can recover the value of the property from his guardian.

2. *Ulpianus, Opinions, Book I.*

Where a guardian or a curator lends the money of the minor whose affairs he is administering, and he himself makes the stipulation, or purchases land in his own name, an equitable action will be granted to the party to whom the money belongs, for its recovery, or for the collection of the loan.

3. *Papinianus, Questions, Book XX.*

The fraudulent acts of guardians can neither injure nor profit their wards. When it is commonly said that the fraud of a guardian cannot injure a ward, this means in case the latter is not pecuniarily benefited by the deceitful conduct of the guardian. Wherefore, Sabinus very reasonably holds that the ward can be sued in a tributorian action on account of fraud committed by his guardian; for instance, if he should favor the interest of his ward by means of an unjust distribution of property. The same rule applies in an action on deposit, and also in one claiming an estate, provided that it is proved that what the plaintiff lost through the fraud of the guardian was credited to the account of the ward.

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

If, however, the guardian should commit any fraudulent act with reference to outside matters, the ward would sustain no injury.

5. *Papinianus, Opinions, Book V.*

After the death of an insane person an action to enforce a judgment will not be granted against a curator who administered his affairs, any more than against a guardian; provided that, after his office has been relinquished it is established that no renewal was made by his consent and the obligation transferred to either the curator or the guardian.

(1) A guardian who binds himself to pay a sum of money for which judgment was rendered against the father of his ward, can legally refuse to do so, if an action is brought against him after the termination of his guardianship. It was decided that the same rule will not apply to the case where a guardian borrowed money in his own name, and with it paid a judgment for his ward, unless the creditor made the contract in order that the money might be used for the satisfaction of the judgment.

6. *The Same, Definitions, Book II.*

A guardian, in compliance with a decree of the Prætor, left an agent for the administration of the affairs of his ward. If judgment is rendered in favor of said agent, an action for its enforcement will be transferred to the ward, just as if the guardian himself had obtained it.

7. *Scævola, Questions, Book XIII.*

Relief is granted to a guardian who defends a young child, in order that an action for the enforcement of the judgment may be granted against the ward.

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

A guardian, who was at the same time the co-heir of his ward, had an action brought against him for the execution of a trust, and bound himself for payment in full. The question arose whether an equitable action should be granted against the ward, after he had reached the age of puberty, for the recovery of his share of the amount. The answer was that it should be granted.

TITLE X.

CONCERNING SUSPECTED GUARDIANS AND CURATORS.

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

The subject which we are about to discuss is one of frequent occurrence and extremely important, for guardians are every day charged with being suspicious.

(1) Therefore, let us examine, in the first place, how this charge of being suspicious originates; before whom a guardian or a curator can be accused of being suspicious; and finally, who can be removed, and by whom, and for what reasons; and what is the punishment of a suspected guardian.

(2) It should be remembered that the accusation of suspicion is derived from the Law of the Twelve Tables.

(3) We give the right of removing suspected guardians to the Prætors, at Rome, and in the provinces, to the Governors of the same.

(4) There was formerly some doubt as to whether a suspected guardian could be accused before the deputy of the Proconsul. The Emperor Antoninus, along with the Divine Severus, stated in a Rescript to Braduas Mauricus, Proconsul of Africa, that this could be done, because when the jurisdiction of the Proconsul was delegated, the entire duty of dispensing justice passed to him. Therefore, if the Prætor delegates his jurisdiction, it must be said that a suspected guardian can likewise be accused before him to whom the authority was transferred; for, while this rescript only has reference to provinces, he also to whom jurisdiction has been delegated by the Prætor can take cognizance of the case of a suspected guardian.

(5) We have shown who can take cognizance of an accusation of suspicion; now let us see what guardians can be suspected. And, in fact, all guardians can be denounced as suspicious, whether they are testamentary, or not, or of some other kind. Hence a legal guardian can be accused, but what if he is a patron? The same rule will still apply, provided we remember that favor should be shown to a patron.

(6) The next thing in order is to see who can accuse a patron as being suspicious. And it should be remembered that this is a public action, that is to say, it is open to all.

(7) Moreover, even women are permitted to bring such an accusation, but only those can do so who are necessarily induced to proceed through affection, as, for instance, a mother, a nurse, and a grandmother. A sister, also, can denounce a guardian as suspicious (for a Rescript of the Divine Severus with reference to a sister is extant). And, indeed, the Prætor will permit any other woman to bring such an accusation, whose sincere affection he knows to exist, who does not transgress the modesty of her sex, and who has such a regard for the ward that she cannot bear to have injury inflicted upon him.

(8) Where anyone of plebeian rank is accused before the Prætor of any atrocious acts committed during his guardianship, he shall be sent to the Prefect of the City to be severely punished.

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

A freedman shall also be sent to the Prefect of the City for punishment, if he is proved to have fraudulently administered the guardianship of the children of his patron.

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

A guardian can also accuse his fellow-guardian of being suspicious, either during his term of office, or after he has relinquished it, and while his fellow-guardian still continues the administration of the same. This the Divine Severus stated in a Rescript. The Divine Pius went still further in a Rescript addressed to Cæcilius Petinus, and held that a guardian who had been removed for being suspicious, could bring the same charge against his fellow-guardians.

(1) The freedmen of wards will act in a grateful manner if they denounce as suspicious the guardians or curators of the said wards, where they improperly conduct the affairs of their

patrons, or of the children of the latter. But if they wish to accuse their own patron of being suspicious in the management of the guardianship, it is a better plan to reject their accusation, for fear that something more serious may be divulged during the inquiry; since the right to bring such a charge is open to all persons.

(2) Not only the curator of a minor, but also one of an insane person or a spendthrift, can be removed on the ground of suspicion.

(3) Moreover, anyone who has supervision of the interests of an unborn child, or of property without an owner, is not free from the danger of being called to account by this proceeding.

(4) Again, let us see whether a suspected guardian can be discharged without any accusation. The better opinion is that he should be discharged, if it should appear to the Prætor, from conclusive evidence of the facts, that he is suspicious. This should be understood as being for the benefit of wards.

(5) Now let us consider for what reasons suspected guardians may be removed. And it should be noted that it is permissible to accuse a guardian of being suspicious, if, on account of having committed fraud during his guardianship, he neglected his duties, or acted basely, or in any manner injuriously to his ward; or, while administering the trust, he misappropriated any of the property of the former. If, however, he has done anything of this kind before he assumed the office, even though it had reference to the property of the ward or the management of the guardianship, he cannot be accused of being suspicious, because the offence took place before his appointment. Hence, if he should have stolen any of the property of the ward before he became his guardian, he should be accused of the crime of robbing the estate, otherwise of theft.

(6) It may be asked if anyone who was the guardian of a ward, and was afterwards appointed his curator, can be accused of being suspicious, on account of offences committed during the guardianship. And, as an action on guardianship can be brought against him by his colleagues, it follows that it must be held that an accusation of suspicion cannot be brought, for the reason that an action on guardianship will lie after that office is relinquished and the duties of the other assumed.

(7) The same question may arise where it is stated that one having ceased to be guardian resumes the office; as, for instance, where he was appointed for a certain time, or under some condition, and he is appointed a second time, either on the fulfillment of some testamentary condition, or by the Prætor; for can he then be denounced as suspicious? And since there are two guardianships, if there is anyone who can bring a tutelary action against him, it would be perfectly proper to hold that an accusation for suspicion will not lie.

(8) If, however, there is but one guardian, as the investigation of his administration cannot be made, should he be removed from the management of the trust, as being suspicious, because he was guilty of improper conduct during his former guardianship. Hence the same rule can be said to apply in the case where a single curator was appointed after the termination of the guardianship.

(9) If a guardian should be appointed to hold his office as long as he remains in Italy, or as long as he does not go beyond sea, can he be accused of being suspicious on account of some act which he performed before he went beyond sea? The better opinion is that he can be accused, since the guardianship remains the same where it has intervals.

(10) Where anyone, who is about to be absent on business for the State, requests that another guardian be appointed in his stead, can he, after his return, be accused of being suspicious, because of some transaction which took place before his departure? Since he can be sued in a prætorian action on account of his previous administration, the accusation cannot be brought.

(11) Where a party who was appointed the curator of an unborn child, or of unoccupied

property, was guilty of fraudulent conduct, and afterwards becomes the guardian of said child, is there any doubt that he can be accused of being suspicious on account of the fraud which he committed during his curatorship? If, indeed, he has any fellow-guardians, he cannot be accused, for the reason that an action can be brought against him, but if he has none, he can be removed from office.

(12) Where a guardian is an enemy of the ward or his relatives, and, generally speaking, if there is any good reason to induce the Prætor not to permit him to administer the guardianship, he should reject him.

(13) Severus and Antoninus stated in a Rescript to Epicurius that: "If guardians should sell property which it is forbidden to dispose of without a decree, the sale will be void; but if they fraudulently alienate the said property, they must be removed."

(14) A guardian who does not demonstrate his ability to support his ward is suspicious, and can be removed.

(15) If, however, he does not conceal himself, but, being present, contends that no decree can be rendered against him, because the wards are poor; and if, after advocates have been appointed for the ward, the guardian is convicted of falsehood, he should be sent before the Prefect of the City; nor does it make any difference if someone does this in order that he himself may be appointed guardian by means of a fraudulent examination, or if, having been appointed in good faith, he intends to plunder the property of another. Therefore, he should not be removed on the ground of suspicion, but should be sent to the magistrate to undergo the penalty which is ordinarily imposed upon those who purchase a guardianship, through having corrupted the officers of the Prætor.

(16) Guardians who have not made an inventory, or who obstinately refuse to employ the money of the ward in the purchase of land, or deposit it until an opportunity for its investment may be found, are ordered to be imprisoned, and, in addition, should be regarded as being suspicious. It must be remembered, however, that all should not be treated with this severity, but only those of inferior rank; for I do not think that persons of high position should be confined in prison on this account.

(17) A guardian who, without proper consideration, or through fraud, induces his ward to reject an estate, can be accused as suspicious.

(18) Where a guardian is removed on account of laziness, idleness, stupidity, or incompetence, he relinquishes the guardianship or curatorship without any imputation against his integrity. When, however, he is not removed from office on account of fraud, but only that a curator may be joined with him, he will not be in bad repute, for the reason that he was not ordered to surrender the guardianship.

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

There are reasons why anyone may relinquish a guardianship or a curatorship and preserve his reputation.

(1) Therefore, the cause of his removal should be mentioned in the decree, in order that it may be known that the reputation of the guardian does not suffer.

(2) But what if the magistrate did not, in his decree, indicate the cause of the removal? Papinianus says that this should not affect the good name of the guardian; which is correct.

(3) If the Prætor by his decision does not remove the guardian from office, but forbids him to discharge its duties, it must be said that the better opinion is that he ceases to be a guardian.

(4) Those who have administered none of the affairs of the trust cannot be accused of being suspicious; they can, however, be removed on the ground of idleness, negligence, or fraud, if they have acted dishonestly.

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

He also can be denounced as suspicious who has given security, or who offers to give it; for it is more advantageous for the ward to have his property safe than to hold instruments merely providing for its preservation. Nor is a fellow-guardian to be tolerated who did not denounce his colleague as suspicious, because he had given security to his ward,

6. *Callistratus, On Judicial Inquiries, Book IV.*

For the reason that security does not change the evil disposition of the guardian, but gives him an opportunity to more readily plunder the property of the ward.

7. *Ulpianus, On All Tribunals, Book I.*

Children under the age of puberty are not permitted to denounce their guardians as suspicious; but it is clear that minors are allowed to denounce their curators in this manner, if they desire to do so; provided that they act under the advice of their near relatives.

(1) Where not fraud, but gross negligence which very nearly resembles fraud, has been committed by a guardian, he should be removed, as being suspicious.

(2) In the consideration of this subject, certain additional provisions were made by a Rescript of our Emperor and the Divine Severus, addressed to Atrius Clonius; for they decreed that, where guardians did not appear in cases involving the distribution of supplies to their wards, they should be deprived of their property, and that the ward should be placed in possession of the effects of him who had been pronounced suspicious by the decree, for the purpose of preserving the same, and if it was perishable, or liable to be diminished in value by delay, it was ordered to be sold, after the appointment of a curator.

(3) Moreover, if a guardian does not appear after having been appointed, it is customary to summon him by several proclamations, and finally, if he does not present himself, he should be removed from office, because of his non-appearance. This proceeding should only be resorted to very rarely, and after a careful investigation has been made.

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

We consider a guardian to be suspicious whose behavior is such as to render him an object of distrust; for a guardian, however poor he may be, should not be removed on the ground of suspicion, if he is trustworthy and diligent.

9. *Modestinus, Inventions.*

Where a guardian is connected with his ward by some tie of relationship or affinity, or where a patron is administering the guardianship of his enfranchised ward, and is about to be removed from the office, the best course is for a curator to be joined with him, rather than to have him removed with blemished character and reputation.

10. *Papinianus, Questions, Book XII.*

When a guardian is removed on account of suspicion, by a decree of the Prætor, he need have no apprehension of liability for the time to come, for it would be unjust for anyone to be removed from guardianship or curatorship, and still not be secure for the future.

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

After a guardianship has ceased to exist, the investigation of a suspected guardian is also at an end, even though the guardianship was the first to terminate.

12. *Julius Aquila, Opinions.*

In an investigation of suspicion there is nothing in the facts stated, by which a curator can prevent the Prætor from making use of a slave of the ward for the detection of the fraud of the curator.

THE DIGEST OR PANDECTS.

BOOK XXVII.

TITLE I.

CONCERNING THE EXCUSES OF GUARDIANS AND CURATORS.

1. *Modestinus, On Excuses, Book I.*

Herennius Modestinus to Ignatius Dexter, Greeting. I have composed a book which I have entitled "The Excuses of Guardianship and Curatorship", which seems to me to be very useful, and which I send to you.

(1) I shall do all that is possible to make the learning of these matters clear, while translating the legal terms into the language of the Greeks, although I am aware that they are not readily adapted to translation.

(2) I shall also add to the narration of the matters to be discussed the identical phraseology of the enactments, where it is necessary, in order that, by the possession at the same time of the legal doctrines and the commentaries of the same, those requiring them may have the laws in all their integrity and utility.

(3) Therefore, in the first place, it should be stated what persons should not be appointed.

(4) Guardians shall not appoint freeborn guardians or curators for minors who are freedmen, unless there is an entire lack of freedmen in the place where the appointment is to be made; for a Rescript of the Divine Marcus directs that freedmen should alone be appointed guardians for emancipated wards, who are residents of the same locality. Where, however, another is appointed, the Divine Severus, mindful of the interest of minors, stated in a Rescript that the party would be liable under the guardianship, unless he could give reasons for not accepting it in compliance with the law.

(5) A husband cannot act as a guardian of his wife (as the Senate has decreed), and if he should be appointed he shall be discharged.

2. *The Same, Excuses, Book II.*

Persons who have attained the age of seventy years are excused from the duties of guardianship and curatorship. It is necessary, however, that they should have passed the age of seventy at the time of their appointment, either when the heir has entered upon the estate, or when a condition prescribed by law has been fulfilled, and not within the time established to render the excuse valid.

(1) Moreover, age is established either by the certificate of birth, or by other legal evidence.

(2) A large number of children is a good excuse for release from the duties of guardianship or curatorship.

(3) All the children, however, must be legitimate, although they may not be under paternal control.

(4) It is necessary that the children should be living at the time their fathers are appointed guardians, for any who have previously died shall not be included among those entitled to be excused; nor, on the other hand, do any who die subsequently prejudice the rights of their parent. This is also set forth in a Constitution of the Divine Severus.

(5) Although, indeed, this seems to have special reference to a testamentary guardian, it is, nevertheless, applicable to all others.

(6) While a child in the womb of its mother is by many provisions of the law considered as already born, still, neither in the present instance, nor with reference to other civil employments, can this operate to release the father. This rule was also set forth in a

Constitution of the Divine Severus.

(7) Again, not only do sons and daughters effect the release of their father from guardianship, but also grandchildren, both male and female, who are the offspring of sons. Moreover, it is only when their father is dead, that they can supply his place with their grandfather. Then, no matter how many grandchildren are born to a single son, they are reckoned only as one child. This also can be ascertained from those constitutions which treat of children; for it is never easy to ascertain where a constitution refers to sons, but this can readily be done where the reference is to children, for this appellation includes grandchildren also.

(8) It is necessary that the party who is appointed should have, at the time, the number of children prescribed by the constitutions, for if they should be begotten after his appointment, this will be of no benefit to him by way of excuse, as the Constitution of Severus and Antoninus sets forth.

(9) Persons who are called to a guardianship or a curatorship may be excused where they already have charge of three guardianships or curatorships; or where three guardianships and three curatorships are united, and are still in existence; that is to say, where the minors have not yet attained their majority. Where, however, anyone is the curator, not of a minor, but of an insane person or a spendthrift, such a curatorship shall be included in the number of those permitting exemption, as is stated in the Constitution of Severus and Antoninus. The distinguished Ulpianus gives the same opinion in the case of persons having the administration of three guardianships.

3. *Ulpianus, On the Duties of the Prætor Having Jurisdiction Over Guardianships.*

The administration of three guardianships offers a good excuse. Three guardianships are understood to mean, not that the number of wards give rise to distinct guardianships, but that the estates are separate and distinct. Hence, where a guardian is appointed for three brothers who are entitled to an undivided estate, or where a guardian is appointed for two of them, and a curator for the others, he is held to have undertaken but one guardianship.

4. *Modestinus, Excuses, Book II.*

We have stated that parties charged with the administration of three guardianships are not required to accept a fourth. Hence the question arises, where anyone is administering two guardianships, and having been called upon to accept a third, appeals, and, while the appeal is pending, is appointed to a fourth guardianship, whether he can excuse himself from the fourth by mentioning the third, or whether he can renounce it altogether. I find that it has been determined by the Divine Severus and Antoninus that a party who has appealed from the appointment of a third guardianship cannot be charged with a fourth; but that, while his application to be excused from the third appointment is pending, he must await its determination to ascertain whether he shall be charged with a fourth appointment or not. There is a good reason for this, for if anyone should undertake the administration of the fourth guardianship, and it should happen that his appeal from his appointment to the third was improperly taken, and the appointment should stand, he would be charged with the administration of four guardianships, which is contrary to law.

(1) Where a father has the administration of three guardianships or curatorships, his son shall not be annoyed with the administration of another, as has been decided by the Divine Severus and Antoninus. This rule also applies to the case of a son, for the guardianship of a son will effect the release of his father, and this is the case where the guardianships are administered in common, by both; that is to say, where one is administered by the son, and two by the father, or vice versa. The same rule applies where the duties of administration are discharged by a single household, and not by separate ones. The distinguished Ulpianus also held this same opinion.

5. *Ulpianus, On the Duties of the Prætor Having Jurisdiction Over Guardianships.*

It is sufficient that the parties charged with three guardianships should belong to the same family. Hence, if the father, the son, or the brother of anyone who is under the same control, is charged with the administration of three guardianships, the father will be responsible for the reason that they are administered with his consent. This will be a good excuse for all of them to be released from any other guardianship. Where, however, they do not administer the trusts with the consent of the father, it has been frequently stated in rescripts that this will not be available as an excuse.

6. *Modestinus, Excuses, Book II.*

If anyone already charged with the administration of two guard-

ianships should have two others simultaneously imposed upon him, the one which is third in order will be available to him to obtain a release from the fourth; even though the Emperor himself may have made the appointment of the fourth, or the third, if, before he was aware of the order of the Emperor, he had been appointed to the administration of the other guardianship. Where, however, no order was observed, but the two appointments were made by different letters upon the same day, he who made the appointment, and not the appointee, shall select which charge he must administer.

(1) Grammarians, sophists, rhetoricians, and physicians in active practice, are entitled to exemption from guardianship and curatorship, just as they are from other public employments.

(2) Again, in every city there are a number of rhetoricians, as well as certain philosophers mentioned in the laws, who are excused from the exercise of public duties, which is stated in a Rescript of Antoninus Pius written for the province of Asia, but which is also applicable to the entire world, and whose contents are as follows: "Small towns are entitled to five physicians, three sophists, and the same number of grammarians, who shall be exempt from the duties of guardianship; larger ones shall be entitled to seven who practice the healing art, and four of each of those who give instruction in both the above-mentioned branches of learning. The largest cities shall be entitled to ten physicians, five rhetoricians, and the same number of grammarians. The largest city, cannot, however, grant exemption to a greater number. It is proper that the capitals of countries should be included in the number of the largest cities; that those which have either a tribunal or a place where causes are heard and determined should be embraced in the second class; and all others in the third."

(3) It is not lawful for this number of exceptions to be exceeded either by a Decree of the Senate, or for any other reason; the number can, however, be diminished, since it is apparent that this measure has been taken for the benefit of the civil service.

(4) These persons, moreover, do not enjoy this exemption, unless they have been regularly registered by a Decree of the Senate, and are not negligent in their practice.

(5) Paulus states that philosophers are also exempted from guardianship; for he says philosophers, orators, grammarians, and those who publicly instruct youths, are excused from the exercise of its duties. Ulpianus also makes a similar statement in the Fourth Book on the Office of Proconsul.

(6) Our Emperor and his father stated in a Rescript addressed to Lælius Bassus that a physician could be rejected by a municipality even though he had already been licensed.

(7) The same Constitution of the Divine Pius states with reference to philosophers that their number has not been officially determined, because very few really belong to this profession. I think, however, that those who are endowed with great wealth will voluntarily contribute their property for the benefit of their country. But where they speak principally of their worldly possessions, it is evident from this fact that they are not true philosophers.

(8) There is a Section of a Constitution of the Emperor Commodus mentioned in a Rescript of Antoninus Pius, in which it is apparent that philosophers enjoy exemption from the duties of

guardianship.

It is expressed in the following terms: "Moreover, in conformity with all these things, as soon as my Divine Father ascended the throne, he confirmed by a Constitution all existing honors and immunities, stating that philosophers, rhetoricians, grammarians, and physicians were exempt, while conducting the schools of the priesthood, and that they cannot be forced to furnish supplies of corn, wine, or oil, or purchase the same; that they cannot be compelled to preside in court, or act as deputies, or be enrolled in armies, or, against their consent, be subjected to any other public service."

(9) It must also be remembered that anyone who gives instruction in his own country, or practices medicine, is entitled to this exemption, for if a man from Comana teaches or practices medicine in Cæsarea, he will not be exempt at Comana. This rule has also been promulgated by the Divine Severus and Antoninus.

(10) Indeed, Paulus writes that the Divine Pius and Antoninus ordered that persons distinguished for learning should be exempt, even if they exceeded the number of those already registered; where they established their residence in a different district.

(11) It was promulgated by the Divine Severus and Antoninus that anyone who taught philosophy at Rome either with or without a salary should enjoy the same exemption as if he taught in his own country. It can be adduced as a reason for such a decree that, as the Imperial City is considered to be the common country of all the people, he who honorably makes himself useful should enjoy exemption there, not less than in the place of his birth or residence.

(12) In fact, teachers giving instruction in any district are not entitled to exemption, but those who teach at Rome are released from guardianship and curatorship.

(13) Ulpianus, in his Book on the Duties of the Prætor having Jurisdiction of Guardianship, writes as follows: "Athletes are entitled to exemption from guardianship, but only such as have been crowned in the Sacred Games."

(14) The governorship of provinces, as, for instance, of Asia, Bithynia, Cappadocia, confers exemption from guardianship; that is, so long as the parties hold the office.

(15) Guardianship is not a public employment, nor one to which a salary is attached, but a civil office; and it is held that the administration of a guardianship cannot be carried on outside of the province.

(16) The magistrates of cities are released from guardianship and curatorship.

(17) Enmity resulting from the accusation of a capital crime, manifested by the appointee against the father of the ward, also affords a release from guardianship, unless it appears that the guardian was appointed subsequently by will, or after the will was drawn up, the strife due to the capital accusation no longer existed; or the enmity preceded the execution of the will; and it is clear that the guardian was appointed for the purpose of being subjected to responsibility and annoyance growing out of the transaction of business. This also is made manifest by a Rescript of the Emperor Severus.

(18) Moreover, anyone can be released from the duties of guard-

ianship when a question is raised with reference to the condition of the ward, and it appears that this was not done through malice, but from motives of good faith. This rule was promulgated by the Divine Marcus and Severus.

(19) Paulus writes as follows with reference to persons residing in the country, who are of humble rank and illiterate: "Inferior rank and rusticity sometimes can be alleged as an excuse, according to Rescripts of the Divine Hadrian and Antoninus." The excuse of a party who states that he has no knowledge of letters should not be accepted unless he is inexperienced in

business.

7. *Ulpianus, On Excuses*.

Poverty, indeed, affords a good excuse, where anyone can prove that he is unequal to the burden imposed upon him; and this is contained in a Rescript of the Divine Brothers.

8. *Modestinus, Excuses, Book III.*

Soldiers, however, who have honorably served their time of enlistment are at present entitled to exemption from the guardianship of any other persons whomsoever. But with reference to the guardianship of the children of those who have served in the same rank, or of such as were formerly soldiers, the comrades of the latter shall be excused during the first year following their discharge. But, after that time, they shall not be entitled to exemption; for the equality of military distinction always appears to be stronger than the privilege attaching to the service, unless perhaps they should have other good reasons for release from guardianship; as, for instance, the number of their years, or anything else of this kind for which it is customary for private individuals to be exempt from all similar obligations. This rule, however, applies to the sons but not to the grandsons of those who were formerly soldiers, for the grandsons of veterans are held to occupy the same position as other private individuals.

(1) Those, indeed, who have been ignominiously discharged, are considered to be like persons who have never been in the army, and for this reason they themselves are not entitled to the privilege of a soldier; and if others who were formerly in the service should be appointed guardians of their children, they will not be required to serve.

(2) Sometimes, however, soldiers do not complete their terms of service and still are entitled to exemption from guardianship; but this is not the same exemption as those are entitled to who have served their full time. He who has been more than twenty years in military service is held to be in the same position as he who has served as a soldier for the full time.

(3) Anyone who has been discharged within this time is not entitled to perpetual exemption from guardianship, but only to exemption for a certain period; just as is the case with other civil employments. Where anyone is released from military duty within five years, he shall not claim any exemption for himself; and he who has served five years shall be entitled to exemption for one year; he who has served eight, shall be exempt for two years; he who has served twelve, for three years; he who has served sixteen for four years; and he who has served twenty years shall, as we stated above, always be exempt.

(4) Anyone who has served in the Night Watch of Rome shall be entitled to exemption for only one year.

(5) What has been stated also applies to persons who have been honorably discharged, or have received a discharge on account of illness, for this is also an honorable excuse; but he who has been ignominiously discharged is not entitled to exemption.

(6) A veteran is considered to be one who has not only served in a legion but has served in any military capacity whatsoever, provided he has been honorably discharged. He can, however, be appointed guardian of the children of another soldier; for one who has served in a legion can be appointed guardian of the children of another who has served in the Night Watch.

(7) A former soldier can also be appointed curator for a minor in the service, where the father of the latter is dead, or even if he has been emancipated.

(8) Constitutions exist which establish all these rules.

(9) Ulpianus also states the same things. Those who have been dishonorably discharged are evidently excluded from guardianship in the City, for the reason that it is unlawful for them to enter therein. Anyone who has served in the urban cohorts, even though he has been discharged before twenty years have elapsed, is still entitled to perpetual exemption from

guardianship.

(10) The question, however, arose whether former soldiers should accept a guardianship at once, or whether during the same time, they could not discharge the duties of the office more than once, so that the first guardianship having been terminated, they could again claim their privilege in a different manner from private persons, who have executed their trust. This will not benefit those who are not entitled to the privilege, nor can it be reckoned among the three which afford exemption; just as in the case of those who were formerly in military service it is no advantage to have been appointed guardians. This was promulgated in the *Curiæ*, as is shown by a Constitution of the Divine Severus and Antoninus.

(11) It makes no difference for what reason the children of a fellow-soldier require a guardian or a curator; whether because they are emancipated, or because their father is dead. Centurions of the first company of the *triarii*, are, under the Imperial Constitutions entitled to exemption from all other guardianships, for such captains shall serve as the guardians of the children of others. Those, however, shall be considered centurions of the first company of the *triarii* who perform the functions of this office. Where, however, one of them dies without discharging his military duties, another officer of this kind shall not be appointed guardian of his children.

9. *Ulpianus, On the Duties of the Prætor Having Jurisdiction of Guardianship.*

After a tribune has served in the prætorian cohorts he shall be exempt from the guardianship of the children of his colleagues, on account of a privilege granted by the Divine Severus and our Emperor.

10. *Modestinus, Excuses, Book III.*

However, not only those who have served in the ranks, as well as in the other divisions of the *triarii*, but also those who, on account of some necessity, have been absent on public business for the benefit of the Roman people, shall be entitled to exemption for the term of one year after their return.

(1) This term of a year is not only granted to those who have completed their ordinary time of military service while engaged in the business for the State, but also to such as have discharged duties of any kind required by the public service, and have returned, even if in so doing they have consumed less time than had been allotted.

(2) Where, however, such persons, were administering guardianships before their departure, and, on this account, relinquished them, because they were absent on public business; after they have returned they must immediately take up their duties again without the benefit of the year of exemption, for this year applies to future and new guardianships, and not to those which should be resumed.

(3) The year of completed days shall be reckoned from the time when the party who is returning takes, or should select, the most direct route, and not one which is circuitous.

(4) Moreover, guardians who are appointed by will can legally refuse to assume the administration of property situated in another province; as is shown by the following Constitution of the Divine Severus: "The Divine Severus and Antoninus, Emperors, to Valerius. If you have been appointed a testamentary guardian, you must appear within the prescribed time and ask to be released from the administration of property situated in another province."

(5) Where one who has completed his service as first centurion of the *triarii*, has undertaken the guardianship of the son of one of his fellow-soldiers, and has been restored to his position through military necessity, he must relinquish the cares of the guardianship.

(6) In like manner, a curator shall be appointed for minors in the place of the guardian where the latter has become the colleague of the father of said minors; as is set forth in a

Constitution of the Divine Severus; and this is applicable to all similar instances, so that a curator can be appointed in the place of such a guardian when he is temporarily released.

(7) Where a freedman, who has not arrived at puberty, is appointed by his patron guardian of his children, or where any minor under twenty-five years of age is appointed, so long as he is under the age of puberty, he shall not be required to discharge his duties, but in the meantime a curator shall be appointed in his place. The rule is the same where the legal guardian happens to be a minor, for a curator shall meanwhile be appointed in his stead.

(8) Where a guardian is ill, but it is not necessary for him to be permanently discharged from the guardianship, a curator shall, for the time, be appointed in his stead, and when he recovers, he shall again resume the performance of his duties. A similar rule applies where a guardian becomes insane. With reference to this, Ulpianus writes as follows: "Illness is a valid excuse, but it must be such an impediment as to prevent anyone from attending to his own affairs"; which our Emperor, together with his father, also stated in a Rescript.

11. *Paulus, On the Excuses of Guardians*.

This rule not only prevents them from undertaking the duties of a guardianship, but also should cause their discharge where those duties have already been assumed.

12. *Modestinus, Excuses, Book III.*

Ulpianus said the same thing. But it is added in this Rescript that it is customary for guardians to be released either temporarily or permanently according to the character of the disease with which they are afflicted. Moreover, insanity does not bring about an absolute discharge, but causes the temporary appointment of a curator.

(1) There are also others who, although they are already acting as guardians or curators, can still be instantly released from any remaining responsibility; as, for instance, those who, in obedience to a rescript of the Emperor, have changed their residence, he being aware that they were guardians, and having given his express permission for the change to be made, this fact having been stated in the Imperial Letters.

13. *The Same, Excuses, Book IV*.

It must be noted that neither guardians appointed by proper authority nor testamentary guardians are required to appeal, as is stated by the Constitution of the Divine Severus and Antoninus. This rule should also be observed with reference to the appointment of a curator, for curators in very few respects differ from guardians. They, however, have permission to appeal from decisions brought against them when they offer excuses.

(1) It is necessary, however, for many formalities to be observed in order that guardians and curators may show good cause for their discharge. They are required, in the first place, to make application to the court within the time prescribed by law, which is as follows. He who is in the same town where he has been appointed, or within the hundredth milestone from said town, shall file his excuse within fifty days, for after this he shall not be permitted to do so, but will be obliged to discharge his duties; and if he does not observe any of these requirements, he will be in the same position as if he had been guilty of negligence, and there will be no way left for him to offer his excuse. Where, however, he is distant more than a hundred miles from the town, he will be entitled to twenty miles for every day from the one on which he received notice of his appointment (and this notice must be served upon him by the Governor either personally, or at his residence) , and, in addition to the above twenty days, he shall be entitled to thirty more for the purpose of offering his excuse. This rule likewise applies to all designated by will, whether they are guardians or curators, whose appointments it is customary to have confirmed by a magistrate.

(2) We also find another provision in the Decree of the Divine Marcus, which is worthy of examination. For, indeed, the legislator grants to the guardian who is in the town in which he

was appointed, or who is within the distance of a hundred miles from the same, the term of fifty days, but to him who resides beyond the distance of *a* hundred miles, he grants one day for every twenty miles, and, in addition to these, he allows thirty days for the presentation of his excuses. It results from this that, if the residence of the person is distant one hundred and sixty miles, he would be entitled to a term of thirty-eight days, that is to say, eight days for the hundred and sixty miles, or one day for every twenty miles, and thirty days in addition, in which to make application to be excused. Therefore, he whose residence is farther away is in a worse condition that he who resides within a hundred miles, or in the town itself; for, indeed, the term of fifty days is always granted to the latter, but a shorter time is allowed the former.

But although the terms of the law, if strictly interpreted, should be understood in this way, still, the intention of the legislator was entirely different; for Cerbidius Scævola, Julius Paulus, and Domitius Ulpianus, authorities most eminent and learned in the law, held that this is the case, stating that the rule must be observed that no one shall be entitled to a term of less than fifty days, when the time computed for the journey added to the thirty days which the law allows for the offering of excuses, exceeds fifty days; for instance, if we should say than anyone resides four hundred and forty miles from the town, he will be entitled to twenty-two days to make the journey, and thirty more to present his application to be excused.

(3) All must observe this rule with reference to time who, for any reason whatsoever, desire, either wholly or in part, to be released from the duties of guardianship or curatorship.

(4) It has been decided as the result of this that, where anyone desires to avail himself of any kind of an excuse, he shall not be heard, if he does not make his application within the prescribed time; unless, indeed, he should be a citizen of some other state.

(5) It is so necessary for the prescribed time to be observed, that if this is not done, and the party having presented his excuse should be discharged, he will not be released; as the Divine Severus and Antoninus state in one of their Constitutions which directs that he who has been appointed in the place of a guardian shall not be retained in office, on the ground that it is not lawful for a second guardian to be appointed where there already *is* one.

(6) It will be sufficient for the guardian to apply to be excused within the prescribed time; for if afterwards, he, having changed his mind, should desist, it will not prejudice him. Therefore, if anyone merely presents himself, and does not afterwards remain for the purpose of offering his excuses, after the prescribed time has elapsed he will be barred by an exception. This is stated in a Constitution of the Emperors Severus and Antoninus.

(7) Where anyone, by reason of illness or any other necessity (for instance, on account of the dangers of the sea, or the severity of the winter, or the attacks of robbers, or any other similar impediment), is not able to appear within the prescribed time, indulgence should be granted him, since his good faith is sufficiently established by natural justice; as the Constitution of the Emperors Severus and Antoninus sets forth.

(8) Again, it should be remembered that it is not sufficient for the guardian to merely appear in court, but he is required to give evidence with reference to the reason for which he asks his discharge, and if he has several reasons to advance which may facilitate it, he must enumerate them all; and if he does not do so, he will resemble a party who has never appeared, or if he did appear, did not show good cause for his discharge.

(9) The fifty days aforesaid are reckoned continuously, beginning from the time of notice served upon the party who was appointed.

(10) It is necessary for the reasons for discharge to be presented orally in court, or by a petition. The party can also reduce his reasons to writing, as the same Emperors declare.

(11) These are the rules having reference to the time prescribed by law which must be obeyed. Now let us consider those who are not required to comply with these rules. Guardians who

have not been legally appointed (that is to say, who have been appointed by parties who have no right to do so; or where they were not eligible; or where the wards were responsible for the illegality; or in case the proper legal formalities were not observed), and were not confirmed, and did not administer the trust, will be discharged, and no one can raise the objection that they did not, in their application to be excused, observe the time prescribed by law; for they are not required to make such application, as is proved by the constitutions hereinafter mentioned, which I have submitted by way of example, and which, indeed, are applicable to all cases. "The Divine Severus and Antoninus, Emperors, to Narcissus: Having been appointed guardian by the maternal grandfather of the ward, you are not required to make application to be excused, for you are not legally liable, and therefore if you do not interfere in the administration of the estate you will be secure." Again, in like manner, where magistrates appoint a guardian or a curator who is not subject to their jurisdiction, he will not be required to observe the time prescribed by law, inasmuch as he is neither a citizen, nor a resident of the town.

14. *The Same, Excuses, Book V.*

Where, in matters relating to the excuses of guardians and curators, reference is had to a freedman, it must be noted that not only the freedman of the father of the ward, but also the freedman of his mother, is understood.

(1) And since we are discussing the children of a patron, it must be noted that this term is not only applicable to descendants in the first degree; that is to say, to sons and daughters, but also to grandchildren on both sides, as well as to those who succeed to them.

(2) And even though a freedman may obtain the right to wear a gold ring, he still retains the rank of freedman, in accordance with what was decreed by Marcus Antoninus.

(3) Where a slave purchases himself with his own money, and is manumitted, he shall never be included among other freedmen.

(4) Where there are several freedmen, one shall be appointed guardian for all the children of his patron, and he shall not be discharged even if he is already administering three guardianships.

15. *The Same, Excuses, Book VI.*

An eunuch can also be appointed a guardian, and he cannot allege his infirmity as an excuse, as is set forth in a Constitution of the Emperors Severus and Antoninus.

(1) He who has promised to act as guardian of the children of anyone cannot be excused from guardianship, even though he would otherwise have a lawful reason for his discharge.

(2) It must be remembered that occupancy of an office is not a reasonable excuse for anyone. Wherefore, if a party is a senator, he can be a guardian of persons of inferior rank, as well as of the children of a senator, as the Divine Marcus and Commodus stated in a Rescript.

(3) Where, however, anyone is the guardian or curator of a ward who is not of senatorial or other distinguished rank, and he afterwards becomes a senator, he shall be instantly discharged. His discharge, however, will not take place where the children whose guardianship or curatorship he is administering are of senatorial rank.

(4) In like manner, anyone who is of inferior rank shall not be excused from the guardianship or curatorship of wards occupying a higher position than himself.

(5) The Constitutions of the Emperors state that neither weighers nor accountants (whom we usually designate as arithmeticians), are entitled to exemption.

(6) Moreover, Jews can be guardians of wards who are not Hebrews, just as they can administer property belonging to other trusts; for the constitutions prescribe that they shall remain unmolested, except under circumstances where the public worship may be

contaminated.

(7) An account due to a municipality is not classed as a single guardianship in an application for exemption.

(8) The freedmen of the wives of senators are not released from the duties of guardianship, even though they may transact the business of their patronesses; for this privilege is only conceded to the freedmen of males of senatorial rank.

(9) If the Governor of a city, that is a magistrate, incurs the responsibility of guardianship through an appointment, he cannot include this with other guardianships for the purpose of being released; just as the sureties of a guardian, or those who are appointed honorary guardians by will, are not allowed to do so.

(10) He who collects taxes for the State shall not be excused from curatorship.

(11) It has been asked if a person who is able to advance several reasons why he should be discharged, any one of which is not sufficient of itself, can be excused. For instance, where a man has not reached the age of seventy years, and is not administering three guardianships, and has not five children, or cannot allege any other lawful reason to be discharged, but is administering two guardianships, has two children, and is sixty years old; or where he gives several other reasons which, of themselves, do not afford absolute cause for relief, but which altogether would appear to be sufficient to enable him to be excused, it has been held that he cannot be discharged.

(12) Where a person receives, or is entitled to exemption from civil or public employment, he will not, for this reason, be excused from guardianship or curatorship.

(13) Where anyone has been discharged from guardianship or curatorship, he can, under no circumstances, make use of the causes set forth in the documents to obtain a discharge from another guardianship or curatorship, if he does not advance other reasons for said discharge.

(14) Anyone who states that he was not known to the father or mother of the ward shall not be excused on that account.

(15) Moreover, where anyone has the administration of three guardianships or curatorships, he has no right to be excused from the administration of a fourth; for instance, if he has manifested a desire to accept it. A guardian, however, is only held to have manifested such a desire, who manages a moderate estate.

(16) Ulpianus states in his work on Exceptions, that where a party is administering as one of three guardianships, that of his emancipated son: "I know that a doubt has arisen as to whether this can be asserted in his favor where he applies to be excused from a fourth." I find, however, that a Rescript exists where the guardianship of an emancipated daughter is allowed to be included among other guardianships for this purpose.

(17) Where anyone under paternal control is appointed a guardian, and his father refuses to become his surety, the laws direct that the father himself shall be made guardian, and that the security of the guardianship shall in no way be interfered with, as is stated in a Constitution of the Divine Hadrian, which is as follows: "The Emperor Hadrian to Bitrasius Pollio, Deputy at Lyons. If Claudius Macer, although he is a son under paternal control, appears to be a suitable person to be a guardian, and his father is unwilling to provide security for him, in order that he may deprive his son of the guardianship, and he continues to display this perfidious spirit, I think that you can properly counteract this fraud by compelling both his son and himself to administer the guardianship of the children of Clement."

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

Gaius, by his will, appointed Nigidius guardian of his son, and also appointed him curator until his son had reached his twenty-fifth year. I ask, since it is lawful for Nigidius to be

excused from the curatorship without an appeal, from what day the time fixed by the Divine Marcus to be observed in the application for discharge shall be reckoned; whether this shall be done from the day when the will is opened, or from that when the guardian is called upon to transact business; that is to say, after the ward has completed his fourteenth year? Modestinus answered that the application to be excused from the curatorship must be made at the time when the curator was confirmed by the decree of the Prætor or Governor.

17. *Callistratus, On Judicial Inquiries, Book IV*.

Not only the value of the estate to be entered upon, the administration of which is to be undertaken in the case of three already existing guardianships, but also the ages of the wards, must be considered. For if the ages of the first wards are approaching puberty, so that only a term of six months remains, or if the age of those, the assumption of whose guardianship is involved, is not far from puberty, an excuse will not be allowed. This matter is provided for by the Imperial Constitutions.

(1) Complete exemption was long since granted to the Trojans, both by Decrees of the Senate and Constitutions of the Emperors, on account of the renowned nobility of their city and their connection with the origin of Rome, where wards are concerned who are not Trojans. This the Divine Pius stated in a Rescript.

(2) Those who belong to certain associations, as, for example, to that of artisans, We declare to be entitled to exemption, for they can be excused from the administration of the guardianship of persons who are not members of their organization, in order to compel them to undertake other public employments, even if their property has been subsequently increased. This is also provided for in the Imperial Constitutions.

(3) All bodies or associations, however, are not entitled to be released from the duties of guardianship, although they may not be obliged to assume municipal offices, unless this privilege has been expressly granted them.

(4) He who is performing the duties of Ædile may be appointed a guardian; for the office of Ædile is included among those magistracies whose incumbents are exempt from private employments, according to a Rescript of the Divine Marcus.

(5) It must, indeed, be noted that it has been settled that those invested with public office are released from the duties of guardianship. Those are exempt who, being already in office, are called upon to undertake the duties of guardianship; but it should also be noted that those who have already been concerned in the administration of its duties are not excused, even during the time of their magistracy.

(6) The masters of ships, among their other privileges, do not seem to enjoy that of being exempt from guardianship. This the Divine Trajan stated in a rescript.

(7) Those who dwell in camps are usually exempt from guardianship, except with reference to that of parties who themselves reside in the same camp, and are of the same condition.

18. *Ulpianus, On the Lex Julia et Papia, Book XX*.

Where children are lost in war, this fact affords a valid excuse for release from guardianship. A question arose, however, as to who these children are, whether they are such as are killed in battle, or whether they include all those who are taken from their parents on account of war; as, for instance, those lost in a siege. The preferable opinion is that only those who are killed in battle, without reference to their sex or age, should afford a valid cause for release, for they have lost their lives for their country.

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

It is customary for those guardians who have their residence in Italy to be excused from the administration of provincial matters.

20. *Julianus, Digest, Book XX.*

When the uncle of a ward alleges that the latter has been disinherited, and that he himself was appointed heir, it is but just for the excuse of the uncle to be accepted, and for a guardian to be appointed for the ward; or, if he is unwilling to petition to be released, he shall be removed from the guardianship, in order that the contest with reference to the estate may be expedited.

21. *Marcianus, Institutes, Book II.*

No one can be excused from guardianship on account of a lawsuit which he has with his ward, unless all the property of the latter, or the greater portion of it, is involved in the controversy.

(1) Where a party wishes to be excused, and has several reasons to advance for that purpose, and is unable to prove some of them; he is not prohibited from making use of the others within the time prescribed by law.

(2) Even though a guardian has been appointed for the administration of the entire estate of the ward, he can, nevertheless, make application to be excused from administering the guardianship of property situated beyond the hundredth milestone; unless the estate of the ward is all in said province. For this reason the Governor of the province shall appoint a guardian for said property.

(3) Nor can Senators be compelled to administer a guardianship beyond the hundredth milestone.

(4) A guardian can be appointed for a ward who already has one, but this must be for the management of other property.

22. *Scævola, Rules, Book I.*

Surveyors are not exempt from the duties of guardianship.

(1) Those to whom the Emperor has committed the transaction of any business can be excused from guardianship so long as they are transacting it.

23. *Ulpianus, Opinions, Book II.*

I have already stated that a person has not a valid excuse for release from guardianship on account of some magisterial office, the duties of which he should discharge in a municipality.

(1) I have given it as my opinion that where a soldier is serving in camp, he has a right to be excused if he is appointed guardian for someone who is not serving in the same camp.

24. *Papinianus, Questions, Book XL*

It must by no means be believed that he is deprived of the privilege of being excused who has obtained his freedom by means of a trust; for in almost every instance of this kind, the party who manumits a slave obtains no right as patron against the person of the freedman, except that the latter cannot summon him into court without the order of the Prætor.

25. *Ulpianus, On the Office of the Proconsul, Book II.*

A guardian cannot state his reasons to be excused in a petition.

26. *Paulus, On Excuses*.

It is apparent from a Rescript of the Divine Marcus and Antoninus, addressed to the Prefect of Subsistence, that the measurers of grain have a right to be excused from guardianship.

27. *Marcianus, Rules, Book V*.

Where a legatee is charged to surrender his entire legacy to another, and desires to be released from the responsibility of guardianship, he will obtain his legacy for the purpose of delivering it to the beneficiary; this case being similar to that of an heir who brings an action claiming

that the will is void, and loses his case.

28. *Papinianus, Opinions, Book V*.

Where a guardian applies for confirmation, and before the day of the decree obtains some privilege granting exemption, he cannot legally withdraw the petition which he has already filed.

(1) Where property is left by a parent to guardians by way of remuneration for their good faith, it has been held that it can be retained by the heirs, even though they are strangers, after the said guardians have been excused.

This, however, will not apply to a son whom Ms father has appointed co-heir with, and guardian to his minor brother; since the son is entitled to the bequest of the father on account of his relationship, and not as guardian.

(2) Where a guardian has been exiled for a certain time, he cannot allege this as an excuse, but a curator should be appointed in his stead during the time of his exile.

29. *Marcianus, Institutes, Book II.*

It is evident that if the guardian is sentenced to perpetual exile, he can be released.

(1) Moreover, the ignorance of an exile will be the more readily pardoned, since he could not have established the suspicious character of his fellow-guardian.

30. *Papinianus, Opinions, Book V*.

Our Noble and Illustrious Emperors decided that persons learned in the law, who had undertaken the administration of guardianship, should be excused where they have become members of the Imperial Council, since they must always be in their presence, and the honor paid to them will not be limited either by time or place.

(1) Where the native of a province fixes his residence at Rome, his curator, appointed by a decree of the Governor and the Prætor, shall undertake the administration of his property in both places. It has been held that he shall not be considered as administering two curatorships, because it is evident that two estates should not be held to be vested in the same person.

(2) He who enjoys the benefit of exemption cannot be compelled to undertake the curatorship of his brother.

(3) A patron appointed by his will certain of his freedmen as guardians of another freedman, who had not yet arrived at puberty. Although it may be established that these parties are solvent, they can, nevertheless, in accordance with public law, be excused from being confirmed by a decree.

31. *Paulus, Questions, Book VI.*

If a man, while administering three guardianships, should be appointed by different decrees guardian of two other wards, he can be excused; and if, before he states the reasons why he should be excused, one of the wards whose guardianship he was administering should die, from this time his excuse will not be available, and he will, at once, be bound by the first decree; which is just as if the fourth guardianship was substituted for the third, since he was guardian in accordance with law before he was excused. Therefore he can be excused from the guardianship of him who now occupies the fourth place, and as he was not excused, he must necessarily also undertake the responsibilities of the other, that is, the third guardianship.

It raises no difficulty in my mind, if anyone should say that the guardian is not required to administer this guardianship, for the matter to be considered is whether its administration is terminated by the death of the ward. Moreover, I think that he will also be liable for the guardianship, if he assumes the responsibility of failing to administer it.

(1) This can also occur where a guardian is appointed by two different wills, at the time when he is already administering three other guardianships; and, in this instance, it is not the time when the wills were opened which should be considered, where the question arises which guardianship was first conferred, but the time when the estate was entered upon, or when the condition upon which the appointment depended was carried out.

(2) This difference also exists between the guardianships of which we have treated, where the third and fourth appointments are made, although the guardian is first held liable for the administration of the fourth, because it is this one, that is to say, the fourth, which he is ordered to administer, and he must bear the responsibility of the other from the day upon which he was appointed.

(3) I think that a guardian who has caused his ward to reject the estate of his father should be retained in the fourth guardianship, the former one being, as it were, rejected.

(4) Moreover, I think that the Prætor will act in accordance with law, where he holds that only one guardianship will be sufficient; if it is so extensive and involves so many business requirements that it is equal to several. Hence, brothers who are entitled to equal shares of an estate should not be considered as being subject to several guardianships; or even if the wards are not brothers, where they have the same patrimony, and a single account of the administration must be rendered by the guardian, the same rule will apply. On the other hand, where there are two distinct estates belonging to brothers, two guardianships must be established; for, as I have already stated, it is not the number of wards, but the difficulty of drawing up and rendering the accounts that must be taken into consideration.

32. *The Same, Questions, Book VII.*

Nesennius Apollinaris to Julius Paulus. A mother appointed her minor son her heir, or some stranger appointed a minor who was also a stranger, his heir, by will, and left a legacy to Titius, appointing him a guardian of the said ward. Titius, after having been confirmed, was excused from the guardianship. I ask whether he will lose his legacy. And what would *be* the case where a guardian was not appointed by will, but accepted a legacy, and having been appointed guardian by the Prætor, is excused; can he justly be deprived of the legacy; or does it make any difference where a guardian is appointed for a minor who has been emancipated, or a curator for a child arrived at puberty, by his father? I answered that where a guardian or a curator was illegally appointed by the father, and has been confirmed by the Praetor, he shall be deprived of the legacy, if he prefers to avail himself of the privilege of being excused, and this was also held by Scævola; for, in fact, the Prætor who confirmed the guardian only carried out the wishes of the deceased.

The same rule must be held to apply to the will of the mother. The following instance is similar to that of the mother, namely, where a stranger appoints a minor his heir, and wishes to provide for the appointment of a guardian for him, as is the case with children whom we have brought up. Therefore, it was very properly held that he who refuses to do what the testator required should be deprived of what the latter gave him. I do not think, however, that one who has renounced the responsibilities of guardianship can always be deprived of his legacy, but only where it is apparent that the legacy was bequeathed to him because the party charged him with the guardianship of his children, and not where he would have given it to him in any event, even without the guardianship. This can be established if you insert the legacy in the will, and afterwards appoint a guardian by a codicil; for, in this instance, it cannot be said that the legacy was bequeathed to him because the testator desired him to act as guardian.

33. *The Same, Questions, Book XXIII.*

This distinction, however, seems to be too finely drawn, and should not be admitted, unless the father plainly stated that he wished to bequeath the legacy, even if the legatee should not

administer the guardianship; for a legacy is always presumed to have been given for this purpose, whether it precedes or follows the appointment of a guardian.

34. *The Same, Questions, Book VII.*

From this it is apparent that he whom the Prætor appoints as guardian should not be included in the same class with such legatees; since he can make use of his right to be excused, as he does nothing in contravention of the will of the testator, for, since the latter did not appoint him guardian, we cannot say that he wished him to administer the guardianship of his son.

35. *The Same, Questions, Book XXIII.*

But what if the guardian was not excused, but declined to administer the property, contending that the other guardians were solvent?

Suit can be brought against him if the ward cannot recover from the others. He ought not, however, to obtain the bequest, and his obstinacy should be punished, because to a certain extent he attempted to excuse himself. Much more should anyone be declared to be unworthy of the bounty of the father, who has been removed from the guardianship because of being suspected.

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

Parents are accustomed to select their dearest and truest friends as guardians for their children, and for this reason they bestow legacies upon them, in order to induce them to assume the burden of guardianship. But where such a person has obtained a legacy by will, and has also been substituted for the ward, it is not probable that the testator intended him to be substituted, if he should undertake the guardianship, and therefore the party in question should be deprived of the legacy if the ward is living; but he cannot be excluded from the substitution, as, in this instance, even if the guardianship is undertaken it would be terminated.

(1) Lucius Titius, out of three sons, had one who was emancipated and of an age to entitle him to have a curator. I ask whether the said Titius, when the said emancipated son petitioned for his father to be appointed his curator by the Prætor, can have recourse to the public law, and demand exemption on account of his three sons. I answered that this privilege cannot be denied the father, for the reason that he is entitled to it on account of the number of his children; but that when he is asked to be the curator of his son, he will act contrary to the instincts of nature, if he should attempt to make use of an excuse of this description.

37. *Scævola, Opinions, Book II.*

A testamentary guardian stated in the presence of the Prætor that he had three children; and added that the minor had an uncle who was his legal guardian, and that he himself had been improperly appointed. The decree of the Prætor was as follows: "If you have been appointed guardian for a minor who has a legal guardian, it is not necessary for you to apply to be excused." I ask, when there is really no such uncle who can be the guardian of the minor, whether the appointment of the testamentary guardian will nevertheless stand. I answered that, according to the case stated, although the party may have good reasons to be excused, still, he cannot be released on account of the irregularity of his appointment.

(1) I also ask, if the guardian acquiesces in the decree, whether an equitable action can be granted against him, for the reason that he did not transact the business of the guardianship. I answered that if he failed to administer the guardianship, rather through mistake, because he alleged that he was legally exempt on account of his three children and thought that he ought to be excused, rather than from malice, an equitable action should not be granted.

38. *Paulus, Opinions, Book II.*

The term of fifty days previously mentioned has reference only to contesting the reasons alleged for exemption, as four continuous months are allowed for the settlement of the case.

39. *Tryphoninus, Disputes, Book XIII.*

Where the guardian himself frames and brings forward excuses, and his discharge by the *Prætor* is prevented by delay caused by contradiction, his grounds for excuse can be legally established.

40. *Paulus, Opinions, Book II.*

If, after the trust has been undertaken, the guardian becomes blind, deaf, dumb, insane, or a chronic invalid, he can lay aside the guardianship.

(1) Poverty, which renders the guardian unequal to the labor and burden of guardianship, usually affords exemption.

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

Persons who are transacting public business through favor of the Emperor are excused from guardianship, as well as curatorship, during the time of their administration, even though no special letters have been issued for this purpose.

(1) The same rule applies to those who have charge of the Prefecture of Subsistence, or command the Night Watch.

(2) The attendance of persons absent on public business, who are of the prescribed number, are excused from guardianships to which they may have been appointed, either while absent, or before their departure; but they cannot resign a guardianship where it has already been undertaken.

(3) Persons who are entitled to exemption on account of their connection with some corporate body or association to which they belong are not excused from the guardianship of their colleagues, or of their children, with the exception of those to whom this privilege is expressly granted.

42. *Paulus, Concerning Judicial Inquiries*.

It is clear that they are not compelled to accept the guardianship of the children of their colleagues, if they reside more than a hundred miles from the City.

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

The freedman of a senator who is administering the guardianship of the children of the latter will not be excused from other guardianships.

44. *Tryphoninus, Disputations, Book II.*

In compliance with a Decree of the Divine Marcus, where a freeborn man was appointed guardian of one who is emancipated had a right to be excused, our Emperor, along with his father, the Divine Severus, stated in a Rescript that the same cause for release could also be advanced by anyone who had obtained the right to wear a gold ring.

(1) Therefore, if a freeborn guardian or curator is appointed for an emancipated ward, entitled to wear a gold ring, the result is that an application to be excused offered by him on account of a difference of condition should not be accepted.

(2) If, however, before the ward or minor under twenty-five years of age has acquired the right to wear a gold ring, Lucius Titius, having been appointed his guardian, should be excused on account of his being freeborn, he can be appointed a second time the guardian or curator of said minor, after he has obtained this privilege; for the same reason that it has been decided, and stated in a Rescript, that a guardian shall be excused who has been appointed within a year after he had returned from employment in the public service, and that period having elapsed, he can be appointed in his own place.

(3) And, although a freedman who acts as agent for the transaction of the business of his

patron, a senator, has a valid excuse for not assuming the guardianship of others, still, he who has acquired the right to wear a gold ring and by this means passes into the rank of freeborn persons cannot avail himself of an excuse of this kind.

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

"I appoint Titius the guardian of my children as long as he is not absent on business for the State." Titius administers the guardianship conferred by will, and afterwards departs on business for the State, and ceases to discharge these duties. Shall he be excused on account of his absence on public business, just as if a new guardianship is now conferred upon him? Or should he not be excused because the will preceded his absence in the service of the government, and the guardianship has already been partially administered by him? But what if, in the meantime, children enough should be born to him for him to claim another right to be discharged? The better opinion is that this is but a single guardianship, and therefore he is not entitled to be excused; and that an action of guardianship cannot be brought against him on account of the former time of his administration.

(1) Where, however, the following clause appeared in the will: "I appoint Titius guardian, and, as long as he is absent in the service of the government, he shall not be guardian, but after he returns, he shall be." Let us see what must be held with reference to his absence on account of public business, or in support of any other excuse which may afterwards arise. Another question, however, comes first in order, that is to say, whether testamentary guardians who have been appointed on a certain day, or under some condition, must offer their excuses before the expiration of the time, or the fulfillment of the condition; and especially whether the term of fifty days in which they are required to state their reasons for being excused, begins to run at once. It is true that a party does not become a guardian before the expiration of the time, as he cannot perform its duties before the estate has been entered upon.

Therefore, for the reason that the guardianship has been administered in accordance with the terms of the same will, and the guardian has been excused because he was about to be absent on public business; having returned, he instantly becomes concerned with the administration of the guardianship previously undertaken, even though this should be within a year. In this instance, however, he ceases to be guardian under the same will, and hence can be excused from a second guardianship.

(2) Where a curator is appointed by the Prætor for an insane person or one who is dumb, or for an unborn child, he can be excused on the ground of the number of his children.

(3) We should only understand guardians as being appointed at Rome who are named either by the Prefect of the City, or by the Prætor, or in a will executed at Rome, or in houses adjoining the City.

(4) Where a freedman is prevented by bodily or mental illness from transacting business, so that he cannot attend to his own affairs, the necessity of the case must be considered, in order to prevent the duties of guardianship which cannot be performed from being imposed upon the freedman, to the inconvenience and disadvantage of the ward.

46. *Paulus, On Judicial Inquiries*.

Members of the guild of millers are excused from the duties of guardianship, provided they are actually engaged in the business; but I do not think that those who are merely included in their number should be excused.

(1) Millers residing in the City are excused from acting as guard-

ians, even for the children of their colleagues.

(2) Where anyone states that his residence is not situated where he was appointed guardian, this can also be alleged as a valid excuse. Attention was called to this point by the Emperor

Antoninus and his Divine Father.

TITLE II.

WHERE A WARD SHOULD BE BROUGHT UP, OR RESIDE, AND CONCERNING THE SUPPORT WHICH SHOULD BE FURNISHED HIM.

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

The Prætor is frequently called upon to determine where children must be supported or reside, not only such as are posthumous, but all kinds of children.

(1) It is customary for him to decide, after taking into account the persons, their position, and the term of guardianship, where wards can be best supported, and sometimes the Prætor goes contrary to the will of the father. Hence, where a certain man provides in his will that his son should be reared by a party whom he had substituted, the Emperor Severus stated in a Rescript that the Prætor should determine in the presence of near relatives of the child whether this should be done; as the Prætor should act so that the ward may be supported and brought up by someone to whom no evil suspicion could attach.

(2) Although the Prætor does not promise that anyone who refuses to bring up a ward in his house shall be compelled to do so, still, the question arises whether, if he is unwilling, he can be compelled; as for instance, where a freedman, a parent, or any of the connections or relatives of the ward has been appointed. The better opinion is that sometimes this should be done.

(3) It is not improperly held that where a legatee or an heir refuses to bring up a ward, as he has been charged to do by will, he shall be refused rights of action; just as in the case of a testamentary guardian. This, however, only holds good where the bequest was made with this understanding, for if the testator knew at the time he made the bequest that the legatee would refuse to bring up the ward, the right of action will not be denied him. This rule was frequently stated by the Divine Severus.

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

It is the duty of the judge who has jurisdiction of the guardianship to allow expenses of the guardian, where they are not excessive; as, for instance, where he alleges that he incurred them for the maintenance or the instruction of the ward.

(1) The amount of the expenses allowed by the Prætor should be observed in accordance with his decree; but if he does not determine it, it should be decided by the judge in proportion to the means of the ward; for the guardian should not be permitted to present a claim for what he had expended, if this is more than what is just.

(2) And besides, even where the Prætor has prescribed the sum to be expended for support, and this is beyond the means of the ward, if the guardian did not advise the Prætor of the amount of property belonging to the ward, the account for the entire sum expended for his support should not be allowed; for the reason that if he had informed the Prætor, either the amount allowed would have been decreased, or so large a sum would not have been authorized by the decree.

(3) Where the father himself prescribed the amount to be expended for the maintenance of his children, whom he appointed his heirs at the time he did so, the guardian can render an account of it, unless the amount stated by the testator is beyond the means of the heirs; for then the guardian will be responsible for not having applied to the Prætor to have the allowance diminished.

3. *The Same, On All Tribunals.*

The Prætor has the right to determine the amount to be allotted for the maintenance of wards; and he himself must apportion the

sum which guardians or curators shall expend for the maintenance of wards or minors.

(1) When the Prætor renders his decision with reference to maintenance, he must take into consideration the value of the estate, and make the allowance with such a degree of moderation as not to permit the entire income of the estate to be expended for the support of the ward; but the allowance must always be made in such a way that a balance of the income will remain.

(2) In rendering his decision, he must bear in mind the slaves who are to serve the wards, the income of the latter, as well as the expenses of their clothing and lodging; and the age of those to whom maintenance is granted should also be taken into consideration.

(3) Still, in the case of large estates, not the entire value of the same, but what will be sufficient to enable the ward to live in an economical manner, should regulate the measure of the allowance.

(4) Where, however, the guardian, and he who desires an allowance for his support to be made do not agree as to the means of the latter, an inquiry should be instituted, and maintenance should not be rashly granted, lest injustice be done to one or the other of the parties. First, however, the Prætor should require the guardian to disclose how much is in his hands, and warn him that he will be compelled to pay a high rate of interest on all that is in excess of the sum mentioned in this statement.

(5) The Prætor is also accustomed to allow a certain sum for the education of male and female wards, or minors, who are under twenty years of age; this to be regulated by the amount of their means, and the age of those who are to receive instruction.

(6) Where, however, the wards are poor, the guardian is not compelled to support them out of his own property, and if a ward should be reduced to want after maintenance has been allowed him, the latter should be diminished, just as it is customary to increase it, ' when the estate has been enhanced in value.

4. *Julianus, Digest, Book XXI.*

A certain man appointed his son his heir, and left two hundred *aurei* to his daughter, by way of dowry, when she should marry; but left her nothing else, and appointed Sempronius guardian of the said children. The latter, having been summoned before a magistrate by the relatives and kinsmen of the female ward, was ordered to furnish maintenance to the said ward, as well as money, in order that she might be instructed in the liberal arts, this money to be paid to her teachers on account of the said ward. The male ward, having reached puberty, paid to his sister, who had already attained that age, two hundred *aurei* in discharge of the legacy.

The question arose whether he could recover in an action on guardianship what had been expended for her support, and the amount disbursed by the guardian on account of the guardianship. I answered: I think that, although the guardian may have furnished maintenance for the sister of his ward without a decree of the magistrate, and also provided for her instruction in the liberal arts, as he was unable to do otherwise, he should not, in an action on guardianship, be obliged to pay anything on this ground either to his male ward or to anyone substituted for him.

5. *Ulpianus, On the Duties of Proconsul, Book III.*

Where a dispute arises as to where a ward should reside, or be brought up, a judicial inquiry having been instituted, the proper authority should decide the question. In an investigation of this kind those parties must be avoided who can take advantage of their position to violate the chastity of the minor.

6. *Tryphoninus, Disputations, Book XIV*.

When a guardian is absent, and a ward applies for maintenance, and negligence and want of care are imputed to the former in the administration of his trust, and in support of this it is proved that, on account of his absence, the affairs of the ward have been neglected and abandoned, the relatives and friends of the guardian having been summoned, and a judicial inquiry instituted even in the absence of the guardian, the Prætor shall issue a decree that he who seems to be worthy of such a mark of ignominy shall be removed, or that a curator shall be joined with him; and he who is appointed must provide maintenance for the ward.

When, however, the absence of the guardian was necessary, and happened through accident (for example, where he suddenly made a journey to be present at a judicial inquiry in behalf of the Emperor; and was unable to arrange for the care of his own property, or to attend to the interests of his ward), and his return is expected, and he is solvent, it is not expedient for another to be joined with him as curator; but if the ward demands maintenance out of his own property, a curator can legally be appointed for this sole purpose, namely, to provide support for the ward out of his own estate.

TITLE III.

CONCERNING THE ACTION TO COMPEL AN ACCOUNTING FOR GUARDIANSHIP, AND THE EQUITABLE ACTION BASED ON CURATORSHIP.

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

In this action a guardian must render an account of everything that he did, of every act which he should not have committed, as well as of those which he failed to perform; and he shall be responsible for malice, negligence, and a lack of such diligence as he would employ in his own affairs.

(1) For this reason, the question is asked by Julianus, in the Twenty-first Book of the Digest, whether a guardian is liable to an action on guardianship in case he authorized his ward to make a donation *mortis causa*. He asserts that he will be liable, for he says that this resembles the execution of a will, a right not granted to wards, and thus they should not be permitted to make donations *mortis causa*.

(2) But where a guardian permits his ward to make a donation which is not *mortis causa*, Julianus states that there are many authorities that hold that the donation is not valid, and this is generally true, but some instances may arise in which a guardian can, without blame, allow his ward to diminish his estate; for example, where a decree of the Prætor authorized it, as where the guardian furnished support to the mother or sister of the ward who have no other means of subsistence. For he says that, as the judgment in a case of this kind is rendered in good faith, no one can tolerate that either the ward or his substitute should complain because persons so nearly related to him have been provided with food. On the other hand, he thinks that an action on guardianship can be brought against the guardian, if he neglects the performance of so plain a duty.

(3) A guardian is required to keep accounts of his administration and render them to his ward. For if he does not do so, or does not produce them after they have been made out, he will be liable on this ground to an action on guardianship. It has been established that slaves can be examined and put to the question to obtain information, and this is a part of the duty of the judge; for the Divine Severus decreed that in case neither an inventory nor an account of sales was produced, this remedy should be used in order that accounts might be obtained from the slaves who had transacted the business; and if the guardians should allege that these accounts had been fraudulently made up by the slaves, that the latter could also be interrogated, after having been put to torture.

(4) Moreover, where a guardian has furnished support to the mother of a ward, Labeo thinks that he will not be responsible. The better opinion, however, is that, unless he provided for her when she was in absolute want, he will not be responsible where the estate of the ward is

large. Hence, both of these conditions must exist, namely, the mother must be in want, and that the son in possession of considerable property.

(5) But if the guardian should give a wedding present to the mother at the time of her second marriage, Labeo states that he will not be responsible to the ward for the same. And yet a gift of this kind is by no means a necessary one.

(6) Where a father appoints several guardians for his children, and one of his freedmen among them, and desires the guardianship to be administered by the latter, and the other guardians agree upon a certain sum to be paid to him, because otherwise he would not be able to support himself, Mela is of the opinion that the account of what has been allowed should be rendered.

(7) And therefore, where a guardian was appointed after an examination instituted to ascertain the condition of the estate of the ward, and his fellow-guardians have allowed him support, they should render an account of this, because there is a good reason for doing so.

(8) But if the guardian has furnished provisions to slaves or to freedmen, who were actually necessary for the transaction of the affairs of the ward, it must be said that an account must be rendered of it. The same rule applies to the case of freemen, if a good reason exists for rendering the account.

(9) Moreover, a guardian must account for the costs of a legal action, and for travelling expenses if, in the performance of his duties, it was necessary for him to go anywhere, or to make a journey.

(10) We must now consider instances where several guardians administer the affairs of a ward, and for what proportion each one of them should be sued.

(11) And, indeed, where all of them have administered the guardianship at the same time, and they are all solvent, it is perfectly just that the action should be divided among them equally, just as in the case of sureties.

(12) Where, however, all of them are not solvent, the action should be divided among those who are, and each of them can be sued in proportion to his pecuniary responsibility.

(13) Where a guardian, having been held liable for an act of his fellow-guardian, makes payment, or where he does so in case of an administration in common, and the rights of action have not been assigned to him, it was decreed by the Divine Pius, as well as by our Emperor and his father, that a prætorian action should be granted to the said guardian against his colleague.

(14) It is evident that where a guardian, who has been sued on account of fraud committed by himself and his fellow-guardians, makes payment, the rights of action should not be assigned, nor will a prætorian action lie, because he is suffering the penalty for his own offence, which renders him unworthy to recover anything from the other participants in the fraud. For no association of malefactors is recognized by the law, nor can any legal contribution for injury arise out of the commission of a crime.

(15) Therefore, where guardians are solvent, recourse cannot be had to their fellow-guardians, since in the first place application should be made to the magistrates who appointed them, or to their sureties; and this rule our Emperor stated in a Rescript to Ulpius Proculus. For Marcellus says, in the Eighth Book of the Digest, what had been very frequently set forth in Rescripts, namely, that when one of two guardians is solvent, recourse cannot be had to the magistrate who appointed them; but this is to be understood to apply only where the fellow-guardian was not removed because he had rendered himself liable to suspicion, or where the other did not require him to give security.

(16) It is settled that this action will also lie against the heir of a guardian.

(17) It can also be brought by the heir of a ward, and by similar persons.

(18) A guardian can demand that the rights of action against his fellow-guardian, on whose account he has had judgment rendered against him, can be assigned to him, not only before, but even after his condemnation.

(19) In an action to compel an accounting, not only are guardians at law liable, but all those who legally administer the estate in this capacity.

(20) In this action, should it be considered whether only double damages shall be paid, or the amount in which the ward is interested, in addition? I think the better opinion is that in this action the interest of the ward is not concerned, but merely the value of the property.

(21) It is settled that, under a guardianship, there are two rights of action arising out of a single obligation, and therefore if an action on guardianship is brought, one to compel an accounting will not lie; but, on the other hand, the right of action of guardianship which has reference to this matter is extinguished.

(22) Papinianus, however, says that a guardian who has appropriated the money of his ward is also liable to an action of theft. And if he, having been sued in this action, is held liable for theft, he will not be released from liability to an action for theft, for the liabilities incurred by theft and guardianship are not identical; so that it may be said that two suits can be brought for the same act, and there are likewise two obligations, for liability arises both from the guardianship and the theft.

(23) It should be noted that this action is a perpetual one, and is granted to the heir and his successors, to recover whatever was stolen from the ward during his lifetime. It shall not, however, be granted against the heir and his successors, because it is a penal one.

(24) This suit then can be brought whenever there is an action on guardianship, that is to say when the guardianship is terminated.

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

No one is liable to an action to account for the appropriation of property, unless the guardian abstracted it during his administration of the guardianship.

(1) Where he acted with the intention of stealing, he will also be liable to the penal action for theft. He is, therefore, liable at the same time to both actions, and one of them does not release him from the other. An action for the recovery of the property on the ground of theft will also lie, and if the ward should recover the stolen goods by means of it, this right of action will be extinguished, for the reason that the ward has lost nothing.

(2) Although this action is brought for double the amount, the recovery of the property is only half, and the penalty is therefore not double.

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

Where an action on guardianship, based on voluntary agency, is brought, and the amount due to the guardian or curator from his adversary is uncertain, security should be given by order of the judge to make good his loss on this account.

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

An action on guardianship can not be brought until the latter is terminated. It is terminated not only by puberty, but also by the death of the guardian or the ward.

(1) Julianus thinks that a son who has been emancipated can be held directly liable, if he has administered the guardianship.

(2) If he is still under the age of puberty, while administering the guardianship, his acts are void.

(3) An action on guardianship will not lie against the curator of an insane person, but an

action on the ground of voluntary agency must be brought, which will lie while he is still transacting the business; because the same rule does not apply in this action, as in one on guarddianship, so long as he whose guardianship is being administered has not reached puberty.

5. *Ulpianus, On Sabinus, Book XLIII*.

Where a guardian does not return property deposited or loaned for use to him by the father, he is liable to an action, not only on the loan or deposit, but also on guardianship; and if he has received money to induce him to restore the property, it is held by many authorities that the said money can be recovered either by an action on deposit, or loan, or by a personal one. This opinion is reasonable, because the property was dishonorably acquired.

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

Where a son under paternal control has administered a guardianship, and, after having been liberated, is guilty of fraudulent conduct; the question arises whether an action on guardianship on this ground will lie against the father. It is just that the father should only be liable for the fraud of his son where the latter committed it before being emancipated.

7. The Same, On the Edict, Book XXXV.

Where one ward becomes the heir of another whose trust his own guardian has administered, he will be entitled to an action against his guardian on the ground of inheritance.

(1) Where a guardian falls into the hands of the enemy, for the reason that the guardianship is understood to be terminated, an action can legally be brought against his sureties who have rendered themselves liable for the preservation of the property, and against anyone who appears as his defender, and is ready to conduct the case, whoever may be appointed the curator of his estate;

8. *Papinianus, Questions, Book XXVIII*.

Even though the guardian may be reinstated in his former guardianship by the right of *postliminium*.

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

Where a guardian is away in the service of the State, and on this account has been excused during his absence, there is ground for an action on guardianship. Where, however, he ceases to be in the service of the government, and is discharged in consequence, anyone who is appointed in his stead can be sued in an action on guardianship.

(1) Where a guardian has been appointed for two brothers who have not reached puberty, and one of them comes under the legal guardianship of a brother who has attained his majority, Neratius says that the guardian who was appointed ceases to hold office. Therefore, for the reason that he is no longer guardian, the action on guardianship will lie against him in the name of the ward, although if he was appointed by will, he would not cease to be the guardian of the minor who is still under puberty, because testamentary guardianship always enjoys the preference over guardianship-at-law.

(2) Where a guardian is appointed by will, under a certain condition, and, in the meantime, another is appointed after an investigation, it must be held that there is ground for an action on guardianship, when the condition has been fulfilled, for the reason that the guardian ceases to be such.

(3) The same rule must be held to apply where a testamentary guardian has been appointed for a certain time.

(4) And, generally speaking, what has been handed down, namely, that a ward cannot bring a tutelary action against his guardian, is only true where the same guardianship is in existence;

for it would be absurd for an account to be demanded for the administration of the business of a ward, where the guardian was still transacting it; still, where the guardian has ceased to do so, but a second time assumes the administration of the trust, he will be responsible to the ward for his former conduct during the guardianship, in the same way as if he had borrowed money from his father.

Let us consider what would be the result of this opinion. It is evident that if there is but one guardian, he cannot proceed against himself, and he must be sued by a curator appointed for that purpose; but, suppose that he already had another guardian, who could bring an action on guardianship against his colleague, and conduct it? Not only is this the case, but if in the meantime he should cease to be solvent, his fellow-guardian can be held liable, because he did not bring an action against him in the first place.

(5) Where a curator is added to a guardian, even though the latter may have been denounced as suspicious, he will not be compelled to defend an action on guardianship, because the guardian is still in office.

(6) Where, however, the property of a guardian has been confiscated, it is established that an action should be granted against the Treasury to him who has been appointed curator in his stead, or to his fellow-guardians.

(7) The other actions, with the exception of that of guardianship, will lie against the guardian, even though he is still administering the trust; as, for instance, those of theft, damage, injury, and for the recovery of specific property.

10. *Paulus, On the Abridgment of the Edict, Book VIII.*

These actions are not granted to the ward as long as the guardian administers the guardianship, although they are extinguished by the death of the latter. The ward, however, will still be entitled to his action against the heir, because he is obliged to pay him.

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

Where a son under parental control administers a guardianship, and then is emancipated; Julianus says that he still remains guardian, and when his ward grows up, an action can be brought against him for whatever he was able to pay during the time before he was emancipated, and after his emancipation for the entire amount; but his father can only be sued to the extent of the *peculium*. For the action *de peculio* will still lie against him after he has attained puberty; as the year from the emancipation within which an action *de peculio* is granted will not begin to run before the guardianship is terminated.

12. *Paulus, On the Abridgment of the Edict, Book VIII.* However, a son who is a guardian, cannot, on this ground, bring an action against his father before arriving at puberty; for this cannot be required of him, even after the guardianship is terminated.

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

Where a guardian administers the affairs of his ward after puberty, he will be liable to an action on guardianship only for the amount without which his administration could not be conducted. Where, however, the guardian of a ward after puberty sells his property, or purchases slaves and land; an account of said sale or purchase will not be included in the action on guardianship; and it is true that only those matters which are connected with the guardianship are embraced in a proceeding of this kind.

It is also true that if the guardian continues to administer the affairs of the trust after the latter has been terminated, the action on guardianship becomes merged in that of voluntary agency; for it becomes necessary for the guardian to exact from himself what is due by reason of the guardianship. Where, however, anyone after administering the guardianship is appointed curator of a minor, it must be said that he can be sued on the ground of voluntary agency.

14. *Gaius, On the Provincial Edict. Book XII.*

If, after the ward has reached puberty, the guardian should relinquish the administration even for a very short time, and afterwards resume it, there is no doubt that he can be sued in an action on guardianship, as well as in one on voluntary agency.

15. *Ulpianus, Disputations, Book I.*

Where a ward transacts business with one of his two guardians, and this results in his loss, the transaction will not benefit the other

guardian, where both are guilty of fraud; nor is this unreasonable, since each one of them must pay the penalty for his fraudulent conduct. But if one of them, having been sued, should pay the ward what is due to him, this will release the other guardian against whom suit was not brought; for, even though both are guilty of fraud, still, it is sufficient for one of them to make payment; and the same rule applies as where property is loaned to, or deposited with two persons, to whose care it has been entrusted.

16. *The Same, On the Edict, Book LXXIV.*

If the action on stipulation is brought against a guardian while he is still administering the trust, or against those who represent him, a doubt will arise as to whether an action on guardianship cannot be brought, and whether one on stipulation will not lie. Many authorities think that this action should also be deferred, for reasons of convenience.

(1) The action can also be brought against the curator of a ward or a minor, even while the curatorship is still in existence.

17. *The Same, On the Duties of Consul, Book III.*

The Emperors Severus and Antoninus stated the following in a Rescript: "Since the question arises whether anything is due to you from guardians or curators, your petition is unreasonable, as you desire them to furnish the money to you for the expenses of the suit".

18. *Papinianus, Questions, Book XXV.*

Where a guardian who is administering the affairs of a ward that has not yet reached puberty induces him to reject the estate of his father, a discussion usually arises whether an equitable action can be granted a ward after the property of his father has been sold. It is held that the action should be divided between the ward and the creditors of the father, in such a way that any deficiency in the account of the property due to the agency of the guardian shall be made up to the creditor. But whatever loss has ensued, either through the fraud or negligence of the guardian in causing his ward to wrongfully reject the estate, shall be left to the boy to be recovered by an action. The above-mentioned action undoubtedly will not lie before the ward has reached puberty, but is granted at once to the creditors.

19. *Ulpianus, Opinions, Book I.*

Where a claim due from a debtor has been approved by the last curator, the guardian cannot be sued for the claim.

20. *Papinianus, Opinions, Book II.*

It has been decided that the minor heir of one of two curators is entitled to complete restitution where the judgment was for the full amount. This proceeding will not afford a ground of action for recovery against the other curator, as having been required to pay a smaller sum of money than he should have paid, where the plaintiff is not of an age when he can obtain relief by law; but, on the ground of equity, relief should be granted him by means of a prætorian action to the extent that the other curator has been released from liability.

(1) Therefore, the suit which is granted, after the age of twenty-five, within the time fixed by law, for restitution against a guardian who has had judgment rendered against him in an action

on guardianship, will not be useless; for the reason that the minor curators have had judgment rendered against him on account of this neglect. Hence, if the judgment has not been satisfied by the curators, the latter can, by means of an exception on the ground of fraud, compel the rights of action of the ward to be assigned to them.

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

When a ward transfers his right of action on guardianship to the guardian against whom a judgment has been rendered in full, to be enforced against his fellow-guardian, the right of action will not be extinguished, even though this is done after the judgment has been satisfied, because it is held that an account is not rendered for the share of the defeated guardian, but that the amount of the claim has been paid.

22. *Paulus, Questions, Book XIII.*

Where a defender of a guardian loses the case, he does not deprive the ward of his privilege, because the latter did not voluntarily contract with him.

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

Where the heir of a guardian has been sued in an action on guardianship, his curator is not held to be released by operation of law, nor will an exception be granted him on the ground of *res judicata*. The same rule shall be observed with reference to the heirs of magistrates.

24. *The Same, Decisions, Book II.*

Where a guardian is appointed for a posthumous child, who is still unborn, an action on guardianship will not lie, for the reason that there is no ward, nor will he be liable as a party acting as a guardian because such a proceeding has no significance, nor can he be sued on the ground of voluntary agency, as he is not considered to have administered the affairs of an individual who is unborn, and therefore an equitable action will be granted against him.

25. *Hermogenianus, Epitomes of Law, Book V.*

Not only is the privilege of guardianship granted in favor of a ward against the property of a guardian, but also against that of one who has acted in his stead, as well as in the case of the curatorship of a male or female ward, or an insane man or woman, where security has not been furnished on this account.

TITLE IV.

CONCERNING THE COUNTER-ACTION ON GUARDIANSHIP AND THE PRÆTORIAN ACTION.

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

The Prætor granted a counter-action on guardianship, and introduced it in order that guardians might the more readily accept the management of the trust; being aware that the wards would also be bound to them as the result of their administration. For although wards are not liable without the consent of their guardians, neither can a guardian compel his ward to encumber his property in his favor; still, it is admitted that a ward can be civilly responsible to his guardian as the result of his administration. For guardians must be urged in order to induce them to pay anything out of their own property for the benefit of their wards, though they know that they will be reimbursed for what they have expended.

(1) This action will lie, not only against a guardian, but also against anyone who transacts business in his behalf.

(2) It must be said, moreover, that where there is a curator either of a ward, a minor, an insane person or a spendthrift, the counteraction should also be granted to him. The same rule has been established with reference to the curator of an unborn child. This was the opinion of Sabinus, who held that the counter-action should also be granted to other curators for the same

reasons.

(3) We hold that this action is available by a guardian after his term of office has expired, but so long as it lasts it will not lie. Where, however, a party transacts business in behalf of a guardian, or even administers a curatorship, there is ground for this action without delay, because in this instance, an action can also immediately be brought against him.

(4) Moreover, where anyone is sued in an action on guardianship, he can include in his account whatever he has expended on behalf of his ward. Therefore, it will be at his option to determine whether he will demand a set-off, or bring suit for his expenses. But what if the judge is unwilling to accept the account of his set-off, can he avail himself of the counter-action? He can undoubtedly do so. Where, however, his account has been rejected, and he has acquiesced, if he brings the counter-action, the judge ought not to decide that he shall be reimbursed for what he has expended.

(5) The question arises whether, in a proceeding of this kind, not only the expenses incurred for the benefit of the ward or for that of his property shall be included, but also whatever is owing to the guardian for other reasons (as, for instance, by the father of the ward, if anything should be due). I think the better opinion is that as the action brought by the guardian is undisputed, the counter-action should not be considered.

(6) Let us see, however, what should be done where the guardian had deferred reimbursing himself on account of his office, and therefore did not collect what was due to him. Can he be indemnified by means of a counter-action on guardianship? The latter seems to be the best opinion, for just as whatever the guardian has expended for the benefit of his ward can be recovered by the counter-action, so also he should recover what is due to himself, or obtain sufficient security for the claim.

(7) I think that if an obligation arises for any cause which is barred by lapse of time, the counter-action on guardianship will lie.

(8) It is held that this action should be granted even if suit is not brought in an action on guardianship, for sometimes the ward is not willing to institute proceedings on guardianship, for the reason that nothing is owing to him; or, on the other hand, more expense has been incurred in his behalf than should have been done; in which instance, the guardian should not be prevented from bringing the counteraction.

2. *Julianus, Digest, Book XXI.*

There is still more reason for granting this action, where suit is brought for the misappropriation of property by the guardian.

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

But what if the guardian should spend more money upon his ward than the latter's property amounts to? Let us see whether he can recover this. Labeo states that he can. This opinion, however, should only be adopted where it is to the interest of the ward for the guardianship to be administered in this manner. If it is not expedient that this should be done, it must be said that the guardian of the ward must be discharged, for guardianship should not be administered in such a way as to ruin the wards. Therefore, the judge who has cognizance of the counter-action must take into consideration the advantage to the ward, and whether the guardian has incurred the expense in accordance with the duties of his office.

(1) It should be considered whether the counter-action to enable the guardian to obtain a release from the ward will lie. No one has held that a guardian can bring the counter-action to enable him to be released from suit on guardianship; but only with reference to a release from liability for anything which he may have lost on account of the discharge of his trust. He can, however, recover the money, if he has used any of his own for this purpose, together with interest, but only at three per cent, or at the rate which is customary in that part of the country;

or such interest as the money was loaned at if it was necessary to lend it in order to relieve the ward for some good reason; or for interest from the payment of which he has liberated the ward; or for such interest as the guardian is entitled to, where it was of great advantage for the ward to be released from his obligations.

(2) It is clear that, if the guardian is obliged to lend at interest certain money belonging to his ward, and has also a sum to pay for him, he cannot himself collect interest from the latter, nor will he be obliged to pay him interest.

(3) Wherefore, if he has appropriated for his own use any money belonging to his ward, and afterwards expends an equal sum upon his ward's property, *he* ceases to have employed that money for his own benefit, and will not be obliged to pay interest on the same. If he has previously expended money upon property belonging to his ward, and afterwards appropriates to his own use any of the funds of the latter, he will not be held to have used for his ward's benefit the amount equal to that due to himself, and will not be liable for interest for the said sum.

(4) Let us see whether a guardian can recover interest on money advanced during his guardianship, or even after its termination; or whether he can only recover it after default of payment. The better opinion is that he can recover the amount due to him, for his money should not be idle.

(5) It must, however, be held that if the sum to be recovered is to be taken from the estate of the ward, he cannot collect interest from the latter.

(6) But what if the guardian could not reimburse himself out of the property of his ward, because the money was deposited to be used for the purchase of land? If, however, the guardian has not applied to the Prætor for payment of the money, or permission to reserve for himself what was due to him out of the amount to be deposited, and if he has requested this, but did not succeed in obtaining it, it must be held that he will not lose his interest if he brings the counter-action.

(7) It is sufficient for the guardian to have properly and diligently administered the affairs of his trust, even though his transactions may have terminated adversely.

(8) In the counter-action on guardianship is included whatever has been expended for the benefit of the property of the ward, both before and after the guardianship; where it is proved that such expenditures were connected with the affairs of the trust during the continuance of the same, whether the party merely acted as guardian and was afterwards appointed one, or whether he was the curator of an unborn child.

If, however, he did not transact the business as acting guardian, he can obtain whatever he has previously expended; for whatever expenses he may have incurred with reference to the property of the ward must be deducted from the amount of the judgment in an action on guardianship; provided, however, that such expenses were incurred in good faith.

(9) It is evident that this action is a perpetual one, and that it is granted both in favor of and against an heir, as well as for and against any other successors who are interested in the matter.

4. *Julianus, Digest, Book XXI.*

A guardian who has been removed from office should be considered to be in the same position as one whose guardianship is terminated, and hence he is liable to actions in the same manner as if the ward had reached puberty; so in the counter-action, if he has lost anything, he is entitled to bring suit to recover it, for there is nothing to prevent a suspected guardian from recovering what he has advanced, and which he should not lose, even though he may have expended too large a sum for the benefit of his ward.

5. *Ulpianus, Opinions, Book I.*

I gave it as my opinion that the heir of a guardian, where he has paid a sum for which his wards were liable, is entitled to the counteraction against them.

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

If a guardian should bind himself for his ward, he is entitled to the counter-action, even before he has paid the debt.

TITLE V.

CONCERNING ONE WHO TRANSACTS BUSINESS AS ACTING GUARDIAN OR CURATOR.

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

The Prætor, through necessity, established an action to take the place of that of guardianship. For very often it is uncertain whether a party has administered the guardianship as an actual guardian, or merely as one occupying his place, and therefore he prescribed an action available in either instance; so that whether the guardian was an actual one who attended to the business, or whether he was not, he would still be liable to the action. For great uncertainty frequently arises, so that it cannot be easily ascertained whether he who administered the trust was really a guardian, or whether he was not, but merely performed the duties of the office in that capacity.

(1) A man transacts business as a guardian who discharges the duties of one with reference to the affairs of minors, either when he thinks himself to be a guardian, or knowing that he is not, nevertheless pretends to be one.

(2) Hence, if a slave acts in the capacity of guardian, the Divine Severus stated in a Rescript that an equitable action should be granted against his master on account of the acts of the slave.

(3) There is no doubt that an action can be brought against a party who transacted the business of a minor in the capacity of guardian, even before the latter arrives at puberty, for the reason that he is not really a guardian.

(4) Wherefore, if anyone acting as a guardian transacts the business of a minor after the termination of his guardianship, he will be liable.

(5) If anyone should administer a guardianship as a pretended guardian before his appointment, and afterwards as a real guardian, he will also be liable for acts performed while he was administering the trust without legal authority, although said acts will be included in an action on guardianship.

(6) Where anyone performs the duties of a guardian with reference to the affairs of a minor who has already reached the age of puberty and who therefore cannot have a guardian, an action of this kind will not lie.

The same rule applies to the case of an unborn child, for where anyone acts as a guardian, it is necessary for the individual whom he represents to be of an age to have one, that is to say under the age of puberty. However, an action on the ground of voluntary agency will lie in this instance.

(7) Where a curator appointed for a minor by the Prætor transacts the business, the question arises whether he will be liable as one occupying the place of a guardian. The better opinion is that this action will not lie, because the party performed the duties of a curator. However, where there is no guardian, and someone is compelled, either by the Prætor or the Governor to act as such, and, believing himself to be a guardian, administers the guardianship, it should be ascertained whether he is responsible for his acts in the capacity of guardian. The better

opinion is that he should still be liable, even though he acted under compulsion, for the reason that he transacted the business with the intention of a guardian, even though he was not one in reality. The above-mentioned curator, however, did not transact the business as a guardian but as a curator.

(8) In the action against a person who has acted as guardian interest is also included.

(9) Should the party who has acted in the capacity of guardian only be held liable for the business which he transacted, or also for that which he should have attended to? And, indeed, he will not be liable for anything which did not concern the guardianship, nor for any matter which should not have had connection with it, while he acted as guardian. Where he transacted certain business, it should be considered whether he can be held liable for what he did not attend to, and he will be responsible to the extent that another would have been if he had transacted it. But if, knowing that he was not a guardian, he refrained from administering the trust, let us see whether he can be held liable, if he did not notify the near relatives of the ward to have a guardian appointed for the latter. The better opinion is that he will be liable.

2. *Celsus, Digest, Book XXV*.

Where anyone transacts business as a guardian while he does not occupy the office, and sells property of the ward which is not subsequently acquired by usucaption; the latter can bring suit for said property even though security may have been given to him, for the reason that the administration of the affairs of a ward by a person acting as guardian is not the same as that of a real guardian.

3. *Javolenus, Epistles, Book V*.

I ask whether he who has been appointed a guardian by will, but is ignorant of the fact, can be held liable for attending to the business of the ward as an actual guardian, or for transacting said business as one acting in the capacity of a guardian. I answered that I do not think that he can be held liable as an actual guardian, because he must know that he is the guardian, in order to discharge the duties of the office with the same spirit with which a guardian should act.

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

He who transacts business as an acting guardian should display the same good faith and diligence as a real guardian.

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

He who has transacted business while acting as guardian is entitled to the counter-action.

TITLE VI.

CONCERNING BUSINESS TRANSACTED UNDER THE AUTHORITY OF A FALSE GUARDIAN.

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

The justice of this Edict is in no respect ambiguous, for it was framed to prevent the contracting parties from being deceived through the intervention of a false guardian.

(1) The following are the terms of the edict: "What is done by the authority (the Prætor says) of one who was not a guardian".

(2) Many things are lacking in the terms of the Edict. For what if the party who was guardian should have no right to exert his authority, for example, if he should be insane, or was appointed for some other province.

(3) However, Pomponius states in the Thirtieth Book that sometimes, although the business has been transacted under the authority of someone who was not a guardian, this part of the

Edict will not be applicable. For what if there are two guardians, one of whom is false, and the other genuine, and they should authorize an act, would the transaction be valid?

(4) Pomponius says in the Thirtieth Book that, even though this Edict does not specifically mention more than one false guardian, it, nevertheless, applies to the acts of several.

(5) Pomponius also says that, even though a ward transacts business under the authority of a person acting as guardian, this Edict will still apply, unless the Prætor shall have decreed that he will ratify what has been done under such authority, for then the act will be valid, on account of the support of the Prætor, and not by operation of law.

(6) The Prætor says: "If a ward should be ignorant that his guardian is not genuine, I will grant him complete restitution". He does not grant relief to a ward who was aware of the fact, which is reasonable, because he voluntarily deceives himself.

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

If the ward should be ignorant that his guardian is not genuine", Labeo holds that this applies where the ward has been informed of the fact, and in good faith refused to believe it.

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

It is evident that such knowledge does not prejudice a party who is not in need of assistance; as, for example, where one ward transacts business with another, for as the act is void, his knowledge does not prejudice him.

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

Relief is afforded to a minor under twenty-five years of age who had knowledge.

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

Sometimes, however, although knowledge may cause prejudice, restitution should be granted where a party was compelled to join issue by order of the Prætor.

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

In any transaction, the knowledge of a ward should not be taken into account, but only that of his guardian should be considered. Therefore, even if security has been furnished the ward, it is held to be better for the property of the latter to be restored to him, than for him to depend upon the uncertain result of the security. This Julianus gave as his opinion in any case where a ward has been defrauded.

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

Finally, the Prætor says: "I will grant an action against a party who, not being a guardian, is said to have fraudulently authorized the act of a ward; and judgment shall be rendered against him for the value of the property in question".

(1) A guardian cannot always be sued, nor is it sufficient for him to have knowingly authorized a transaction, but he also must have acted in bad faith. What would be the result if he were forced to grant his authority, or was induced to do so through fear: ought he not to be excused under such circumstances?

(2) Where the Prætor says: "The value of the property in question". I do not think that the penalty, but merely the true amount lost is referred to.

(3) Pomponius very properly states in the Thirtieth Book that the account of the expenses which the plaintiff has been forced to incur by bringing this action should also be included in the judgment.

(4) Where there are several false guardians, and restitution is made by one of them, the others will be released, but this is not accomplished by the mere selection of one by the plaintiff.

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

Hence Sabinus says that where the plaintiff did not recover the entire amount from one of them, he should not be refused recourse against the others for the deficiency.

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

With reference to this action, Pomponius states in the Thirty-first Book that it can be granted against anyone who acts in bad faith, in order to induce another, who is ignorant of the fact, to authorize a transaction by his ward.

(1) Labeo says that actions of this kind *in factum* can be brought by heirs and their successors, but that they will not lie against them, nor can they be brought after the expiration of a year, since they punish an act, and are based upon fraud; and that they become noxal actions when instituted against parties who are subjected to the authority of others.

10. *Gaius, On the Provincial Edict, Book IV.*

Where an action is brought against a ward on account of a false guardian, and, in the meantime, the term prescribed by law has elapsed, or the property has been acquired by usucaption, the guilty party must sustain all the inconvenience which may arise, just as if he were a genuine guardian, and suit had been brought against him within the prescribed time.

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

A false guardian who grants authority to a minor of twelve or fourteen years of age to make a contract shall be liable to an action *in factum* on the ground of fraud, no matter what his condition may be, whether he is his own master, or under the control of another.

(1) He who fraudulently grants authority to a minor will be liable under this Edict.

(2) Moreover, anyone who authorizes a daughter under paternal control to enter into a contract is liable. The same rule of law applies where anyone acting as guardian authorizes a female slave to borrow money; for in all these instances the contracting party is deceived by the agency of the guardian, for he would not have contracted with the minor without the intervention of the authority of the guardian.

(3) Julianus in the Twenty-first Book of the Digest discusses the point whether this action should be granted against a father who gave his daughter in marriage, while she was under twelve years of age. The weight of authority is that a father is to be excused who desired to introduce his daughter too soon into the family of her husband, for in doing so he is held to have acted rather from an excess of affection, than through malice.

(4) Julianus thinks, however, that if the daughter should die before reaching the age of twelve years, after having received her dowry, and he who was entitled to it had acted in bad faith, the husband can be barred by an exception on the ground of fraud when he sues for the dowry, in cases where he would have been benefited to the extent of all, or a part of it, if the marriage had been valid.

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

Where a party, having been interrogated in court, answers that he is a guardian, he will not be liable to any action for making this statement. Where, however, he was not a guardian, and the minor was in any way defrauded through his answer, an equitable action should be granted against him.

TITLE VII.

CONCERNING THE SURETIES OF GUARDIANS AND CURATORS AND THOSE WHO HAVE OFFERED THEM, AND THE HEIRS OF THE FORMER.

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

Although the heir of a guardian does not succeed to his position, the business of deceased which remains unfinished must be settled by the heir, if he is a male and of lawful age, and under such circumstances he can commit fraud.

(1) The heir must deliver to the ward whatever was in the hands of the guardian. If the heir should take anything left by the deceased in the hands of the ward, he will not be free from criminal liability; for this has nothing to do with guardianship, and he can be compelled by a prætorian action to surrender it.

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

An application for a guardian is held to have been made even when this is done through another; and the same rule applies to the appointment of one, for he who makes it through the agency of another does the same thing.

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

It has been established that both the surety and his heirs shall be compelled to pay the same amount of interest as is required of the guardian himself.

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

As we have shown that an heir also can be sued in an action on guardianship, it should be considered whether fraud committed by the heir himself can be included in the case, or merely the manner in which he has administered his trust. An opinion of Servius is extant, in which he held that if the heir continued to transact the business of the ward after the death of the guardian, or had spent the money of the ward which he found in the chest of the guardian; or had collected money which the guardian had contracted for, he could be held liable in his own name in an action on guardianship; for since it is permitted for an oath to be taken against the heir with reference to the value of property which has been lost by him through his own fraudulent acts, it is evident that he can be held liable in an action on guardianship for bad faith on his part.

(1) It is evident that an heir will not be responsible for his own negligence.

(2) The heir of a guardian must pay interest on the money of the ward which he has invested, and the judge shall decide according to the principles of right and justice as to the amount of the interest, and the time for which it must be paid.

(3) Where sureties who have been named by guardians present themselves and are not opposed, and their names are permitted to be inscribed on the public records, it is just that they shall be held liable to the same extent as if a stipulation had legally been entered into. The same rule appears to apply to those who vouch for guardians, that is to say those who declare that they are solvent, for they occupy the place of sureties.

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

If suit based on the stipulation that the property of the ward shall be secure is brought against the sureties of a guardian, they have a right to take the same measures for their defence that a guardian has.

6. *Papinianus, Opinions, Book II.*

A ward brought suit against his guardians and their sureties. The judge having cognizance of the case died before it came before him to be heard, and another judge was appointed against the sureties alone. It is the duty of the judge having jurisdiction to hold the guardians personally responsible for the larger part of the judgment, where they are solvent, and the administration of the trust was not separate, but in common.

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

When sureties, who bound themselves to see that the property of the ward remained secure,

ask that the latter shall bring an action against his guardian, before having recourse to them, and they promise that if he does so they will indemnify him for what he cannot recover from the guardian, it is held that an action to recover the balance shall be divided among the sureties who are solvent; because the obligation is held to have been assumed by them, as where money is loaned under the direction of several persons, the action is equally divided among them. For where what has been given by one is used for the release of another, why should the particular nature of an action exclude an equitable division?

8. *Paulus, Opinions, Book IX.*

The heirs of a person who was not regularly appointed a guardian or a curator, and did not undertake the administration of the trust, shall be liable for neither bad faith nor negligence.

(1) Paulus is of the opinion that an action of this kind should be brought against the heir of a guardian, just as the deceased would have been subjected to it. This is applicable to the extent that the heir will not be excused if he alleges that he had not found the documents relating to the guardianship; for as the heir in all *bona fide* actions is liable for the bad faith of the deceased, I think that the same rule should be observed in an action on guardianship. Relief, however, is granted by the Imperial Constitutions on account of the ignorance of heirs. This rule must also be observed when an heir is sued after the death of the guardian, but not where he died after issue had been joined; for by joinder of issue penal actions are transmitted for and against the heirs of both parties, and rights of action ordinarily extinguished by time are perpetuated.

TITLE VIII.

CONCERNING SUITS AGAINST MAGISTRATES.

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

Subsidiary actions are not granted against the Order in general, but against the magistrates in particular, and they cannot be brought against the sureties of the latter, for these have bound themselves for the safety of the property of the Government, and not for that of the ward. Hence not those who nominated the magistrates shall be liable for this reason, but the magistrates alone. Where, however, the Order itself assumed the responsibility, it must be held that those are liable who were present; for it makes little difference whether they nominated the guardian, or became sureties for him, or whether they assumed the responsibility themselves. Therefore a prætorian action will lie against them. Where, however, a guardian is appointed by municipal magistrates, he is not held to have been selected by the entire Order.

(1) Neither the Prætor, nor anyone else invested with the right of appointing a guardian, shall be liable under this action.

(2) If the Governor of a province desires that the magistrates shall merely furnish a statement of the means of a guardian, in order that he himself may make the appointment, let us see to what extent they are liable, if at all. A Rescript of the Divine Marcus is extant by which he decides that those who file a report to the Governor with reference to this matter are not liable as if they themselves had made the appointment; but if they have been guilty of deception by making false statements through the inducements of either favor or money, they will be responsible.

It is clear that if the Governor of the province orders them to require security, we have no doubt that they will be liable, even though he may have appointed a guardian.

(3) Where the Governor of a province, having received from others the names of parties to be appointed guardians, sends these names to the municipal magistrates, in order that they may obtain information with reference to the same, and he, having received it, appoints the guardians; the question arises whether the magistrates should be held liable in the same

manner as those who furnish information to a Prætor. The question is asked, does it make any difference whether the magistrates themselves give the names that are selected to the Governor, or whether he receives them from someone else? I think that in both instances the magistrates will be liable, if they have been guilty of fraud or gross negligence.

(4) Not only wards, but also their legal successors, can avail themselves of subsidiary actions.

(5) Where curators, who are not entirely solvent, have been appointed, it must be said that magistrates are liable if the Governor made the appointment at their suggestion, or from among names approved by them. Where, however, the Governor sends the names to them for appointment, or does so after the appointment to require them to take security, the responsibility attaches to the magistrates.

(6) The magistrates shall also be responsible where no guardian or curator at all is appointed, but they will only be liable where, after having been notified, they do not make the appointment. Therefore, the magistrates will undoubtedly be liable for any wrong which either the minors or youths may suffer in the meantime, where they did not perform their duties after having been directed to do so.

(7) Again, it should be noted that if municipal magistrates purposely defer the appointment of a guardian until their term expires, or if they purposely delay the furnishing of security until their successors enter upon the duties of their office, it will be of no advantage to them.

(8) The Divine Hadrian stated in a Rescript that an action should be granted even against the party who was selected to examine the value of securities offered by a guardian.

(9) Where understanding existed between magistrates that guardians shall be appointed only at the risk of one of them, the Divine Hadrian stated in a Rescript that such a contract should not prejudice the rights of the ward; for the public law cannot be changed by a mere agreement of the Duumvirs; I think, however, that recourse should first be had to the party who assumed the liability, and that, as soon as his means were exhausted, his colleague should be called to account, just as where one alone had made the appointment we would hold that he should first be applied to, and afterwards his associate.

(10) Where persons who appear to be solvent are not to be found in the town where the wards were born, it is the duty of the magistrates to search for some thoroughly honest persons in the neighboring towns, and send the names to the Governor of the province, but they themselves cannot claim the right of appointment.

(11) Where a magistrate appoints a guardian who was solvent at the time, and does not require security from him, this will not be sufficient; but if he requires security, and the party is solvent, even though subsequently the guardian or his sureties become insolvent, no responsibility can attach to him who made the appointment; for magistrates should not be responsible to a ward for future events and accidents.

(12) Where the magistrate did not exact security, and the guardian was solvent at the time when the action on guardianship could be brought, this will be sufficient.

(13) Proof is not required of the ward that the sureties were not solvent when they were accepted; but the magistrates must show that they were solvent at that time.

(14) A ward is not a preferred creditor with reference to the property of a magistrate, but he will be entitled to share with other creditors.

(15) A magistrate shall require security in such a way that the slave of the ward, or the latter himself, if he is entitled to do so and is present, may stipulate with the guardians, as well as with their sureties, that his property will be secure; or if there is no one to enter into such a stipulation, a public slave must stipulate for the safety of the ward's property, or the magistrate himself must do so.

(16) Where a public slave, or the magistrate himself, makes such a stipulation, it is clear that it must be held that an equitable action should be granted to the ward.

(17) The question arises, where the magistrate is a son under paternal control, and does not take measures to provide security for the ward, or when, through his fault, proper security is not furnished; should an action be granted against his father, and if so, for what an amount? Julianus says that the action should be granted against the father to the amount of the *peculium*, whether the son became a Decurion with his consent, or not; for even though he administered the magistracy with the consent of his father, still, the latter should not be sued for an amount in excess of the *peculium*, for the reason that a man who gives his consent for his son to become a Decurion, only thereby binds himself that the property of the Government will remain secure.

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

A case has been proposed where two guardians, having been appointed by municipal magistrates without security being required, one of them died in poverty, and the other, after being sued by the ward, paid the entire amount. The question arose, whether this guardian would be entitled to an action against the municipal magistrates when he was aware that security was not required from his fellow-guardian. I stated it as my opinion that, since the claim of the ward against the guardian had been satisfied by the latter, neither the ward nor the guardian had any further recourse against the magistrates, for a guardian never has any right of action against a magistrate, as a Decree of the Senate gives relief to the ward; and especially is this the case when the guardian is to blame for not requiring security from his colleague, or for not denouncing him as suspicious, if, in accordance with the facts stated, he knew that he had not given security by order of the magistrates.

3. *Julianus, Digest, Book XXI.*

If no blame attaches to a guardian on this account it will not be unjust for him to be granted an action against the magistrates.

4. *Ulpianus, Disputations, Book III.*

The heirs of magistrates are not responsible in the same way as the latter, for the heir of a guardian is not liable upon the ground of the negligence of the deceased; as the magistrate indeed assumes all the responsibility, and his heir is only liable in case of fraud, or of negligence resembling fraud.

5. *Julianus, Digest, Book XXI.*

Two guardians divided the administration of the guardianship between them, and one died without leaving an heir. The question arose whether an action should be granted to the ward against the magistrate who did not see that security was given, or against the other guardian. I answered that it was more equitable for an action to be granted against the other guardian than against the magistrate; for the former, when he was aware that security had not been furnished to the ward, should have taken charge of the entire administration; and with respect to that portion which he had committed to the care of the other guardian, he resembled one who did not attend to the transaction of certain business of his ward. For although he may have transacted a certain portion of the business of his ward, he will still be liable for neglecting to attend to what he should have done.

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

A Rescript of the Divine Pius is extant which refers to the heir of a magistrate, and states that, after proper cause is shown, an action should be granted against him; for if the negligence of a magistrate should be so great as to cause him to fail to take any security, it is but just that he should be held to occupy the position of a surety, so that his heir may also be liable.

Where, however, he took security, and the sureties at the time were solvent, but afterwards ceased to be; just as the magistrate himself can very properly refuse to answer in such an action, so his heir can refuse with even more justice.

Finally, an action should not be granted against the heir of a magistrate, unless it is evident that the latter accepted sureties which were not perfectly solvent.

7. *Celsus, Digest, Book XI.*

I ask you to carefully note in the case of magistrates who have appointed a guardian whether an action should be granted against them for equal amounts, or whether it shall be optional with the ward to sue any of them that he pleases. The answer was that if the magistrates have acted fraudulently, so that sufficient security was not given to the ward, an action for the entire amount should be granted the latter against whomever he may select; but if this occurred merely through their negligence, and did not result from bad faith, I think that it would be more equitable for each one of them to be sued for his own share, provided that, in this way the property of the ward will be preserved.

8. *Modestinus, Opinions, Book VI.*

Magistrates exacted security from the curators of a minor for the preservation of his property, and one of them died without leaving an heir. I ask whether his colleague will be liable to indemnify the ward from the entire amount. Modestinus answered that there is no reason why he should not be required to do so.

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

The question arose, where an action is granted against magistrates, should the principal be collected together with the interest, or can interest not be claimed, since it has been decided that interest on penalties cannot be recovered. It was stated in a Rescript by the Divine Severus and Antoninus, that interest can be collected, since the same action is granted against magistrates that lies against guardians.

TITLE IX.

CONCERNING THE PROPERTY OF THOSE WHO ARE UNDER GUARDIANSHIP OR CURATORSHIP, AND WITH REFERENCE TO THE ALIENATION OR ENCUMBRANCE OF THEIR PROPERTY WITHOUT A DECREE.

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

Guardians and curators are prohibited by a decree of the Emperor Severus from disposing of the lands of wards and others under their care, whether they are situated in the country, or in a city.

(1) This decree was published in the Senate during the consulship of Tertyllus and Clement.

(2) Its provisions are as follows: "Moreover, Conscript Fathers, I forbid guardians and curators to sell either rustic or urban estates, unless parents have provided by will or by codicil that this may be done. If, however, debts exist to such an amount that they cannot be paid out of the proceeds of other property, then application can be made to the illustrious Urban Prætor, who in his discretion shall determine what lands may be alienated or encumbered, and a right of action will be reserved for the ward, if it should subsequently be established that the Prætor was imposed upon. Where the property is held in common with another, and the joint-owner applies for partition, or if a creditor who has received land by way of pledge from the father of the ward demands his rights, I hold that no new decree should be issued."

(3) When the deceased had property which could have been sold during his lifetime, but did not provide by his will that this should be done, the sale of the same ought not to be made; for even if the testator desired to sell the property, he may not have thought that it should be disposed of after his death.

(4) Where a minor under twenty-five years of age purchases land under the condition that it shall be pledged to the vendor, until the price of the same is paid, I do not think that the pledge is valid, for whenever the ownership of property is acquired by a minor he ceases to be liable.

2. Paulus, On the Decree of the Divine Severus.

But here a difficulty arises, for the reason that a pledge becomes operative at the same time with the acquisition of ownership, and the obligation becomes a part of the transaction from the very beginning. But what if the minor made the purchase from the Treasury? There is no doubt in this instance that the right to the pledge would remain unimpaired. Therefore, where an instance of this kind arises in a sale to a private vendor, application must be made to the Emperor in order that the pledge may be confirmed by a Rescript.

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

But if one ward should purchase land with the money of another, and it was delivered to the ward or the minor, is he with whose money the said land was purchased entitled to the obligation or pledge? The better opinion is, that the right of pledge remains unimpaired, in accordance with the Constitution of our Emperor and his Divine Father, in favor of the ward with whose money the land was purchased.

(1) Land belonging to a ward can, nevertheless, be seized and sold by order of a magistrate, a Governor, or any other official having jurisdiction. Again, anyone can be placed in possession of the property of a ward by the Prætor; and the right of pledge may be contracted either for the purpose of preserving a legacy, or to provide against threatened injury, and the Prætor can order the property to be taken possession of as he shall direct. These obligations or alienations are effected through the authority of magistrates, and not with the consent of a guardian or a curator.

(2) The question may also be asked, where restitution of a tract of land belonging to a ward is demanded by a guardian, whether the tender of its value in court operates as an alienation. The better opinion is that it does so operate, for such an alienation does not depend upon the will of the guardian.

(3) The same thing must be said where land which belonged to the ward is demanded, and the guardians return it in opposition to the ward; for, in this instance, the alienation will be valid on account of the authority of the decision rendered.

(4) Where the ward enjoys the right of perpetual lease or of possession, let us see whether it can be disposed of by his guardians. The better opinion is that it cannot be, even though the title of the other party to the land may be better.

(5) Nor can an usufruct be alienated, even though the usufruct alone belongs to the ward. Hence, must it be assumed that the right is lost by non-user, if the guardian gave occasion for it? It is clear that it should be restored. Where, however, the ward owns the property, he cannot alienate either the usufruct or the use of the same, although the decree states nothing with reference to the usufruct. In like manner, it may be said that a servitude cannot be imposed on the land of a ward, or a minor, nor can one be extinguished. This rule is also established with reference to dotal lands.

(6) Where a ward has mines of alum, or metal, or any other substance, or chalk-pits, or silver mines, or anything else of this kind,

4. *Paulus, On the Decree of the Divine Severus.* Which private individuals have a right to possess:

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

I think that the better opinion is, that the alienation cannot be made in accordance with the

spirit of the decree.

(1) It must be held that the same rule will apply where the ward owns salt-pits.

(2) Where the ward possesses, in good faith, land which belongs to another, I think it should be held that his guardians cannot alienate it; for where anything is sold which appears to belong to a ward the sale will not be valid.

(3) Where a tract of land has been pledged to a ward, can his guardians sell it? I think that they can, for this is, as it were, the property of the debtor, that is to say, they sell what belongs to another. Where, however, the ward or his father acquires the right to possess the property on the ground of ownership, it must be said in consequence that it cannot be disposed of, because it is considered as land belonging to the ward. The same rule applies where the ward has been directed to take possession of property for the prevention of threatened injury.

(4) Where land has been devised, or left by way of trust to a ward who was appointed heir, to be transferred to Seius, can his guardians deliver the "said land without the authority of the Prætor? I think that if the testator devised his own property, the decree will not apply; but if the bequest has reference to the property of the ward, it should be held to come within the terms of the decree, and that it cannot be alienated without the consent of the Prætor.

(5) If a ward should enter into a stipulation, can he pay the money borrowed without the authority of the Prætor. The better opinion is that he cannot do so; otherwise a pretext for alienating the property of the ward would be obtained.

(6) But if a father should promise land by a stipulation, and the ward should succeed to him in the assumption of his obligation, it may be said more positively that he can give up the land without the authority of the Prætor.

The same rule also applies where the ward, by hereditary right, succeeds another who obligated himself.

(7) On the same principle, if a father, or anyone else whom the ward succeeded, should have agreed to sell a tract of land, it may be said that the ward can conclude all the other terms of the sale without applying to the Prætor.

(8) A ward cannot reject the devise of a tract of land without the authority of the Prætor; for no one doubts that this is a case of alienation, as the property belongs to the ward.

(9) Guardians should not be granted the right to sell property of the ward indiscriminately, under the pretext of the payment of debts; for this method of disposing of such property ought not to be allowed. Hence the Senate left the determination of this matter to the Prætor, whose duty, in the first place, was to examine it and ascertain whether money for the purpose of discharging the debt could not be obtained elsewhere. Therefore, he should inquire whether the ward has any resources, either in cash, or in notes, upon which suit may be brought, or an interest in crops which have been stored, or has the expectation of receiving any income or other property. He must also ascertain whether there is anything else except the land that can be sold, and from the proceeds of which the claim may be satisfied. Then, if he should find that the debt cannot be discharged except by the sale of the land, he must permit this to be done; provided the creditor insists upon payment, or the rate of interest under which the debt was contracted offers an inducement for its settlement.

(10) The Prætor should also decide whether it will be more advantageous for him to allow the land to be sold, or to be encumbered. He must likewise exercise great care to prevent a larger sum from being borrowed by the encumbrance of the land than he may think necessary for the payment of the debt; or if the land is sold, that a considerable portion of it is not disposed of in order to discharge a moderate obligation. Where, however, the ward is the owner of a tract of less value, or one which is less useful to him, it is preferable for the Prætor to order this one to be sold, rather than the larger and more useful one.

(11) In the first place, then, whenever the Prætor is applied to by a party for permission to dispose of land, he should be required to inform himself concerning the estate of the ward, and not trust too much to the statements of guardians or curators, who, sometimes, for the sake of their own advantage, are accustomed to assure the Prætor that it is necessary to sell or encumber the land of a ward. He must, therefore, make inquiry of the near relatives of the ward or his parents, or of any of his faithful freedmen, or of anyone else who is familiar with the property of the ward, and where no one of this kind can be found, or where those who have been found are liable to suspicion, he must order accounts to be rendered, and also a memorandum of the property of the ward to be filed, and appoint an advocate for the latter who can advise the Prætor as to whether he should consent to the sale or encumbrance of the property.

(12) It may be asked, where the Prætor, having been applied to, permits property situated in the province to be sold, whether this act is valid. I think that it is valid, provided the guardianship is administered at Rome, and the guardians have charge of the administration of the property.

(13) However, to prevent the improper use of money which guardians have borrowed on account of an alleged debt of the ward, it is necessary for the Prætor to see that the borrowed money is paid to the creditors, and with reference to this to render a decree, and appoint a court officer, who shall report to him that the money has been employed for the purpose for which the alienation or encumbrance was asked.

(14) Where there is no debt to be paid, but the guardians allege that it is expedient for certain lands to be sold, or others to be purchased, or for others to be got rid of, it should be considered whether the Prætor ought to allow this to be done. The better opinion is, that he cannot do this, for full authority is not granted to a Prætor to dispose of property belonging to a ward, but only in case where a debt must be paid. Hence, where no debt is involved, if he should permit the land to be sold, we consequently hold that there is no sale, and that the decree is void, for permission is not granted to the Prætor to dispose of the property of a ward indiscriminately, but only where the demand for payment of debts is urgent.

(15) A ward retains his right of action if he can afterwards prove that the Prætor has been deceived. It should, however, be considered whether we should grant him a real or a personal action. The better opinion is that a real action should be granted, as well as a personal one against his guardians or curators.

(16) By lands held in common, we should understand such as are jointly held and undivided. Where, however, they are held in common, but the shares are separated, there is ground for a judicial decision, as the decree does not apply.

6. *The Same, Concerning All Tribunals, Book II.*

Where one person enjoys the ownership of land, and another the usufruct of the same, the better opinion is that that portion of the decree which relates to the division of property does not apply, for there is no real community of interest.

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

Where lands are owned in common by wards who have different guardians, let us see whether the right of alienation belongs to each. And, as an application for permission to do this is necessary, I think that alienation will be prevented, as neither of the parties can ask for it, and each must wait for the application of the other. Again, if they have the same guardians, there is still greater reason for asserting that the alienation cannot take place.

(1) Where a ward gives land by way of pledge with the permission of the Prætor, there is no doubt that the alienation of said land can be prevented. It must be said, however, that the creditor can exercise his right, but he will be safer if he first makes application to the Prætor.

(2) Where a father or a relative is the guardian of a child, must the Prætor be applied to, if he or she wishes to encumber the property? The better opinion is that this ought to be done; however, the Prætor should be more inclined to consent to the demands of the father than to those of anyone else.

(3) Where the Prætor permits guardians to sell land, and they encumber it, or *vice versa*, will such an action be valid? My opinion is that where a party does something different from what has been authorized by the Prætor, the act is void.

(4) But what if the Prætor should decree as follows: "I permit the property to be sold or encumbered"? Will the guardian have a right to do what he pleases? The better opinion is that he will, provided we bear in mind that the Prætor has not properly performed his duty, for he should determine and select whether it is better for him to allow his property to be encumbered, or sold.

(5) Where a guardian encumbers property without a decree, although the obligation is not valid, there will, nevertheless, be ground for an exception based on fraud, if the guardian should pay the money loaned to him to a creditor who holds the land in pledge.

(6) It should also be considered whether the guardian can encumber the property to him. It must be said that if he receives the same principal, and the rate of interest is not higher, the obligation will be valid, and the rights of the first creditor pass to the second one.

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

There is no doubt that persons who are not legal guardians or curators, but transact business while acting as such, cannot in this capacity dispose of the property of wards or minors.

(1) It should be considered whether a sale will be valid by the ancient law under these circumstances, or whether this decree is applicable to the case of a curator of an insane person, or of anyone else who is not a minor. Because the Emperor refers to wards, and the duties of curators are understood to be connected with those of guardians, I think that the same rule must be held to apply to all of them, in accordance with the intent of the decree.

(2) The question arises whether common property, in which the ward has an interest, can be encumbered. And I do not think that this can be done without a judicial decision; for what is excepted in the decree merely has reference to the extinguishment of the common ownership, and not to the increase of its difficulties.

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

Although a former Governor may have authorized the sale of land belonging to a ward, and his guardian should then purchase it for himself, through the agency of another buyer; still, if the successor of the said Governor should ascertain that fraud and bad faith had been committed by the guardian in violation of the Decree of the Senate, he must determine as to what extent he shall punish such a fraudulent act, by way of example.

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

Where the land of a ward or a minor has been sold illegally and in violation of the Decree of the Senate, and on this account an assessment of damages is made in an action on guardianship, or in an equitable action, and the amount assessed has been paid, the recovery of the land is forbidden by the principles of equity.

11. *The Same, On the Duties of Proconsul, Book III.*

If an application should be made for the sale of land belonging to a minor of twenty-five years of age, after proper investigation, the Governor of the province should permit this to be done. The same rule should be observed with reference to the property of an insane person, or a spendthrift, or of anyone else whose land his curators desire to alienate.

12. *Marcianus, On the Hypothecary Formula.*

The Decree of the Senate is not violated where the guardian of a ward pays the creditor of the father of the latter, in order that he may be subrogated to him.

13. *Paulus, On the Decree of the Divine Severus.*

Where a tract of land belonging to a ward is either sterile, stony, or pestilential, it should be considered whether or not the guardian can alienate it. The Emperor Antoninus and his Divine Father stated the following in a Rescript with reference to this subject: "The fact that you allege that the land which you desire to sell is unfruitful has no weight with us, since a price can only be obtained for the same in proportion to the crops which it will yield."

(1) Although a guardian can neither sell nor encumber land belonging to his ward, still Papinianus states in the Fifth Book of Opinions that a guardian cannot legally dispose of the land of the ward without a decree of the Prætor. He says, however, that where the guardian, through ignorance, sells the property, and pays the price received for the same to the creditors of the father of the minor, and the latter subsequently brings suit for recovery of the land, with the profits, from the owner; an exception on the ground of fraud can properly be pleaded, if the minor does not tender the price, and the interest for the intermediate time, which was due to the creditor, if the debt could not have been paid out of the property belonging to the ward.

On this point I stated that even if the ward could have paid the debt out of other property, and the latter has been saved, it must be said that an exception on the ground of fraud can be interposed, if the ward was attempting to profit by the loss of another.

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

Paulus gave it as his opinion that even though the will of a father should subsequently be held to be void, still, the guardians or curators of his son were considered to have committed no act against the Decree of the Divine Emperors, where in accordance with the desire of the deceased expressed in his will, land belonging to the ward which was situated in the country.

TITLE X.

CONCERNING THE APPOINTMENT OF CURATORS FOR INSANE PERSONS AND OTHERS WHO ARE NOT MINORS.

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

By the Law of the Twelve Tables, the administration of his own property is forbidden to a spendthrift. This provision had previously been introduced by custom. In our day, however, where Prætors or Governors encounter a man of this kind, who regards neither time nor limit, so far as expenditures are concerned, but wastes his property by dissipating and squandering it, they appoint a curator for him just as they do for an insane person, and both continue under curatorship, until the insane person recovers his senses, or the spendthrift conducts himself properly. Whenever this takes place, the parties, by operation of law, cease to be under the supervision of their curators.

(1) The curatorship of one who was forbidden to dispose of his property was formerly refused to his son. However, a Rescript of the Divine Pius is extant in which he declares that curatorship should be granted by preference to a son, where his father is insane, provided the former is a man of integrity.

2. *Paulus, On the Duties of Proconsul, Book I.*

The Proconsul must appoint, or order to be appointed, curators for other persons who cannot attend to their own affairs; and he will not hesitate to appoint a son the curator of his father.

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

The Prætor appoints a curator for an estate while the appointed heirs are deliberating whether

they will accept it.

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

The curatorship of an insane mother belongs to her son, for equal filial affection is due to both parents although their authority is not the same.

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

A curator is appointed under the Decree of the Senate where the person is illustrious, as in the case of a senator or his wife; and there is reason for their property to be sold in order that their creditors may be paid honestly out of it, as far as possible; and a curator is appointed either by the Prætor or by the Governor of the province for the purpose of disposing of the property.

6. *Ulpianus, On All Tribunals, Book I.*

The Prætor must be careful not to appoint a curator rashly and without the most thorough investigation of the case, since many persons feign madness or insanity in order that, by the appointment of a curator, they may the more readily evade their civil obligations.

7. *Julianus, Digest, Book XXI.*

Not only the estate, but also the person and the safety of one who is insane, must be protected by the advice and exertions of his curator.

(1) A curator was appointed for an insane person, and a decree issued requiring him to give security which he did not do, and, nevertheless, he alienated certain property of the insane person in accordance with the legal formalities. The heirs of said insane person brought an action to recover the property which the curator had alienated, and an exception on the ground that the curator had not sold the property was interposed. In this case, a replication should be granted that he had sold the property without furnishing security in accordance with the decree. If, however, the curator had paid the creditors of the insane person the price received for the property, a triplication on the ground of bad faith will render the possessors secure.

(2) Where the Proconsul removed the curator of an insane person from the administration of the property of the latter for the reason that he had not furnished security, and had transacted the business of the trust improperly, and substituted another curator in his stead, the latter, who himself did not furnish security, brought an action based on voluntary agency against the curator who had been removed, and afterwards when the heirs of the said insane person brought suit on the ground of voluntary agency against the second curator, the latter pleaded an exception based upon the settlement of the case between them and his predecessor, the heirs should be granted the right to reply that he himself had not given security when he brought the action. The judge, however, must determine whether such a reply would be of any benefit to the curator, for if the second curator had employed the money which he had recovered by a judgment against the first, for the benefit of the property of the insane person, a triplication on the ground of fraud can be interposed.

(3) The question arose whether payment can legally be made to one of the curators of an insane person, and whether one of them can alienate his property. I answered that such payment would be legal, and that the party who purchased, with the proper formalities, any land belonging to an insane person from one of several curators, could obtain the right to the same by prescription; because payment, sale, and delivery are rather matters of fact than of law, and therefore the act of one of the curators is sufficient, for the reason that the other is understood to consent. Hence, if the other curator is present and opposes the payment, or delivery, the debtor is not released from liability, nor can the purchaser obtain the property by prescription.

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

A curator must be appointed for the property of an unborn child, and the Proconsul, in order

that it may be safe, requires him to give security such as would be accepted by a reliable man. This is the case where the appointment is not made after investigation, for if an investigation takes place security will not be necessary.

9. *Neratius, Parchments, Book I.*

When the Senate permits the appointment of curators for the sale of property, it does not authorize the creditors to dispose of the same, even though they prefer to sell it after this privilege has been granted; as, while the latter have the right to choose whichever one they may desire, still, after they have selected one curator, they must not apply to another.

It is much more just for this rule to be observed where the curator, after having been appointed for the sale of property, dies before the transaction has been concluded; for, in this instance, another curator must be appointed for the settlement of the entire matter, and the heir of the first curator cannot be entrusted with it, since it may happen that the heir may not be fitted for the business, either on account of sex, or the infirmity of age, or the higher or lower rank, of the former curator; and, moreover, there may be several heirs to the first curator, and it may not be expedient for all of them to transact the business, or some reason may be alleged why one of them should be charged with this duty rather than the others.

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

Julianus says that those to whom the administration of their property has been forbidden by the Prætor can transfer nothing to anyone, because they have no control over the property, as they are excluded from the exercise of their civil rights.

(1) The curator of an insane person can legally deliver his own property as belonging to the said insane person, and transfer the ownership of the same; but if he should deliver the property of the insane person as belonging to himself, it must be said that he does not transfer the ownership, because he did not do so while transacting the affairs of the insane person.

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

A pledge given by the curator of an insane person is valid, if this was done because the benefit of the latter required it.

12. *Marcellus, Digest, Book I.*

It is established that the property of an insane person cannot be dedicated to religious purposes by an agnate, or any other curator of the former; for the agnate of an insane person has not an absolute right to alienate his property, but can only do *so* where the administration of his affairs demands it.

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

The curatorship of a madman or a spendthrift is, by a law of the Twelve Tables, often granted to another person than a relative, and the Prætor may confer the administration of his estate upon another; namely, where the party specified by the law appears to be unsuited for the management of the trust.

14. *Papinianus, Opinions, Book V.*

A husband must not be appointed the curator of his wife when she is of unsound mind.

15. *Paulus, Sentences, Book III.*

The management of her own property can be forbidden to a woman who lives extravagantly.

(1) A privilege over the property of the curator is reserved for the benefit of an insane person of either sex. Spendthrifts, and all other persons, even though no mention is made of them in the Edict, are, by a decree, entitled to a similar privilege with reference to the property of a curator.

16. *Tryphoninus, Disputations, Book XIII.*

Where a father by his will appoints a curator for his son who is insane, even though he may be over twenty-five years of age, the Prætor should confirm him in accordance with the wishes of his father; for the right to appoint a curator of this description is vested in the Prætor, as is stated in a Rescript of the Divine Marcus.

(1) The result of this is that where a father designates a curator for his son, who is a spendthrift, the Prætor should respect his wishes, and appoint the same curator. There is some doubt as to whether this rule is applicable to all cases; for where the father did not make any provision by will, should the Prætor forbid the said son to manage his property, especially where this spendthrift himself has children?

(2) The father has, nevertheless, another way by which to provide for his grandchildren, where he appoints them his heirs, and disinherits his sons; for he can bequeath to them a certain portion of his estate which will be sufficient for the support of his sons, stating the necessity and the reason which have impelled him to take this step; or if he has no grandchildren under his control, because they were born after the son was emancipated, he can appoint them his heirs, on the condition that they shall be emancipated by their spendthrift father.

(3) But what if the spendthrift father should not give his consent to their emancipation? The will of the testator must, by all means be observed, in order that the magistrate may not think that he whom the father, after proper reflection, considered a spendthrift, is a man of good business capacity in spite of his failing.

17. *Gaius, On Manumissions, Book I.*

The curator of an insane person can under no circumstances grant freedom to his slave, because this is a matter not included in his administration; for, in disposing of the property of the insane person, he only alienates it where it relates to the management of the affairs of his trust, and therefore, if he alienates any property by way of a donation, the transfer will be of no effect, unless he does this on account of some great advantage it affords the insane person, after an investigation has been made by the court.

THE DIGEST OR PANDECTS.

FIFTH PART.

BOOK XXVIII.

TITLE I.

WHO CAN MAKE WILLS AND IN WHAT MANNER THEY SHOULD BE EXECUTED.

1. *Modestinus, Pandects, Book II.*

A will is the lawful expression of our wishes with respect to what anyone desires to be done after his death.

2. *Labeo, Abridgments of Last Works by Javolenus, Book I.* Soundness of mind is required of a testator at the time that he makes a will, but bodily health is not necessary.

3. *Papinianus, Questions, Book XIV.*

The execution of a will is not a private right, but a matter of public law.

4. *Gaius, Institutes, Book II.*

If we make inquiry as to whether a will is valid, we should first ascertain whether he who made it had the right to do so, and then, if he had, we should ascertain whether it was drawn up in accordance with the rules of the Civil Law.

5. *Ulpianus, On Sabinus, Book VI.*

Let us consider at what age males or females can make a will. The better opinion is that males must have attained the age of fourteen and females that of twelve, to fulfill the legal requirements. In order to make a will, is it sufficient for a party to have reached the age of fourteen, or must he have passed that age? Suppose a person born on the *Kalends* of January makes his will upon his fourteenth birthday, will such a will be valid? I hold that it will be valid, and I go even farther, and say that if he made his will upon the day preceding the *Kalends* of January, after the sixth hour of the night, his will will be valid, for, according to Marcianus, he is then considered to have completed his fourteenth year.

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

Where an individual is under the control of his father, he has no right to make a will; and to such an extent is this true that even if the father should grant him permission, he, nevertheless, cannot legally execute a will.

(1) Persons who are deaf and dumb cannot make a will, but where anyone becomes dumb or deaf through illness, or any other accident, after the will has been executed, it will still be valid.

7. *Æmilius Macer, On the Twenty Per Cent Law of Inheritance, Book I.*

Where a person who is dumb or deaf obtains permission from the Emperor to make a will, it will be valid.

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

A will executed by a person while in the power of the enemy is not valid, even though he should return.

(1) Where fire and water have been forbidden to anyone, no will which he made previously or subsequently will be valid, and whatever property he was possessed of at the time of his condemnation shall be confiscated; or, if it does not seem to be sufficiently valuable for this to be done it shall be abandoned to his creditors.

(2) Persons who have been deported to an island are in the same condition.

(3) Those, however, who have been relegated to an island, and such as have been forbidden to remain in Italy or in their own province, retain the right to make a will.

(4) Moreover, those who have been sentenced to fight in the arena, or to be thrown to wild beasts, or to work in the mines, forfeit their liberty, and their property is confiscated; from whence it is evident that they lose the right to make a will.

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

If anyone accused of crime should die in prison before being convicted, his testament will be valid.

10. *Paulus, Opinions, Book III*.

Where a man has lost his hands, he can make a will, even though he is unable to write.

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

Hostages cannot execute a will, unless permission is granted them to do so.

12. *Julianus, Digest, Book XLII*.

According to the *Lex Cornelia*, the wills of those who die while in the power of the enemy are confirmed, just as if those who had executed them had never been in the hands of the enemy, and their estates pass to whomever are entitled to them under the testamentary provisions. Wherefore, in case a slave is appointed heir by a person who dies while in the power of the enemy, he will become free and the heir of the testator, whether he is willing or not; although he is improperly said to be a necessary heir, for the son of a man who dies while in the hands of the enemy must assume the obligation of the estate, even if unwilling to do so, although he cannot be said to be his heir, as he was not under his control at the time of his death.

13. *Marcianus, Institutes, Book IV*.

Those who have been captured by robbers, as they remain free, can make a will.

(1) Moreover, those who perform the duties of envoys in foreign countries can make a will.

(2) Where anyone convicted of a capital crime appeals, and makes a will in the meantime, while the appeal is pending, and then dies, his will is valid.

14. *Paulus, Rules, Book II*.

Where a slave manumitted by the will of his master is not aware that the latter is dead, and that the heir has entered upon his estate, he cannot execute a will, even though he may already be the father of a family, and his own master; for he who is uncertain as to his own condition cannot make an absolute testamentary disposition of property.

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

Those who entertain any doubt with reference to their condition or are mistaken concerning it cannot execute a will; as the Divine Pius stated in a Rescript.

16. *Pomponius, Rules*.

It is held that a son under paternal control, the slave of another, a posthumous child, and a deaf person, have the right to take under a will; for, although they cannot execute one, still they can acquire property by a will, either for themselves or for others.

(1) Marcellus observes that an insane person also has the right to take under a will although he cannot execute one; hence a party is understood to possess this right, because he can acquire for himself either a legacy or a trust, for the right to bring a personal action is also acquired by parties that are not aware of the fact, but who are of sound mind.

17. *Paulus, Sentences, Book III*.

Where a party loses his mind on account of bodily illness, he cannot make a will as long as this condition exists.

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

He who is legally prohibited from managing his own property cannot make a will, and if he should make one, it will not be valid in law. Where, however, he executed a will before his interdiction, it will be valid. Hence it is reasonable that he cannot be offered as a witness to a will, since he has not the right to make one himself.

(1) Where anyone has been convicted of public libel, it is stated in the Decree of the Senate that he cannot make a will; hence he can neither execute one, nor be offered as a witness to prove the will of another testator.

19. *Modestinus, Pandects, Book V.*

Where a son under paternal control, a ward, or a slave draws up a will and seals it, possession of the property mentioned therein cannot be granted to the legatees, even though the testator should be a son who is independent, or a ward who has reached the age of puberty, or a slave who should become free, at the time of his death; for the reason that a will drawn up by one who has no right to do so is void.

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

Where an heir is appointed by will, he cannot be a witness to it. The contrary rule applies to a legatee, and to one who is appointed guardian, for such persons can act as witnesses, if no other impediment exists; as, for instance, where the party had not arrived at puberty, or was under the control of the testator.

(1) The term "control" not only applies to children who are in the power of their father, but also to one whom the testator has redeemed from the hands of the enemy, although it is established that such a person shall not be a slave, but shall merely be kept under restraint until he has paid the amount of his ransom.

(2) On the other hand, the question may be asked whether a father can be offered as a witness to a will by which his son disposes of his *peculium castrense.* And Marcellus states in the Tenth Book of the Digest that he can be a witness, and that his brother can also be one.

(3) Moreover, what we have stated with reference to the testimony of those who are under the control of a testator being prevented from witnessing a will is applicable to all cases where any kind of business is transacted by means of which property is acquired.

(4) Nor can an insane person be offered as a witness, as he is not of sound mind. If, however, he has lucid intervals, he can testify during their continuance; a will which he has executed before he became insane will be valid; and he should be entitled to the possession of property in accordance with the terms of the will.

(5) I think that anyone who has been convicted of embezzlement cannot be a witness to a will, since his testimony in court is forbidden.

(6) A woman cannot act as a witness to a will, although she can be a witness in court; as is established by the *Lex Julia de Adulteriis*, which prohibits a witness who has been convicted of adultery from testifying or making a deposition.

(7) A slave cannot participate in the formalities attaching to the execution of a will, and very properly, as he has no share whatever in the rights conferred by the Civil Law, or indeed in those granted by the Prætorian Edict.

(8) The ancient authorities thought that those who are summoned to take part in the solemn formalities of a will should remain until the last attestation had been completed.

(9) We do not, however, require that a witness should understand the language of the testator;

for the Divine Marcus, in a Rescript addressed to Didius Julianus, stated this with reference to a witness who was ignorant of the Latin language; for it is sufficient if the witness perceives by his senses for what purpose he was summoned.

(10) Where the witnesses are detained against their consent, the authorities hold that the will is not valid.

21. *The Same, On Sabinus, Book II.*

The name of the heir should be plainly spoken, in order that it may be heard. The testator is, therefore, permitted either to mention the heirs by name, or to write down their names, but if he mentions them he must do so distinctly. What does the term "distinctly" mean? It does not mean that this shall be done publicly, but in such a way that the names may be heard, not, indeed, by everyone, but by the witnesses to the will; and where there are several witnesses, it will be sufficient for them to be heard by the number specified by law.

(1) Where the testator wishes to change his will, it is established that everything must be done over again from the beginning. The question, however, arises whether, after the legal formalities have been complied with, he can explain anything which may happen to be obscure in his will, either in words or in writing. As, for instance, where he makes a bequest of Stichus, when he has several slaves of that name, and did not mention which one he had reference to; or where he makes a bequest to Titius, when he has several friends who are called Titius; or where he has made a mistake either in the name, the title or the surname of a party, but did not make a mistake with reference to the article bequeathed; can he afterwards state what he meant? I think that he can, for he does not give anything by doing so, but merely points out what was given. But if he should subsequently append a note to a legacy, either orally or in writing, or add a certain sum, or insert the name of the legatee which he had not yet filled out, or mention the kind of money with which the legacy is to be paid, will he act in accordance with law? I think that even the kind of money to be paid can afterwards be designated, for where he has not done so, it will be necessary to determine this with reference to the bequest, either from documents drawn up at the same time, or in accordance with the custom of his family or of the province.

(2) It is held in the case of wills, where witnesses are asked to be present for the purpose of attesting the same, that if they have been summoned for any other purpose, they will not be competent; and it must be understood in this instance that even though they may have been requested to appear, or were collected for some other purpose, and, before they act as witnesses, they are informed that they are to be employed for that purpose, they can legally act as such.

(3) The will must be drawn up with reference to itself alone, and this is done where nothing foreign to the purpose of the instrument is introduced; but where any act connected with the will is performed, the validity of the latter will not be affected.

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

In order to obtain at the same time the legal number of witnesses, the father, the son, and any other persons who are under his control may be called.

(1) In order to establish the condition of the witnesses, we should consider the time when they attached their seals to the will, and not the time when the testator died. Therefore, if at the time they attached their seals they were competent to do so, the validity of the will can not be questioned if anything should afterwards happen to the witnesses.

(2) If I take a ring from the testator himself, and make use of it to seal his will, the latter will be valid, just as if I had sealed it with another ring.

(3) If the seals should be broken by the testator himself, the will will not be held to have been sealed.

(4) Where one of the witnesses did not sign his name, but, nevertheless, attached his seal, it is the same as if he had not been present; and if he signed it (as many do) without attaching his seal, we hold that the same rule applies.

(5) Can we only attach our seals by means of *a* ring, or if we do not use a ring can we do so with any other article, as men frequently do? The better opinion is that the seal can only be impressed by means of a ring, for it must have a form and be engraved with a device.

(6) There is no doubt that a will can be sealed at night.

(7) A will must be considered to have been sealed when the seals have been impressed upon the cloth in which it is wrapped.

23. *The Same, Disputations, Book IV*.

If the seals of a will have been broken by the testator, and it has been sealed a second time by himself and seven witnesses, it will not be void, but will be valid by both the Prætorian and the Civil Law.

24. *Florentinus, Institutes, Book X*.

Anyone can make several copies of the same will, and indeed this is sometimes necessary; for example, where the testator is about to take a sea voyage, and desires to leave the will behind him, and take a copy with him.

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

Where anyone who makes a will after having mentioned the first heirs loses the power of speech before he can mention the second ones, the better opinion is that he has begun to make a will rather than that he has made it; which view Verus stated, in the First Book of the Digest, was entertained by Servius; therefore the first heirs appointed cannot take under such a will. Hence Labeo thinks that this is correct, if it should be established that the testator who executed the will intended to appoint several heirs. I do not think that Servius intended anything else.

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

Whenever anyone is declared by law to be incapable of becoming a witness, this means that his testimony cannot be received, and, moreover (as certain authorities hold), that no testimony can be introduced in his behalf.

27. *Celsus, Digest, Book XV*.

"Domitius Labeo to his friend Celsus, Greeting. I ask whether he is to be included in the number of witnesses who, after having been requested to write a will, attached his seal to the same after he had done so." "Jubentius Celsus, to his friend, Labeo, Greeting. I either do not understand the point with reference to which you desire to consult me, or your request for advice is certainly foolish, for it is ridiculous to doubt whether such a person can act as a witness, since he himself drew up the will."

28. *Modestinus, Rules, Book IX*.

A slave, even though he belongs to another person, is not prohibited from drawing up a will by order of the testator.

29. *Paulus, Opinions, Book XIV*.

Nothing can be claimed under a written instrument which was drawn up as a will, where it was not legally completed, not even where something has been left by way of trust.

(1) By the following words which the head of a household added to a written document, namely: "I desire this will to be valid as far as possible"; he seems to have intended that every bequest that he left by said document should be valid, even though he might die intestate.

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

It is proper for every witness to a will to sign his name in his own hand, as well as that of the party to whose will he attached his seal.

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

The Treasury cannot seize the property of anyone who publicly announces that he is going to make the Emperor his heir.

TITLE II.

CONCERNING THE APPOINTMENT AND DISINHERITANCE OF CHILDREN AND POSTHUMOUS HEIRS.

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

Let us consider what is meant by the term "specific disinheritance." Must the name, the title, and the surname be mentioned, or will it be sufficient for any of them to be stated? It is established that it is sufficient for one of them to be mentioned.

2. *The Same, Rules, Book VI.*

It is held that a son is specifically disinherited in the following words, "Let my son be disinherited", even if his name is not expressly stated, where the testator has only one son; for where he has several, the opinion is entertained by most authorities, in accordance with the more beneficent interpretation, that none of the sons will be disinherited.

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

Where the testator does not mention his son by name, but merely states that he was born of Seia, he legally disinherits him. And if he should refer to him in terms of reprobation, as, for example: "He who is not to be mentioned by me"; or "He who is not my son, who is a robber and a gladiator"; the better opinion is that the son is legally disinherited. The same rule applies where he refers to him as born of adulterous intercourse.

(1) Julianus thinks that a son should be unconditionally disinherited, which opinion we have adopted.

(2) The son can be legally disinherited between the separate appointments of two heirs, and, in this instance, he will be removed from every degree of inheritance, unless the testator should have disinherited him as only one of his heirs; for if he does this, the disinheritance will be defective, just as if he had expressed himself in the following terms: "Whoever my son will be, I disinherit him." For (as Julianus says) a disinheritance of this kind is defective, since the testator desires his son to be excluded after he has entered upon the estate, which is impossible.

(3) A son who is disinherited before the appointment of an heir is excluded from all degrees.

(4) In accordance with the opinion of Scævola, which I think to be correct, where a son is disinherited between two degrees of inheritance, he is excluded from both.

(5) Mauricianus properly holds that where two degrees of succession are mingled, the act of disinheritance will be valid, for example: "I appoint the first heir to half of my estate; if there is no first heir, the second heir shall inherit half of my estate, and the third the other half. I disinherit my son if there is no third heir, and I appoint the fourth in his stead"; for the son is, in this instance, excluded from every degree.

(6) Where a father executes a will in such a way as to pass over his son in the first degree, and disinherits him only in the second, Sabinus, Cassius, and Julianus hold that the first degree having been disposed of, the will begins to be operative from that degree from which the son was disinherited. This opinion should be approved.

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

It is established that every man can appoint a posthumous child his heir, whether he is married or not. For, indeed, a husband can repudiate his wife, and one who has not contracted marriage can subsequently do so; and where a husband appoints a posthumous heir, it is held that this does not only apply to a child who is born of the present wife of the testator, but also to one who is unborn, and indeed may be born of any wife whomsoever.

5. *Javolenus, On Cassius, Book I.*

Therefore, where a man has appointed a posthumous heir, and, after the execution of the will, marries again, he is held to have been appointed who is the issue of the subsequent marriage.

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

The question arose whether a man who has not complete power of reproduction can appoint a posthumous heir. Cassius and Javolenus say that he can do so, because he can marry and adopt children. Labeo and Cassius state that one who is temporarily impotent can also appoint a posthumous heir, since in this instance neither age nor sterility can be considered as impediments.

(1) Where, however, the individual in question has been castrated, Julianus, following the opinion of Proculus, does not think that he can appoint a posthumous heir. This is the modern practice.

(2) An hermaphrodite can appoint a posthumous heir, if the male organs predominate in his physical conformation.

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

If a son who is under paternal control should be passed over in his father's will, and die during the lifetime of the latter, the will is not valid, and where there is a former one, it will not be broken. This is also the rule at the present time.

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

If I disinherit my son by the appointment of an heir in the first degree, but do not disinherit him from the second degree of substitution, and if, while the first heir appointed is hesitating whether he will enter upon the estate or not, the son should die, the second heir, according to the rule which we have adopted, will have no rights under the will on account of having been improperly appointed in the beginning, since the son was not disinherited from the second degree. If this should occur in the case of a posthumous child, so that it is born during the lifetime of the father, by whom it was disinherited, and it should afterwards die, the same rule must be held to apply with reference to the substituted heir, since when this child was born he occupied the place of the one who survived.

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

Where anyone who, on account of age or ill health, cannot have children, appoints posthumous heirs, a former will is broken, because the nature of man and the capacity for procreation must rather be considered than a temporary defect or illness, by reason of which a man is deprived of the power of generation.

(1) Where, however, a man appoints a posthumous child as his heir who is to be born of the wife of another, the appointment will not be valid in law, for the reason that it is dishonorable.

(2) If I disinherit my son, and pass over my grandson born to said son, and appoint another person my heir, and my son survives, even though he should die before my estate is entered upon, my grandson cannot, nevertheless, break my will; so Julianus, Pomponius, and Marcellus hold.

The case is different where my son is in the hands of the enemy and dies there, for my

grandson in this instance can break my will, since, when his grandfather died, the right of the son was in suspense, and was not extinguished, as in the former instance. Where, however, the appointed heir rejects the estate, the grandson will be the lawful heir, as these words, "If he should die intestate", have reference to the time when the will ceased to be valid, and not to that when the party died.

(3) But where I appoint a posthumous heir to be born of a woman whom it is wrong to marry, Pomponius does not think that the will is broken.

(4) If I have an adopted sister, I can appoint her posthumous child my heir, for the reason that if the adoption is annulled I can marry her.

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

A child that is yet unborn may very conveniently be appointed an heir, in the following terms: "If, during my lifetime or after my death, a child should be born to me, I appoint him my heir"; or this may be done absolutely, without making mention of either time. If either of these contingencies is omitted, and the child is born, so far as the one which is omitted is concerned the will will be broken, because the said child is not understood to have been born subject to the condition under which it was appointed heir by the will.

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

In the case of proper heirs, it is perfectly evident that a continuation of ownership legally remains, so that there appears to be no succession; since those should be held to be the owners of the estate who, during the lifetime of their father, were already considered to occupy that position. Wherefore, the son of a family is so called, just as a father is styled the father of a family, so that it is only by the prefix that the parent is distinguished from the child. Hence, after the death of the father, the children are not considered to have obtained the inheritance, but rather to have acquired the free administration of the property. For this reason they are owners, even though they have not been appointed heirs, for there is no reason why he should not possess the right of disinheriting those whom he formerly had the right to put to death.

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

When it is said that the birth of a child breaks a will, the term "birth" must be understood to also apply where it has been taken from its mother's womb by means of a surgical operation. For in this case a child breaks a will, provided it is born under paternal control.

(1) But what if the child should be born deformed, but still of sound mind; would the will be broken in this instance? It must be held that it would be.

13. *Julianus, Digest, Book XXIX.*

The following was set forth in a will: "If a child should be born to me, I appoint him heir to two-thirds of my estate, and I appoint my wife heir to the remaining third; if, however, a daughter should be born to me, I appoint her an heir to one-third of my estate, and my wife to the remaining two-thirds." In case both a son and daughter are born, it must be held that the estate should be divided into seven parts, out of which the son should be entitled to four, the wife to two, and the daughter to one portion. Thus, in compliance with the will of the testator, the son should have twice as much as the wife, and the wife twice as much as the daughter, and although, according to the strict rule of law, it might be held that the will was broken; still, as the testator desired that his wife should have something in case either of the children mentioned should be born, recourse was had to this interpretation through motives of humanity, and it was also clearly accepted by Juventius Celsus.

(1) It has been established by a rule of the Civil Law that an estate once granted cannot be taken away; wherefore, in case a slave is directed to become free and an heir, even though his master should deprive him of freedom by the same will, he shall, nevertheless, be entitled to

both his freedom and the estate.

(2) When a will is framed in the following terms: "Let Titius be my heir, after the death of my son, and I disinherit my son"; it is of no effect, because the son is disinherited after the death of the testator, and for this reason he can obtain possession of the estate in opposition to the wills of the freedmen of his father.

14. *Africanus, Questions, Book IV.*

Where a posthumous child has been disinherited in the first degree, and passed over in the second, even though it was born at the time when the estate belonged to heirs appointed in the first degree, it is held that the will is broken with reference to the second degree, so that if the heirs who have been appointed fail to enter upon the estate, it itself will become the heir. Nay more, if the heirs who have been appointed fail to enter upon the estate after its death, the substituted heirs cannot do so. So if the posthumous child who was disinherited in the first degree, passed over in the second, and disinherited in the third, should die while the first heirs are deliberating whether they will accept the estate or not, it may be asked if the first ones should reject the estate, whether it will belong to those who are appointed in the third degree, or to the heirs-at-law. In this instance it is also held to be more equitable that it should belong to the heirs-at-law. For in a case where two heirs have been appointed and substitution has been made for each of them, and the posthumous child has been disinherited in the first degree, and passed over in the second, if either of the appointed heirs should not accept the estate — even though the posthumous child may have been excluded — still the substituted heir cannot be admitted.

(1) While it is commonly asserted that the rule having reference to a degree in which a child is passed over is not valid, this is not true in every instance; for if a son has been appointed heir in the first degree, he should not be disinherited in the substitution. Therefore, where a son and Titius have been appointed heirs, and Mævius was substituted for Titius, Titius having refused the estate, Mævius can enter upon it, even though the son may not have been disinherited in the second degree.

(2) If anyone should make the following statement in his will: "I disinherit So-and-So, whom I know is not my son"; a clause of this kind will be of no force or effect, where it is proved that the party referred to is the son of the testator; for a son is not held to have been disinherited merely because his father spoke disparagingly of him at the time, and added that he disinherited him for this reason, and it is proved that the father was mistaken with reference to his motive for disinheriting him.

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

The same rule applies if the testator should have said: "I disinherit So-and-So, the son of So-and-So," attributing an adulterous father to him through mistake.

16. *Africanus, Questions, Book IV.*

Where a son is appointed heir by his father, who passes over a posthumous child, and his grandson who is the son of the said heir is afterwards substituted for him, and the son, in the meantime, dies, and the posthumous child should not be born, the said grandson will be the heir of both his father and grandfather. Where, however, no one is substituted for the son, and he alone is appointed heir, then, for the reason that, at the time when the son died, it begins to be certain that there will be no heir under the will, the son himself will become the heir of his father if the latter dies intestate; just as frequently happens where a son who is under the control of his father is appointed heir under some condition, and dies before he has complied with it.

17. *Florentinus, Institutes, Book X.*

Sons can also be disinherited in the following terms: "Let my son be disinherited"; "My son

shall be disinherited."

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

Many fathers disinherit their children not on account of any disgrace or to do them injury, but with a view to their own welfare (as, for instance, those who have not arrived at puberty), and bequeath their estates to them in trust.

19. *Paulus, On Vitellius, Book I.*

A certain man appointed his daughter sole heir to his estate, and bequeathed ten *aurei* to his son, who was under his control, and added: "My son shall be disinherited so far as the remainder of my estate is concerned." The question arose whether he could be held to be legally disinherited. Scævola answered that he did not seem to be properly disinherited, and, while discussing the point, added that the disinheritance was void, for a child could not be legally disinherited when this only had reference to a certain tract of land; and that the case was different where anyone is appointed an heir, for the reason that appointments are understood to be subject to the most liberal interpretation, but no encouragement should be given to disinheritances.

20. *Modestinus, Pandects, Book II.*

Where a son is appointed an heir under some condition, and while the condition is pending gives himself to be arrogated, he will cease to be a necessary heir.

21. *Pomponius, On Quintus Mucius, Book II.*

If I should disinherit my son by name and afterwards appoint him my heir, he will be my heir.

22. *Terentius Clemens, On the Lex Julia et Papia, Book XVII.*

When a posthumous child is appointed an heir under some condition, and the condition is fulfilled before he is born, the will will not be broken by the birth of the said posthumous child.

23. *Papinianus, Questions, Book XII.*

Where a father, after emancipation granted by him to his son, resumes control over him again by arrogation, I have stated that the disinheritance previously made by his father will prejudice his rights; for it is proper to be observed in almost every law that an adopted son can never be understood to hold that relation towards his real father, in order to prevent the truth of nature from being obscured by a mere formality; so that the son is not considered to have been brought under the care of his father, but to have been returned to his control. In the case suggested, I do not think that it makes much difference whether the father arrogated his disinherited son either as his son or his grandson.

(1) Where Titius is appointed an heir and adopted in the place of a grandson, and afterwards the son who was considered the father of said grandson dies, the will is not broken by the succession of the grandson, so far as he who has been appointed heir is concerned.

24. *Paulus, Questions, Book IX.*

Where a posthumous child appointed heir under some condition is born while the condition is pending, and during the lifetime of its father, this breaks the will.

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

Titius appointed an heir by will, and having a son disinherited him, as follows: "Let all my other sons and daughters be disinherited." Paulus was of the opinion that the son seemed to have been legally disinherited. Afterwards, having been asked whether a son whom his father believed to be dead could have been held to have been disinherited, he answered that, in accordance with the case stated, the sons and daughters were specifically disinherited, but,

with reference to the case of the father who was mistaken with reference to the death of his son, the point should be determined in court.

(1) Lucius Titius, while drawing up his last will in the City, had a granddaughter by his daughter who was at that time in the country, and pregnant, stated that her unborn child should be heir to a portion of his estate. I ask, if on the very day when Titius drew up his will in town, about the sixth hour, his granddaughter Mævia brought forth a male child in the country; whether such an appointment was valid, since at the time when the will was drawn up the child had already been born? Paulus answered that the terms of the will seemed to have reference to a great-grandchild to be born after the execution of the will; but if, as in the case stated, the granddaughter of the testator was born upon the same day on which the will was executed, and before it was drawn up, even though the testator may have been ignorant of the fact, still, the appointment must be held to have been legally made; and this opinion is in accordance with law.

26. *Paulus, Decisions, Book III.*

Where a son under paternal control is serving in the army he should, just as any civilian, be appointed an heir, or be disinherited by his father by name; for the Edict of the Divine Augustus, by which it was provided that a father should not disinherit his son while in the army, has been repealed.

27. *The Same, On Neratius, Book III.*

A father can appoint as his heir a posthumous child the issue of him and any widow whomsoever.

28. *Tryphoninus, Disputations, Book XX.*

A son who was appointed an heir by his father while under control of the latter, dependent upon a certain condition with which he had nothing to do, and who was disinherited when the condition was not fulfilled, died while the condition of his appointment, as well as of his disinheritance, was still pending. I held that the son, when he died, was the heir of his intestate father, since during his lifetime he was neither the heir under his will, nor was he disinherited. Where a son is appointed heir to a certain share of an estate, his co-heir can be appointed after the death of the son.

(1) A son under paternal control, who was in the military service, made a will disposing of his *peculium castrense*, having at the same time a son under his control. After he left the service, and his father, who was also a grandfather, died; the question arose whether his will was broken. He did not, in fact, adopt anyone, nor had any son recently been born to him, nor was his nearest heir removed from his control, so that the next in order might take his place; still, he began to have under his control a person not previously in that position, and at the same time he became the head of a family and his own son became subject to his authority. Therefore, his will is broken. If, however, his said son had been either appointed or disinherited by his will, it would not be broken; for the reason that he obtained power not by any innovation on his part, but in the natural course of affairs.

(2) Where a party appoints an heir to be born of a certain wife of his he runs the risk of breaking his will if children are born to him by some other woman.

(3) If a testator appoints as heir a child to be born from a certain woman who at that time could not be his wife, and he afterwards was legally able to marry her; the question arises whether a child born under such circumstances can be an heir under the will. For example, if to-day you appoint as an heir a child born to yourself and Titia, and Titia at the time is a female slave, or a minor under twenty-five years of age, or because your father administered her guardianship, or you yourself administered it, and Titia afterwards should become your legal wife, either because she obtained her freedom, or reached the age of twenty-five years,

her legal majority, or your accounts as guardian had been rendered; would your child born of her be your heir?

Certainly, no one will doubt that such a child born after you married her would be your heir, even though on account of her age she could not be legally married at the time that the will was executed. And, generally speaking, whenever an heir appointed by a will is born after it is made, he has a right to enter upon the estate, no matter in what condition the woman who subsequently married the testator may have been in at the time of the execution of the will.

(4) But what if the testator had appointed the son and daughter to be born after his will his heirs, the son for two-thirds, and the daughter for one-third of his estate, without appointing any co-heir, or substituting one for the other? The child that was born would be the sole heir under the will.

29. *Scævola, Questions, Book VI.*

Gallus stated that posthumous grandchildren could be appointed heirs in the following terms, namely: "If my son should die during my lifetime, and within ten months after my death any grandchildren, either male or female, should be born to his wife, let them be my heirs."

(1) Certain authorities hold that the appointment of heirs will be legal, even if the father does not mention the death of the son, but simply appoints his grandchildren his heirs; since it may be inferred from his words that in such an event the appointment will be valid.

(2) It must also be believed that Gallus held the same opinion with reference to grandchildren, when the testator says: "If my grandson should die during my lifetime, then my great-grandchild who is his issue," etc.

(3) If, however, the grandson should die during the lifetime of the son, leaving his wife pregnant, and the testator should make a will; he can say: "If my son should die during my lifetime, then my great-grandson sprung from him shall be my heir."

(4) While the testator's son and grandson are still living, can the testator provide for the succession of his great-grandson, under the assumption that both the former will die during his lifetime? This also must be admitted, in order to prevent the will from being broken by the succession, if in fact the grandson should die, and then the son after him.

(5) What if the testator should only anticipate the event of the death of his son, and what would be the result if the testator should suffer the interdiction of water and fire? What if the grandson, the father of the great-grandson appointed heir, as we have stated, should be emancipated? These instances, as well as any of those in which a lawful heir is born after the death of his grandfather, have no connection with the *Lex Velleia.* But, in accordance with the spirit of the *Lex Velleia*, all these matters should be taken into consideration, just as other cases should be admitted, for example, where death occurs.

(6) What course must be pursued where the person who makes the will has a son in the hands of the enemy? Why has it not been held that, if the son should die before returning from captivity, but after the death of his father, then the grandson who was born during their lifetime, or even after the death of his grandfather, could not break the will? This case has no relation to the *Lex Velleia*.

The better opinion therefore is that, for the sake of convenience, and especially after the *Lex Velleia*, which disposed of many cases where a will could be broken, the interpretation should be adopted that, where a testator appoints his grandson who was born after his death, he shall be held to have appointed him legally. And no matter under what circumstances the grandson born after the testator's death may become his heir, whenever he has been passed over in the will, he can break it. Even if its provisions are stated in general terms, for instance: "Any children born to me after my death, or whoever shall be born after my death, shall be appointed my heir"; provided such a child should be born his heir.

(7) Where anyone has a son, and appoints his grandson born of said son his heir, and his daughter-in-law, being pregnant, is captured by the enemy, and while in their hands, and, during the lifetime of the grandfather and his son, brings forth a child, and the latter, after the death of his father and grandfather returns; is this case included in the *Lex Velleia*, or must recourse be had to the ancient law, so that the grandson who is appointed may not break the will either under the ancient law or the *Lex Velleia?*

This question may be raised, if, after the death of the son, the grandfather appoints his grandson his heir, and the latter returns after the death of his grandfather. However, when the will cannot be broken by him who was appointed, it makes no difference whether he is excluded from the succession by the ancient law or by the *Lex Velleia*.

(8) Someone perhaps may doubt whether, in this instance, if the grandson should be born after the execution of the will, and during the lifetime of his father and grandfather, he can be appointed an heir because his father had not been legally appointed. There should be no apprehension on this ground, for the grandchild is born of a lawful heir after the death of his ancestors.

(9) Hence, if a great-grandson, born of a grandson, can be admitted to the succession, if afterwards his son should be living, a son born to him will also be entitled to the succession.

(10) In all these instances, it must be observed that only a son who is under parental control can be appointed heir to any portion of an estate, for his disinheritance after the death of the testator will be void. It is not necessary, however, for the son to be disinherited if he is in the hands of the enemy and dies there; and certainly with respect to the grandson and great-grandson, we never require their appointment if their children are appointed heirs, because they can be passed over.

(11) Let us now examine the *Lex Velleia.* It prescribes that children born in our lifetime, in like manner, cannot break our wills.

(12) The first section of the law has reference to those who after they are born, will become proper heirs. I ask, if you should have a son, and appoint as your heir your grandson by said son, who is not yet born, and your son should die, and your grandson should be born during your lifetime, what will be the result?

It must be held from the words of the law that the will is not broken, as it not only states in the first section if the grandson is appointed at the time during which the son was not in existence, but also if he should be born during the lifetime of his father. In this case, why should it be necessary for the time when the will was executed to be considered, since it is sufficient to observe the time when the grandson was born? For, in fact, the following are the words of the law: "He who makes a will can appoint as heirs all those children of the male sex who will be his proper heirs"; and also, "even though they may have been born during the lifetime of their father".

(13) In the next section of the law, it is not provided that those who succeed to the place of the children can break the will; and this must be interpreted in such a way that if you have a son, a grandson, and a great-grandson, and after the death of the first two, your grandson having been appointed and succeeding the lawful heir, will not break the will.

It has been very properly decided that the words: "If any one of his heirs should cease to be his heir"; have reference to all those cases to which we have stated the formula of Gallus Aquilius is applicable; for not only where a grandson dies during the lifetime of his father, the great-grandson succeeding his deceased grandfather does not break the will, but also where he survives his father and then dies, provided he has either been appointed heir, or been disinherited.

(14) It should be considered whether by the words of this last section, namely: "If any of his

heirs should cease to be his heir, his children shall become heirs in his stead", are susceptible of the interpretation that if, having a son in the hands of the enemy, you appoint your grandson by said son your heir, not only if your son should die during your lifetime, but even after your death and before he returns from captivity, he does not break the will by the succession, for the testator added nothing by which the time might be indicated, unless you may rather rashly hold that he has ceased to be a lawful heir during the lifetime of his father (although he died after the death of the latter), because he did not and could not return.

(15) The following case is a difficult one. If you have a son and you appoint your grandson, who is not yet born, your heir, and the latter is born during the life of his father, and then his father dies, he is not his heir at the time when he was born, nor afterwards, for by his succession he who has already been born is held to be forbidden to break the will. Hence, by the first section of the law, those children are permitted to be appointed heirs who are as yet unborn, and who, after they are born, will be proper heirs.

By the second section, their appointment is not permitted, but the law forbids them to break the will; nor on this account should the second section be considered of inferior importance. However, the child who was not yet born at the time he was appointed should take the place of his father (which in fact he could not do by law), just as if he had been legally appointed. Julianus, however, held that the two confused sections of the law might be reconciled in such a way as to prevent wills from being broken.

(16) After adopting the opinion of Julianus, let us, however, examine whether if a grandson is born during the lifetime of his father, and is subsequently emancipated, he can voluntarily enter upon the estate. This opinion should be approved, for a party cannot become a proper heir by emancipation.

30. *Gaius, On the Provincial Edict, Book XVII.*

Among other things which are necessarily provided for in the execution of wills, one of the most important has reference to the appointment or disinheritance of children as heirs; lest, they having been passed over, the will may be broken; for a will is void where a son who is under paternal control is passed over.

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

Where a son is a captive in the hands of the enemy, his father can legally make a will and pass him over; but if the son was under paternal control, the will will be void.

32. *Marcianus, Rules, Book II.*

Where a son has been disinherited after his emancipation, and another, who is under the control of the father, is passed over, and the one who is emancipated contests the will, his act will be void; for both the proper heir and the son who is emancipated will be entitled to the succession *ab intestato*.

TITLE III.

CONCERNING ILLEGAL, INVALID, AND BROKEN WILLS.

1. *Papinianus, Definitions, Book I.*

A will is said not to have been executed in compliance with the law, where the legal formalities are lacking; or to be of no force and effect, where a son who is under the control of his father is passed over; or broken by another subsequent will, when by the terms of the latter, an heir is created, or the birth of a proper heir takes place; or where it does not become operative because the estate is not entered upon.

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

Hence, a first will is broken when a second one is properly executed, unless the latter has been

executed in accordance with military law, or where the testator stated therein who would be entitled to succeed *ab intestato;* for, in this instance, the first will is broken by the second, although it may not be perfect.

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

Posthumous children who descend through the male sex are disinherited by name, just in the same way as the living children of the testator, unless they break the will by their birth.

(1) We only style those children "posthumous" who are born after the death of their father; those who are born after the execution of the will are, in accordance with the *Lex Velleia*, forbidden to break the will, where they are disinherited by name.

(2) Wherefore, children can be also disinherited either before the appointment of an heir, or between the appointment of several heirs, or between the different degrees of inheritance; for the Divine Marcus decreed that the same rule should be observed with reference to a posthumous child, as in the case of a living one, since no reason for establishing a difference can be given.

(3) From these matters it is apparent that a difference exists between living children and those subsequently born. The former always render the will illegal, the latter break it, and when they are born do not find themselves disinherited.

(4) Where a former will by which a posthumous child is disinherited exists, it is established that it is broken, whether the child is born after the death of the testator, or during his lifetime; the first one is broken by the second, and the second by the birth of the posthumous child.

(5) A posthumous child is also considered to be expressly disinherited where the testator says: "Let any child whosoever that is born to me be disinherited, whether it has been brought forth by Seia, or whether it is still unborn." If, however, he should say: "Let my posthumous child be disinherited"; and it is born either after the death, or during the life of the testator, it will not break the will.

(6) However, even though a posthumous child who has been passed over breaks a will by its birth, still, it sometimes happens that only a portion of the will is broken; as, for example, where the posthumous child was disinherited in the first degree, and passed over in the second; for in this instance the appointment in the first degree will be valid, if that in the second is void.

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

Then, if the heirs appointed in the first degree deliberate as to the acceptance of the estate, those appointed in the second degree cannot obtain it, because the second degree being broken and weakened, the estate can no longer be acquired from that source.

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

Where anyone is appointed an heir under some condition, by which a posthumous child is not disinherited, still, the degree is broken while the condition is pending, as Julianus stated. But when someone is substituted, even where the condition upon which the appointment in the first degree depends is not fulfilled, the substituted heir will not be admitted to the succession from which the posthumous heir has not been disinherited.

I think, therefore, that if the condition of the appointment under the first degree is complied with, the posthumous heir will have the preference. However, the birth of the posthumous child, after failure to comply with the condition, does not destroy the appointment in the first degree, because the latter becomes null and void. By breaking the will, the posthumous child makes a place for himself, even though the son causes the second degree from which he was disinherited to become valid. Where, however, the posthumous child who was passed over in the first degree and disinherited in the second is born at the time when one of the appointed

heirs is living, the entire will is broken; for, by destroying the first degree, he makes a place for himself in the succession.

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

Where anyone, after having disinherited his son, dies, leaving his daughter-in-law pregnant, and appoints a stranger his heir under some condition, and while the condition is pending and after the death of the father, or while the heir is deliberating as to whether or not he will enter upon the estate, the disinherited son should die, and a grandson should be born, will this break the will? We say that the will is not broken, as a grandson ought not to be disinherited in this way by his grandfather, who preceded his father in the succession.

It is clear that if the appointed heir should refuse to accept the estate, there can be no doubt that this heir would inherit from his grandfather *ab intestato*. Both of these cases are founded upon good and sufficient reasons, for a posthumous child breaks a will by his birth, where no one took precedence of him at the time of the death of the testator, and he succeeds *ab intestato* where the succession has not been granted to anyone before him. It is evident that, in this instance, the succession has not been granted to the son, since he died while the appointed heir was deliberating as to his acceptance of the estate. This, however, is the rule only where the grandson was still unborn at the time of the death of his grandfather; for Marcellus says that if he had been conceived after that time, he could not be admitted to the succession either as a proper heir, a grandson, or a cognate, or would be entitled to prætorian possession of the estate.

(1) Where the father of a grandson who, at the time of the death of the grandfather, was in the hands of the enemy, and died in captivity, the said grandson, by obtaining the succession after the death of his grandfather, breaks the will, because his aforesaid father was not in his way; for, as he died while a captive, he is not considered to have been alive when his grandfather died, and even if the captive father should return, this would render the will of his father illegal, as he had been passed over therein.

(2) If a grandson was either conceived in his own country or among the enemy, as the right of *postliminium* is also granted to unborn children, the will will be broken by his birth.

(3) Therefore, those who succeed to proper heirs do not break the will, whether they are appointed heirs or disinherited in the degree in which the succession is granted, provided that this is valid.

(4) However, no matter in what way fathers standing first in the succession may cease to be under paternal control, whether through captivity, death, or the infliction of some penalty, their children who succeed them and who are either appointed heirs or disinherited by a will cannot break it.

(5) A will becomes invalid whenever anything happens to the testator himself; as, for instance, where he loses his civil rights through being suddenly reduced to slavery, for example, where he is captured by the enemy; or where, being over twenty years of age, he permits himself to be sold for the purpose of transacting the business of his purchaser, or to share in his own price.

(6) Where, however, anyone convicted of a capital crime is condemned to be thrown to wild beasts, or to fight as a gladiator, or some other sentence is imposed which will deprive him of life, his will becomes void, not from the time when he suffered punishment, but from the date of his sentence, for he then at once becomes a penal slave; unless, being a soldier, he is convicted of some military offence, for under such circumstances, it is customary for him to be permitted to make a will, as the Divine Hadrian stated in a Rescript; and I think that he can make one in accordance with military law. On this principle, therefore, as he is allowed, to make a will after his conviction, should one which he had previously executed be held valid, if he was allowed to make it, or should it be considered void on account of the penalty, after it

has been made? There can be no doubt that, if he has a right to make a will by military law, and wishes the first will to be valid, he will be considered to have executed it.

(7) The will of a person who has been deported does not immediately become void, but only after the Emperor has confirmed the sentence, for then he who was condemned loses his civil rights. Where, however, the punishment of a Decurion is concerned, or that of his son or grandson, and the Governor refers the case to the Emperor, I do not think that the convicted party becomes at once a penal slave, although it is customary to incarcerate him for safe-keeping. Therefore, his will does not become void before the Emperor issues his decree that he must suffer the punishment. Hence, if he should die before this is done, his will will be valid, unless he takes his own life; for, by the Imperial Constitutions the wills of those who are conscious of their guilt are void, even though they may die while in possession of their civil rights.

But where anyone, through weariness of life, or because he is unable to endure the suffering of illness, or through a desire for notoriety commits suicide, as certain philosophers do, this rule does not apply, as the wills of such persons are valid. The Divine Hadrian also made this distinction with reference to the will of a soldier, in a letter addressed to Pomponius Falco, stating that if anyone belonging to the army preferred to kill himself because he was guilty of a military offence, his will shall be void; but if he does so because he is tired of life, or on account of suffering, it will be valid, and if he should die intestate, his property can be claimed by his relatives, or, if he has none, by his legion.

(8) All those persons, whose wills we have stated become void because of their condemnation, do not lose their civil rights if they appeal from the decision of the tribunal; and therefore any wills which they may have previously executed do not become void, and it has very frequently been decided they can still make a will. They are not held to resemble those who are doubtful concerning their condition, and have not testamentary capacity, for they are certain of their condition, and they are only uncertain of themselves while the appeal is pending.

(9) But what if the Governor did not receive the appeal, but delayed the infliction of the penalty until it was confirmed by the Emperor? I think that the party in question would, in the meantime, also preserve his status, and that his will would not become invalid. For (as has been stated in the Address of the Divine Marcus) where an appeal which has been taken by the party directly, or by someone acting for him is not received, the infliction of the penalty must remain in abeyance until the Emperor answers the letter of the Governor and returns his decision together with the letter; unless the accused is a notorious robber, or has been guilty of fomenting sedition, or has perpetrated bloodshed, or where some other good reason exists which can be set forth by the Governor in his letter, and which does not admit of delay, not for the purpose of hastening the punishment, but in order to provide against danger to the community; for, under such circumstances, he is permitted to inflict the penalty and then communicate the facts to the Emperor.

(10) Let us see where someone has been illegally condemned and the penalty has not been inflicted, whether his will will be invalid. Suppose, for instance, that a decurion has been sentenced to be thrown to wild beasts, will he lose his civil rights, and will his testament become void? I do not think that this will be the case, as the sentence cannot legally bind him. Therefore, where a magistrate finds someone guilty who is not subject to his jurisdiction, his will will not be void, as has been frequently decided.

(11) The wills of those whose memory is condemned after their death, for example, on account of high treason, or some similar offence, are invalid.

(12) With reference, however, to what we have stated, namely, that the will of anyone captured by the enemy becomes invalid, it must be added that the will regains its validity through the right of *postliminium*, if the testator should return; or if he dies while in captivity,

it is confirmed by the *Lex Cornelia.* Therefore, where anyone is convicted of a capital crime, and is restored to his civil rights through the indulgence of the Emperor, his will again becomes valid.

(13) It has been settled that the will of a son under paternal control who has served his time in the army, and has become his own master through the death of his father, is not void; for when a son disposes of his *castrense peculium* by will, he must be considered as the head of a household, and therefore it is certain that the will of a soldier or a veteran does not become void by his emancipation.

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

If a soldier should make a will in accordance with the Civil Law, and appoint an heir in the first degree, which he is entitled to do under military law, and in the second degree should substitute someone as heir which he can do by the Common Law, and should die a year after his discharge, the first degree becomes invalid, and the will commences with the second.

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

It is true that a will is broken by either the adoption or the arrogation of a son or a daughter, just as it is ordinarily broken by the birth of an heir.

(1) Where a daughter and a grandson are emancipated, this does not break a will, because they are released from paternal control by a single sale.

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

Where a father is taken captive by the enemy, and his son retains his citizenship, the father's will is not broken by his return.

10. *The Same, On Vitellius, Book I.*

Nor does a son returning from captivity break the will of his father through the right of *postliminium*, which is the opinion held by Sabinus.

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

Where two wills executed at different times are produced, and each of them is sealed with the seals of seven witnesses, and the last one, having been opened, is found to be blank, that is, without any writing whatsoever, the first will is not broken for the reason that the second one is void.

12. *The Same, Disputations, Book IV.*

A posthumous child, having been passed over, was born and died during the lifetime of the testator. Although by strict construction of the law, and by the employment of excessive subtlety, the will may be held to be broken, still, if it was properly sealed, the heir who was entitled to the possession of the estate in accordance with the terms of the will will acquire it; as the Divine Hadrian and Our Emperor stated in Rescripts. For this reason the legatees, as well as the beneficiaries of the trust, will be secure in the possession of whatever has been left to them. The same must be said with reference to a will improperly executed, or one which is void, where the possession of the estate was granted to him who could have obtained it *ab intestato*.

(1) Where a civilian who had already made one will makes another, and provides in the latter that the heir shall be entrusted with the execution of the first will, the first is unquestionably broken. Having been broken, it may be asked whether it should not be valid as a codicil. Since the words of the testator in the second will refer to a trust, undoubtedly all matters therein contained relate to a trust, not only the legacies and the property left to be administered in a fiduciary capacity but also all manumissions, as well as the appointment of an heir.

13. *Gaius, Institutes, Book II.*

Those also are included among posthumous children who, by succeeding to the place of proper heirs, through their birth become the lawful heirs of their parents. For instance, if I have a son, and a grandson or a granddaughter born to him, all under my control, as the son takes precedence by a degree in the succession, he alone has the right of a direct heir, even though the grandson and granddaughter, who are his children, are also under my control. If, however, my son should die during my lifetime, or, for any reason whatsoever, should be released from my control, the said grandson and granddaughter will take his place in the succession, and in that way their rights as direct heirs will be acquired, as it were by birth, but my testament will not be broken in this way, just as if I should appoint or disinherit my son as my heir; nor can I legally make a will in such a way that it will become necessary for me to appoint as heir, or disinherit my grandson or my granddaughter, unless my son having died during my lifetime, and my grandson or granddaughter having taken his place in the succession, should break the will, just as is done by birth; and this the *Lex Julia Velleia* provided for.

14. *Paulus, Concerning the Assignment of Freedmen.* Where disinheritance is expressed as follows: "If a male or female child should be born, let it be disinherited"; and both are born, the will is not broken.

15. *Javolenus, Epistles, Book IV*.

A man whose wife was pregnant fell into the hands of the enemy. I ask where a son was born, at what time the will executed by the testator, who was there in the enjoyment of his civil rights, was broken, and if the son should die before the father, whether the testamentary heirs will be entitled to the estate. 1 answered that I did not think that there could be any doubt, in accordance with the Cornelian Law, which was enacted for the confirmation of the wills of those who died while in captivity, that, if a son was born, the will of a testator who was in the hands of the enemy would be broken. It follows, therefore, that the estate will belong to no one by this will.

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

When in the second will we appoint an heir who is living, whether this is done either absolutely or conditionally, and the condition can be fulfilled even though this may not take place, the first will is broken. It makes a great deal of difference, however, what the imposed condition was; for everyone that can be conceived has reference either to the past, the present, or the future. One is imposed with reference to the past, for instance: "If Titius has been consul"; and if this condition is true (that is to say if Titius has actually been consul), the heir will be appointed in such a way that the first testament will be broken, for he becomes the heir for this reason. If, however, Titius has not been consul, the former testament will not be broken.

Where the condition imposed with reference to the appointment of an heir relates to the present time, as for instance: "If Titius is consul"; the result will be the same, so that, if he is consul, the party can become the heir, and the former testament will be broken. But if he is not consul, the party cannot become the heir, and the former testament will not be broken.

If conditions are imposed with reference to a future time, and they are possible and can be fulfilled, even though they may not take place, they cause the former will to be broken. Where, however, they are impossible, as, for example, "Let Titius be my heir if he has touched the sky with his finger", it is held that this condition is just as if it had not been prescribed, as it is impossible.

17. *Papinianus, Opinions, Book V*.

Where a son who was under his father's control has been passed over, no manumissions or legacies granted by the will are valid, if the son who was passed over does not claim his share of the estate from his brothers. If, however, he refuses to accept any of his father's estate,

although, in accordance with the strict interpretation of the law, the will may be considered void, still, the wishes of the testator will be complied with on the principles of justice and equity.

18. *Scævola, Questions, Book V*.

Where anyone who has been appointed heir by a testator is arrogated by him, it can be said that he has done enough for him, because before he adopted him, his appointment was merely that of a stranger.

19. *The Same, Questions, Book VI.*

If Titius and myself should be appointed heirs, and by our appointment a posthumous child is disinherited, or one is not disinherited on account of our substitution as heirs, and Titius should die, I cannot enter upon the estate; for the will is broken on account of the appointment of a person by which the posthumous child is disinherited, and who is called to the succession as a substituted heir, by whom the posthumous child is not disinherited.

(1) Where, however, Titius and myself are substituted for one another, even though the posthumous child may not have been disinherited in that part of the will which mentions the substitution, and Titius either dies, or rejects the estate, I think that I can enter upon and become the heir of all of it.

(2) However, in the first case, even though Titius may be living, I cannot enter upon the estate without him, nor can he do so without me, for the reason that it is uncertain whether the will may not be broken by one of us refusing to accept, and therefore we should both enter upon the estate together.

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

Lucius Titius, while of sound mind and in good health, made a will in the proper manner, and afterwards became ill, and while insane mutilated the instrument. I ask whether the heirs appointed by the said will can enter upon the estate. The answer was, that in accordance with the facts stated, they will be prevented from doing so.

TITLE IV.

CONCERNING ERASURES, CANCELLATIONS, OR ADDITIONS TO A WILL.

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

Where any words have undesignedly been erased or blotted in a will, so that they can still be read, they will, nevertheless, be valid; but this is not the case where it has been done purposely. Where anything has been obliterated or erased without the order of the testator, it is of no effect. The term "read" must be understood to mean not that the sense can be ascertained, but that what has been written can be perceived by the eyes. But where the meaning can be gathered from some other source, the words are not held to be legible. It is sufficient, however, for them to be legible where they have been thoughtlessly erased, either by the testator or by someone else, against his will. The word "blotted" must be understood to signify that the words are obscured.

(1) Hence, where anything of this kind has been done unintentionally and the writing can be read, it is just as if it had not been done at all. Therefore, if at the end of the will (as is customary) there was written: "I, myself, have made all the erasures, insertions, and changes herein contained"; it is not held that this has reference to anything which may have been erased accidentally; for if a testator should write that he had made the erasures unintentionally, the words will remain, and if he has rendered them illegible, they will not be considered to be so.

(2) Where words of this kind cannot be read, and have been unintentionally erased, it must be held that nothing is granted by them; provided, however, that this was done before the

completion of the will.

(3) Where, however, words have been intentionally erased, parties claiming under them will be barred by an exception, but if this was done undesignedly, they will not be barred, whether the words can, or cannot be read; since if the entire will does not exist, it is established that everything therein contained will be valid. If indeed the testator mutilated the will, actions will be denied to parties mentioned in it; this, however, will not be the case where the mutilations were made against the consent of the testator.

(4) When the heir has been deprived of a portion of the estate, or of all of it, and a substitute has been appointed, the act will be held to be legally performed; but the estate will not be considered to have been taken away from the heir, but never to have been given to him, as where an estate has once been granted it is not easily taken away.

(5) Where anyone confirmed his codicils by a will, and added something in a codicil which he afterwards erased, but which is still legible; will any obligation be incurred by it? Pomponius says that a codicil which has been erased is void.

2. *The Same, Disputations, Book IV*.

A certain individual cancelled his will, or erased it, and stated that he did so on account of a certain heir, and this same will was afterwards sealed by witnesses. The question arose with reference to the validity of the instrument, and of that portion of it which the testator said that he had cancelled on account of the said heir. I held that if the testator had erased the name of one of the heirs, the remainder of the will would undoubtedly be valid, and the right of action would be absolutely refused to the said heir; but where he had been specifically charged with legacies they would be due, if it was the intention of the testator that only his appointment as heir should be annulled. If, however, he erased the name of the appointed heir, and retained that of the substituted heir, he who was appointed would not be entitled to anything out of the estate. But if (as in the case stated), the testator should erase all the names, and should allege that he had done so on account of his dislike to a single heir, I think that it makes a great deal of difference whether he merely desired to deprive the said heir of his inheritance, or whether, on his account, he intended to invalidate the entire will; so that, although only one heir was the cause of the erasure, all of them would be prejudiced by it. If, however, he only wished to deprive a single heir of his share of the estate, the erasure will not prejudice the others, any more than if the testator, while intending to erase the name of one heir, had also unintentionally erased that of another. If the testator thought that his entire will should be cancelled because one of the heirs was undeserving, the right of action will be denied to all of them. But it may be asked whether the right of action should also be denied to the legatees. So far as this doubtful question is concerned, it should be held that the legacies are due, and that the appointment of the co-heir is not invalidated.

3. *Marcellus, Digest, Book XXIX*.

A case was recently brought to the attention of the Emperor, where a certain testator erased the names of the heirs, and the estate was claimed as forfeited to the Treasury. There was doubt for a long time as to what disposition should be made of the legacies, and especially of such as had been bequeathed to those whose appointment as heirs had been erased. Several authorities decided that the legatees should be excluded, and I thought that this course should be adopted if the testator had cancelled his entire will; others were of the opinion that what had been erased was abrogated by operation of law, but that all the remainder was valid. What course should then be pursued? Could it not sometimes be held that a testator who had erased the names of his heirs was aware that he would be in the same position as if he had died intestate? Where a point is in doubt, it is not less just than safe to follow the more indulgent interpretation.

The following is the decision by the Emperor Antoninus Augustus, during the Consulship of

Pudens and Pollio: "Since Valerius Nepos, having changed his mind, has mutilated his will, and erased the names of his heirs, his estate, in accordance with the Constitution of my Divine Father, does not seem to belong to the heirs mentioned therein". He also stated to the advocates of the Treasury: "You have your own judges". Vivius Zeno said, "I ask, O Lord Emperor, that you hear me patiently, what do you decide with reference to the legacies?" The Emperor Antoninus replied: "Does it seem to you that a testator who erased the names of his heirs intended that his will should stand?" Cornelius Priscianus, the advocate of Leo, said: "The testator only erased the names of his heirs". Calpernius Longinus, the Advocate of the Treasury, answered, "No will can be valid in which an heir is not appointed". Priscianus added, "He manumitted certain slaves, and bequeathed legacies."

The Emperor Antoninus, having caused all the parties to retire while he considered the matter, and having ordered them to be again admitted, said: "The present case seems to admit of an indulgent interpretation, so that we think that the testator Nepos only intended that portion of his will which he erased to be annulled". He had actually erased the name of a slave whom he had ordered to be free. Antoninus stated in a Rescript that the slave would, nevertheless, be liberated. He decided the question in this way on account of the favor conceded to freedom.

4. *Papinianus, Opinions, Book VII.*

A testator solemnly indicated his wishes in a will, several copies of which were made at the same time; and he afterwards removed and erased some of these which had been deposited in a public place. Whatever provisions were legally made by said will, and which could be established by the other copies of the same which the testator did not remove, were not held to have been annulled.

Paulus states that if the testator defaced the will in order that he might die intestate, and if those who desired to inherit *ab intestato* were able to prove this, the heirs mentioned in the will would be deprived of the property.

TITLE V.

CONCERNING THE APPOINTMENT OF HEIRS.

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

He who executes a will should generally begin with the appointment of an heir. He can also begin with a disinheritance specifically made; for the Divine Trajan stated in a Rescript that a son may be disinherited by name, even before the appointment of an heir.

(1) We also say that an heir has been appointed where the testator did not write, but only mentioned his name.

(2) A person who is dumb, or one who is deaf, can legally be appointed an heir.

(3) Where a testator is not about to bequeath any legacies or disinherit anyone, he can make a will in five words, by saying: "Let Lucius Titius be my heir". This formula can also be used by a person who does not commit his will to writing, and who can even make a will in three words, as where he says: "Let Lucius be heir"; for the words my and Titius are superfluous.

(4) Where anyone is appointed sole heir to a tract of land, the appointment will be valid, without any mention of the land.

(5) If anyone should write as follows: "Lucius heir", even though he may not add, "Let him be"; we hold that this is a nuncupative, rather than a written will. And if he should write: "Let Lucius be", we hold that it would amount to the same thing. Therefore, if he should only write "Lucius", Marcellus thinks, and not without reason, that this form would not be accepted at the present time.

The Divine Pius, however, in the case where a testator, who was distributing certain portions of an estate among his heirs, merely said: "So-and-So to all this share, and So-and-So to all

that"; but did not add "Let him be heir", the Emperor stated in a Rescript that the appointment was valid, and this opinion was also adopted by Julianus.

(6) The Divine Pius also stated in a Rescript that an appointment was valid when made in the following terms: "Let my wife be", even though the word "heir" was lacking.

(7) Julianus does not think, that an appointment made as follows, "So-and-So to be heir," is valid, since something is lacking. This appointment, however, will be valid, because the words, "I order", are understood.

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

Where a testator makes use of the words: "I appoint So-and-So and So-and-So to be my heirs according to their shares"; with reference to those who are appointed heirs, Marcellus does not think that they become such where no shares have been assigned to them, just as if they had been designated in the following terms: "If I should specify their shares". The better opinion is, that where the wishes of the deceased are not disregarded, each appointment should be understood, for instance: "I appoint them heirs for the shares of the estate which I shall assign to them, but not to equal shares"; just as if a twofold appointment had been made. This opinion Celsus approves in the Sixteenth Book of the Digest. But he thinks otherwise where an appointment is made as follows: "Let Seius be my heir to the same portion to which Titius has appointed me heir"; for if he was not appointed by Titius, Seius will not be appointed by him. This opinion is not unreasonable, for in this instance a condition is involved. Marcellus, however, thinks that the cases are similar.

(1) It makes a difference where a party writes: "Of those shares which I have assigned to him", or "Which I shall assign to him", for, in the first instance, you can say that where no shares are designated, there is no appointment; just as Marcellus decided in a case where the appointment was made as follows: "Let So-and-So and So-and-So be heirs to those portions to which they have been appointed by the will of their mother", and if their mother should die intestate, they will not be legally appointed.

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

A slave who belongs entirely, or partly, to another, can be appointed the heir of the testator, without the grant of his freedom.

(1) If I appoint my slave to be absolutely my heir, but grant him his freedom under a certain condition, his appointment will be deferred until the time when his freedom is granted him.

(2) Where a party stated in his will: "If Titius shall be my heir, let Seius be my heir and let Titius be my heir"; the acceptance of Titius is awaited as a condition for Seius to become the heir. And, indeed, this is reasonable, and seems so to Julianus and Tertyllianus.

(3) Where an heir has accepted a trust by which freedom is conditionally granted to a slave, the said slave can be appointed heir by the former, with an absolute grant of his freedom, without waiting for the fulfillment of the condition, and he will obtain both his freedom and the estate. In the meantime, he will be a necessary heir, and will become a voluntary heir when the condition is fulfilled, so that he will not cease to be an heir, but the right of succession will be changed so far as he is concerned.

(4) Delay in opening a will does not affect the rights of a necessary heir, as we are accustomed to hold where anyone is substituted for a minor. For it has been established that if the substitute gives himself to be arrogated by the minor, as the son of the deceased, he will become his necessary heir.

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

A direct heir can also be appointed under a condition. The son of the testator must, however, be excepted, because he cannot be appointed under any condition whatsoever. He can, indeed,

be appointed under a condition which it is in his power to carry out, and on this opinion all authorities are agreed; but will the appointment take effect if he fulfills the condition, or will it do so if he should not fulfill it, and dies?

Julianus thinks, where a son has been appointed heir under such a condition, that he cannot be removed from the succession, even if he should not comply with the condition, and therefore when he is appointed in this way and has a co-heir, the latter is not obliged to wait until the son complies with the condition; since, although the latter, by not complying with it, can render his father intestate, there is no doubt that the co-heir should wait. This opinion seems to me to be correct, so that where a son is appointed under a condition, compliance with which depends upon his will, he cannot by avoidance render his father intestate.

(1) I think that, generally speaking, a question of fact is involved in the case where a condition is, or is not, dependent upon the power of the son to carry it out. For a condition like this: "If he should go to Alexandria", does not depend upon the will of the son, if the weather should be severe, but it may depend upon it where the condition was imposed upon a person who only lived a mile from Alexandria. The following condition: "If he should pay ten *aurei* to Titius", presents a difficulty, if Titius should be absent upon a long journey. Hence, recourse must be had to the general definition of a condition which can be complied with by the party in question.

(2) If, however, after the testator appointed his son his heir under a condition which the latter was able to carry out, or where he appointed a stranger, I think that the substitute cannot become an heir during the lifetime of the son, but can after his death; and it is not necessary for the son to be disinherited by the appointment of the substitute. And even if the disinheritance should be made it would be void; for we have shown elsewhere that where this takes place after the death of the son it is invalid. Therefore, we are of the opinion that where a son has been appointed under such a condition, and is under the control of his father, he does not need to be disinherited from the following degrees; otherwise he must also be disinherited by the appointment of a co-heir.

5. *Marcellus, On Julianus, In the Twenty-ninth Book of the Digest, Observes That:*

If the condition under which the son was appointed an heir is of such a character that it is certain that at the last moment of his life it

cannot be fulfilled, and, while it is pending, the son dies, he will be the heir to his father just as if the latter was intestate; for instance: "If he should go to Alexandria, let him be my heir". If, however, the condition can be complied with during the last hours of his life, for example, "If he pays ten *aurei* to Titius, let him be my heir", I hold that the contrary is true.

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

Where a certain time is mentioned in the condition, for instance: "If he goes up to the Capitol within thirty days"; it can be said that if he does not comply with the condition, the son will be excluded from, and the substitute will be admitted to the succession. This is the result of the opinion of Julianus and myself.

(1) The grandsons and other successors of the testator, who, when appointed, do not break the will under the *Lex Velleia*, can be appointed under any condition whatsoever, although they occupy the position of a son.

(2) We are accustomed to say that anything which occurs in the intermediate time does not injuriously affect the heir; for example, where the party appointed is a Roman citizen, and becomes a foreigner during the lifetime of the testator, and afterwards recovers his Roman citizenship, what has happened to him in the meantime does not prejudice his rights. Where a slave belonging to another is appointed an heir, and afterwards is delivered to another slave belonging to the estate, and is then acquired by a stranger through usucaption, his appointment

as heir is not annulled.

(3) When a master appoints a slave, owned by him in common with another, his heir with the grant of his freedom, and ransoms him from his joint-owner, he becomes a necessary heir. Where, however, the slave is substituted for a minor, and the latter purchases the share of the other joint-owner, Julianus says that the said slave does not become a necessary heir.

(4) It is asked by Julianus whether this slave, appointed heir with a grant of his freedom, can subsequently be deprived of it by means of a codicil. He holds that in the case where the said slave becomes a necessary heir, any deprivation of his freedom will not be valid, for he would be compelled to deprive himself of it; as where a slave is appointed an heir, he receives his freedom from himself. This opinion is reasonable, for as he cannot bequeath his freedom to himself, so also he cannot deprive himself of it.

7. *Julianus, Digest, Book XXX.*

When a slave held in common is appointed an heir under some condition, and obtains his freedom during the lifetime of the testator, he can enter upon the estate while the condition under which he is to obtain freedom by the will, is still pending.

(1) Again, he will be entitled to the estate by the order of his master, even if the testator had alienated him during his lifetime, or the heir has done so after the death of the testator.

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

Two partners by their will directed a certain slave owned in common by them to be their heir and free, and both of them perished at the same time by the fall of a house. Several authorities gave it as their opinion that, in this instance, the slave became the heir of, and obtained his freedom from both of them; and this opinion is correct.

(1) Where two partners direct a slave owned in common by them shall become free and their heir, under the same condition, and the condition is complied with, the same rule of law will apply.

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

Whenever a testator who wishes to appoint an heir appoints another person through a mistake in the individual (as for instance, "My brother, my patron"), it is settled that neither of them will be his heir; he who is mentioned, for the reason that it was not the intention of the deceased to appoint him; nor he whom he intended to appoint, because he was not mentioned.

(1) In like manner, if a testator should make a mistake with reference to the property (for instance, if he should leave a garment when he intended to leave a dish), he will owe neither. This rule applies whether the testator wrote his will himself, or dictated it to be written by another.

(2) Where, however, the testator was not mistaken with reference to the article itself, but only as to a part of what was to be bequeathed (for example, if, while dictating, he stated that a certain party should be appointed heir to half his estate, while, in fact, he was appointed only to a fourth), Celsus says, in the Twelfth Book of Questions and the Eleventh Book of the Digest, that it can be maintained that the party is heir to half of the estate, as the larger amount was mentioned, but the smaller one was written; and this opinion is supported by certain general rescripts. The same rule will apply if the testator himself writes down a smaller amount when he intended to write a larger one.

(3) But if the person who drew up the will put down the larger amount or (which is a matter more difficult of proof), the testator himself did so, as, for instance, a half instead of a quarter, Proculus thinks that the heir will only be entitled to the quarter, since the quarter is contained in the half. This opinion is also approved by Celsus.

(4) Where, however, the testator writes two hundred for one hundred in figures, the same rule

of law will apply, because both the sum that he intended and what was added to it were written at the same time. This opinion is not unreasonable.

(5) Marcellus discusses this same point with reference to a party who, intending to insert a condition in his will, did not do it; and he holds that the heir should not be considered as having been properly appointed. If, however, he added a condition without intending to do so, it will be annulled, and the heir will be admitted to the succession; since whatever is written contrary to the intention of the testator is not held to have been mentioned by him.

This opinion is adopted by Marcellus, and we approve it.

(6) He also discusses the point that, if the person who draws up the will omitted the condition against the wishes of the testator, or changed it, the heir will not be entitled to the succession, and will be considered as not appointed.

(7) But where the testator who intended to appoint one heir to half his estate, appoints both a first and second heir, the first one will solely be considered his heir, and the only one appointed to half the estate.

(8) Where a testator does not mention the name of his heir, but designates him by some mark which does not admit of doubt, and which differs very little from mentioning him by name, without, however. adding any epithet which may cause him injury, the appointment will be valid.

(9) No one can appoint an heir without designating him with certainty.

(10) When a testator says: "Let whichever of my brothers, Titius and Mævius, who may marry Seia, be my heir to three quarters of my estate, and the one that does not marry her, be my heir to the remaining quarter"; in this instance, it is certain that the appointment is legally made.

(11) It is clear that an appointment made in the following terms, namely: "Let whichever of my above-mentioned brothers who marries Seia be my heir", comes under the same rule. I think that this appointment is valid, as being made subject to a condition.

(12) Heirs are legal successors, and, where several are appointed, their respective rights must be apportioned among them by the testator; for if he does not do this, all of them will share equally as heirs.

(13) Where two heirs are appointed, one to a third of the Cornelian Estate, and the other to two-thirds of the same estate, Celsus adopts the very appropriate opinion of Sabinus that, leaving the mention of the land out of consideration, the heirs whose names appear in the will are entitled to the estate just as if their respective shares had not been indicated; provided that it is perfectly evident that the will of the testator has not been disregarded.

(14) Where a testator inserts in his will: "Let Stichus be free, and after he becomes free let him be my heir", Labeo, Neratius, and Aristo hold that if the word "after" should be omitted, the slave will obtain his freedom and the estate at the same time.

(15) If anyone should appoint an heir to a third of his estate, and another also to a third, and, in case there should be no second heir, appoints still another heir to the two-thirds; in this instance, if the second should reject the estate, the third heir appointed will be entitled to two-thirds of it, not only by the right of substitution, but also by that of appointment; that is to say, he will have one-third of the estate by the right of substitution, and one-third by the right of appointment.

(16) Where a slave is appointed an heir with the grant of his freedom, and then is alienated, he can enter upon the estate by the order of the party to whom he has been transferred. If, however, he should be ransomed by the testator, his appointment will be valid, and he will become a necessary heir.

(17) If a slave should be granted his freedom to date from a certain time, and is left the estate

absolutely, and he is afterwards alienated or manumitted, let us see whether his appointment will be valid. And, indeed, if he should not be alienated, it can be maintained that his appointment will be valid, so that he will become a necessary heir when the day he receives his freedom, and which delays his right to the estate, arrives.

(18) But where his freedom is granted him from a certain time, and the estate is left to him under a certain condition, if the condition should be fulfilled after the day of his freedom arrives, he will become both free and the heir.

(19) When a slave has been appointed an heir unconditionally, and his freedom is to date from a certain time, if he should be either alienated or manumitted, it must be said that he can become the heir.

(20) Where, however, not the slave himself, but only the usufruct in him is alienated, his appointment will be valid, but it will be postponed until the time when the usufruct is extinguished.

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

When anyone appoints heirs to different portions of different tracts of land, it will be the same as if they had not been appointed to certain portions of the same; for it is not easy to ascertain what their shares will be in the different tracts. Therefore, it is more expedient, as Sabinus says, for it to be considered that the testator had neither mentioned the land, nor the shares to which they were entitled.

11. *Javolenus, Epistles, Book VII.*

"Let Attius be my heir to the Cornelian Estate, and let the two persons named Titius be my heirs to such-and-such a house." The persons named Titius will be entitled to half of the estate, and Attius to the remaining half. This opinion is held by Proculus; what do you think of it? The answer is that the opinion of Proculus is correct.

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

Where unequal shares in an estate were bequeathed by a testator, and he added, "Let those heirs to whom I have allotted unequal portions share equally"; it should be held that they do share equally, provided this clause was inserted before the completion of the will.

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

Sometimes, this addition, "Let my heirs share equally", expresses the intention of the testator; as, for instance: "Let the first, and the sons of my brother share equally"; for this addition indicates that all the heirs are appointed for equal shares, as is stated by Labeo; and if it is omitted, the first will be entitled to half the estate, and the sons of the testator's brother to the other half.

(1) The father of a family can divide his estate into as many portions as he wishes, but the regular division of an estate is made into twelve shares, called *unciæ*.

(2) Hence, if the testator divides his estate into a smaller number than this, recourse is had to this rule by operation of law; for example, where a testator appoints two heirs each to a fourth of his estate, for in this case the remainder of the estate is apportioned in such a way that each heir is held to have been appointed for six shares.

(3) Where, however, one heir is appointed for one-fourth of the estate, and another for half, the remaining fourth will be added in proportion to the shares which they inherit respectively.

(4) If a testator should divide his estate into more than twelve shares, a diminution will then be made *pro rata*, as for example, if he appointed me heir to twelve shares, and you heir to six, I will be entitled to eight shares of the estate, and you to four.

(5) When a testator appoints two heirs for the entire estate and two others for twelve parts of

the same, the inquiry is made by Labeo, in the Fourth Part of his Last Works, whether an equal distribution shall be made. And he holds that the former are entitled to half the estate, and those who are appointed for twelve shares of it will be heirs to the other half. I think that this opinion should be adopted.

(6) If, however, a testator should appoint two heirs for his entire estate, and then appoint a third for a half and a sixth of the same, Labeo says, in the same book, that the entire estate should be divided into twenty parts, of which the two first heirs shall have twelve, and he who was appointed for the half and the sixth will be entitled to eight.

(7) Labeo also gives as an example: "Let Titius be appointed for a third of my estate"; and then, after the entire estate had been disposed of was added: "Let the same Titius be appointed for a sixth". Trebatius says that this estate should be divided into fourteen parts.

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

If anyone should appoint heirs as follows: "Let Titius be heir to the first share, Seius to the second, Mævius to the third, and Sulpicius to the fourth", equal shares of the estate will belong to the parties appointed; for the reason that the testator is held to have named them rather to show the order of their designation, than to prescribe the method of dividing the estate into shares.

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

Julianus states in the Thirtieth Book that where a testator appointed his heirs as follows: "Let Titius be the heir to half of my estate, and Seius to half, and out of the portion which I have left to Seius, let Sempronius be my heir to an equal amount"; it may be doubted whether the testator intended to divide his estate into three shares, or whether he intended to join Seius and Sempronius as heirs to the same half. The latter is the better opinion, and therefore these two are held to have been appointed heirs to the same portion of the estate; hence the result is that Titius will be entitled to half of the estate, and each of the others to a fourth of the same.

(1) The same authority stated in the same book, that where a testator said, "If the first is heir to one-half, the second will be heir to the

other half; but if the first should not be an heir, let the third be substituted as heir for three-quarters of my estate". This is indeed a question of fact, but it may very properly be said that if the first heir enters upon the estate, the others will be entitled to equal shares of the same; but if he rejects it, it must be divided into fifteen parts, of which the third heir will be entitled to nine, and the second to six.

16. *Julianus, Digest, Book XXX.*

For the third heir occupies the position of one who has been both appointed and substituted, as he is held to have been appointed for three parts of the estate, and substituted for six.

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

Sabinus says that where a share has not been allotted to one of the heirs this requires investigation. For instance, where a testator appointed two heirs, each to a fourth of the estate, but did not assign anything to the third, the latter will be entitled to the remainder. Labeo also adopts this opinion.

(1) The same authority discusses the question: "Where a testator appointed two heirs to eleven shares of his estate, and two without any, and afterwards one of those to whom no share was assigned rejected the succession, will the twenty-fourth to which he was entitled belong to all the heirs, or to him alone to whom no share was assigned? He does not determine this point. Servius, however, says that the share will belong to all the heirs, and I think that this opinion is the better one; for, so far as the right of accrual is concerned, those who are appointed without any share are not joint heirs with the others. This opinion is adopted by Celsus in the

(2) Sabinus also holds that where the testator has disposed of the entire estate, and appointed two heirs without assigning them any portion thereof, neither of them will be joint-heirs with the others.

(3) But if, after having disposed of the entire estate, he should appoint another without any share, the latter will be entitled to half of double the amount of the original shares of the said estate. It will be otherwise, however, if, after having disposed of his entire estate, the testator should provide: "Let So-and-So be my heir to the remainder"; since, as there is nothing left, an heir cannot be appointed for any share.

(4) But if, after the entire estate was disposed of, two heirs should be mentioned without any shares being assigned to them, the question arises, shall these two be united in the doubling of the estate, or only in a single division of the same? Labeo thinks, and it is the better opinion, that they will be entitled to share in a single division; for, where one has been appointed without the assignment of any share, and afterwards two are appointed together without any share being assigned to them, Celsus says, in the Sixteenth Book, the estate should not be divided into three portions, but only into two.

(5) But if the testator, after doubling the shares of the estate, should divide it between two heirs, and should appoint a third without any share, the number of original shares will not be tripled; but the said third heir will be entitled to a third part of the same, as Labeo stated in the Fourth Book of his Last Works, and this opinion is not referred to by either Aristo or Paulus, perhaps because they deemed it correct,

18. *Paulus, On Vitellius, Book I.*

Sabinus says: "The question arises where a testator had distributed among his heirs a larger number of shares than the usual division of an estate requires, and had appointed one heir without any share; will the latter be entitled to half the double division, or only what is lacking of the twenty-four shares?" I think that the latter opinion is the more correct one, so that the same ratio shall be observed where the division is doubled, or any other greater number of shares is made than is done in the ordinary distribution of an estate. Paulus: "The same ratio must be observed in the second division as in the first".

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

Pomponius and Arrianus assert that a discussion arose with reference to the following point, namely, where a man left a portion of his estate undisposed of, and then provided, "If Seius" (whom he had not appointed) "should not be my heir, let Sempronius be my heir", whether the latter could take that portion of the estate which had not been allotted to anyone. Pegasus thinks that he would be entitled to this portion. Aristo holds the contrary opinion, because a share was allotted to him which did not exist. Javolenus, Pomponius, and Arrianus approve this opinion, which prevails at the present time.

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

It makes no difference to what place an heir to whom no portion of the estate has been given is assigned, whether to the first, the intermediate, or the last.

(1) Where the fourth of an estate has been left to a person who is already dead, and the remaining three-fourths to another, and a third part was mentioned without any share of the estate being allotted to him, Labeo says that the one who was appointed heir without any share will be entitled to half of the doubled shares of the estate, and that this was the intention of the testator. Julianus also approves this opinion, and it is correct.

(2) Where a person who is living and one who is dead are appointed joint-heirs to half of an estate, and a third party to the other half; he says that they will be entitled to equal shares,

because the share assigned to the deceased is considered as not having been mentioned.

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

Trebatius says that the following is not correctly stated: "Whoever shall be my heir, let Stichus be free and my heir", but that the slave will, nevertheless, become free. Labeo holds, and very properly, that he will also be the heir.

(1) I think it very probable that freedom can be absolutely granted to a slave, and that the estate can, at the same time, be bequeathed under some condition, in such a way, however, that both provisions will depend upon the condition.

22. *Julianus, Digest, Book XXX.*

The condition having been fulfilled, the slave will become free and an heir; no matter in what part of the will freedom has been conferred upon him. Where, however, the condition has not been fulfilled, it is considered that freedom has been bestowed upon him without the estate.

23. *Pomponius, On Sabinus, Book I.*

Where an heir is appointed for a time which is either certain or uncertain, he can claim possession of the estate, and can dispose of it as the heir.

(1) But if he should not claim possession of the estate, but postpones compliance with the condition, which he can very easily carry out (for instance, if the condition was that he should manumit a slave who is under his control, but he does not do so), in this case it is the duty of the Prætor to issue his edict designating the time within which the heir shall enter upon the estate.

(2) Likewise, if the heir cannot comply with the condition because it is not in his power (for instance, when it consists of something to be done by another, or depends upon some uncertain event, for example: "If he should become Consul"); and the Prætor should then decide, upon application of the creditors, that unless the estate was accepted and entered upon within a certain time, he would direct the said creditors of the estate to take possession of the property of the deceased, and, in the meantime, would order any of the property which it was necessary to dispose of to be sold by agents appointed for that purpose.

(3) Where, however, an heir is appointed under a condition, and the indebtedness of the estate is considerable, and is liable to be increased by the imposition of penalties, and especially where there is a public debt, the indebtedness should be discharged by means of an agent, just as where an unborn child is in possession of the estate, or there is a minor heir who has no guardian.

(4) And therefore he says that an investigation should be made with reference to those heirs who are absent, without wilfully being in default; but who are prevented either by acute or chronic illness from coming into court, and have no one to appear in their defence.

24. *Celsus, Digest, Book XVI.*

"Let Titius and Seius, or the survivor of either of them, be my heir." I think that if both of them survive, both will be heirs, but if one of them should die, the survivor will be heir to the entire estate:

25. *Ulpianus, Rules, Book VI.*

For the reason that a tacit substitution seems to be included in the appointment.

26. *Celsus, Digest, Book XVI.*

The Senate also decided this question where a legacy was bequeathed in the same way.

27. *Pomponius, On Sabinus, Book III.*

If I appoint you absolutely my heir to half of my estate, and appoint another heir to the other half under some condition, and I then appoint a substitute for you, Celsus says that if the condition is not complied with, the substitute will be the heir to that portion of the estate.

(1) But if I appoint you my heir unconditionally, and afterwards appoint you under some condition, the second appointment will not be valid, because the first one takes precedence of the other.

(2) Where, however, several appointments have been made for the same share of an estate under different conditions, and the first condition is fulfilled, the result will be the same that we stated above, where the appointment was made absolutely, and also under a condition.

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

If anyone should be appointed an heir as follows: "Let Titius be my heir, if Secundus will not be my heir", and afterwards he says, "Let Secundus be my heir", it is settled that Secundus is appointed in the first degree.

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

By the term "either" all the heirs are meant, and therefore Labeo says that if the following was inserted in the will, namely: "Let Titius and Seius be my heirs to the amount that either of them has appointed me his heir". If both of them did not appoint the testator their heir, neither of them will be his heir, since the phrase has reference to the act of all; but in this instance, I think that the intention of the testator should be considered. It is more equitable, therefore, that he whom the testator would have designated to inherit his estate should be his heir to that amount, and that he whom he would not have appointed, should not be admitted to share in his estate.

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

The Emperor Severus stated in a Rescript that where a slave was pledged he could be the necessary heir of his master, provided that he was ready to satisfy the creditor beforehand.

31. *Gaius, On the Provincial Edict, Book XVII.*

We can appoint as heirs not only slaves but freemen, provided that the slaves belong to parties whom themselves we can appoint, since the making of a will with reference to slaves is a right derived from the authority of their masters.

(1) The power to appoint a slave who forms part of an estate before the estate has been entered upon is based upon the principle that the estate is considered to be the owner of the slave, and to occupy the place of the deceased.

32. *The Same, Concerning Wills; On the Edict of the Urban Prætor, Book I.*

The appointment of an heir, as follows, "Those whom Titius may wish", is defective, for the reason that it depends upon the desire of another. For the ancient authorities very frequently decided that the validity of wills must be derived from themselves, and not depend upon the wishes of others.

(1) Anyone who is in the hands of the enemy can legally be appointed an heir, because, by the law of *postliminium*, all his personal rights of citizenship remain in suspense, and are not annulled. Therefore, if he should return from captivity he can enter upon the estate. His slave can also legally be appointed heir, and if his master returns from captivity, he can be ordered to enter upon the estate. If, however, he should die, his legal successor will become his heir through the act of the slave.

33. *The Same, Concerning Wills; On the Edict of the Urban Prætor, Book II.*

If anyone should write the following into a will, namely: "Let Titius be heir to half of my estate, and let the same Titius be heir to the other half if a ship arrives from Asia", as the heir

enters upon the estate by reason of an unconditional appointment, although the condition of the second appointment may still be pending, he becomes the heir to the entire estate, even if the condition should not be fulfilled, as its fulfillment will not, in any way, benefit him; since there is no doubt that if a party is appointed heir to half of an estate, and no other heir should afterwards appear, he is held to have been appointed heir to the whole of it.

34. *Papinianus, Definitions, Book I.*

An estate cannot legally be bequeathed from a certain time or until a certain time, but the defect with reference to the time having been ignored, the appointment of the heir will stand.

35. *Ulpianus, Disputations, Book IV.*

In a case which was stated, a certain testator appointed two heirs, one to his property situated in a province, the other to his property situated in Italy; and as it was his custom to bring merchandise into Italy, he sent money into the province for the purpose of buying some, and this merchandise was purchased either during his lifetime or after his death, but had not yet been brought into Italy.

The question arose whether the said merchandise belonged to the heir to whom the property in Italy had been bequeathed, or whether he was entitled to it to whom that in the province had been left? I stated that it was settled that heirs could be appointed for different kinds of property, and that the appointment was not void; but that it was the duty of the judge having jurisdiction of the partition of the estate to see that no heir to whom a certain portion of the estate had been left, should receive any more than he was entitled to under the will.

This should be understood as follows: for example, suppose two heirs were appointed, one to the Cornelian Estate, the other to the Livian Estate, and that one of these tracts of land compose three-fourths of the property, and the other the remaining fourth; the said heirs will then inherit equal portions of the estate, just as if they had been appointed without any designation of their shares; but it will be the duty of the court to see that the land which was devised to each of them shall be adjudged or allotted to him.

(1) Hence, I am aware that the question arises for what portion of the debts of the estate shall each of these heirs be liable. Papinianus, whose opinion I myself have approved, holds that each of them should be liable for the debts of the estate, in proportion to his hereditary share, that is to say, for half of it; for these lands are understood to have been received as a preferred legacy. Therefore, if the indebtedness was so great that nothing will remain after it has been discharged; we hold consequently that such appointments made with reference to the disposition of certain specific property are of no force or effect.

If the application of the Falcidian Law should cause the diminution of the legacies, it will then become the duty of the judge to reduce these preferred legacies, so that neither one of the heirs may receive more than he would have been entitled to if he had obtained a bequest, or any other property, or even the said legacies. But if there should be any doubt as to the application of the Falcidian Law, it will be perfectly right for the judge to require the parties to furnish security to one another.

(2) This being the case, the appointment which we are considering should not be rejected as invalid, where one heir was left property situated in a province, and the other property situated in Italy. It will be the duty of the judge to assign to each of the heirs that part of the estate which was bequeathed to him. Nevertheless, the said heirs will each be entitled to half of the estate, because no share was allotted to them by the testator. The result of this is, that if there should be more of certain assets of the estate in one place than in another (for example, more in Italy than in the province), and payment of the debts is pressing, it must be held that the same diminution must be made which we have mentioned above. Hence, where legacies have been left to others, contribution for their settlement should be made by the heirs.

(3) It should now be ascertained what is meant by property situated in Italy, or in the provinces. The intention of the deceased must determine this point, for consideration must be given to what he had in mind. Nevertheless, it must be understood that by the term "property in Italy" all those things are included which the testator always had there, and made arrangement to keep there. Again, if he transferred property temporarily from one place to another, not for the purpose of keeping it there, but with a view to restoring it to its former location, this will not increase the amount of the property in the place to which he transported it, nor diminish that in the place from whence he took it; as, for instance, if he should send from his Italian estate certain slaves into a province (as in Gaul) either for the purpose of paying a debt, or to buy merchandise, who were to return after they had made their purchases, there is no doubt that it must be said that they continue to belong to the Italian estate; as was stated by Mucius where a tract of land was devised, either with all the means of cultivation or with the property which is situated thereon.

For Mucius says that where a slave named Agaso was sent to a country estate by his master, he did not belong to the land which was devised, because he had not been sent there to remain permanently; hence, where a slave is sent to a country estate to remain there for a certain time, because he had offended his master; he is, as it were, temporarily banished, and it is held that he does not constitute a part of the estate devised. Hence, slaves who are accustomed to labor on one farm and who are sent to another, being as it were loaned by one tract of land to the other, do not form part of the estate devised, because they do not seem to be permanently attached to the land. In the present instance it must be held that property situated in Italy is such as the testator intended should remain there permanently.

(4) Hence, where a man sends money into a province for the purpose of buying merchandise, and it has not yet been purchased, I say that the money which was sent there to obtain goods to be brought into Italy must be held to form part of the Italian estate; for if the testator had sent into the province money which he was accustomed to use in Italy, and it was taken and returned from one place to another, it should be considered to belong to the Italian estate.

(5) I therefore stated that the result would be that the said merchandise which had been purchased to be conveyed to Rome, whether it was transported during the lifetime of the testator, or whether this had not yet been done, and whether the testator knew, or did not know this to be the fact, it will belong to that heir to whom the Italian estate was bequeathed.

36. *The Same, Disputations, Book VIII.*

Where anyone appoints an heir as follows: "Let Titius be the heir to that portion of my estate to which I have appointed him by a codicil"; he will still be the heir, as having been appointed without any certain share, even though his share was not mentioned in the codicil.

37. *Julianus, Digest, Book XXIX.*

When a testator makes the following disposition in his will: "If my son should die during my lifetime, and the grandson by him should be born after my death, let him be my heir", there are two degrees of succession, for under no circumstances can both of them be admitted to share in the estate. From this it is evident that, if Titius should be substituted for the grandson, and the son should be the heir of his father, Titius cannot be the heir of his son, for the reason that he is substituted not in the first, but in the second degree.

(1) The following clause: "Let Publius, Marcus, Gaius, substitutes for one another, be my heirs", should be understood to mean that the testator seems to have appointed three heirs in a very few words, and to have substituted them for one another, just as if he had written, "Let So-and-So, So-and-So, and So-and-So be appointed my heirs, and be substituted".

(2) Where a man has three sons and wrote in his will: "Let my sons be my heirs, and let my son Publius be disinherited", he is considered to have only appointed two of his sons his heirs in the first part of his will.

38. *The Same, Digest, Book XXX.*

Where a testator bequeathed a slave named Pamphilus to his disinherited son, a minor, he can appoint the said slave heir to a portion of his estate in the same way, after the death of his son, just as anyone who bequeaths a slave to Sempronius, can appoint the said slave heir to a portion of his estate, after the death of Sempronius.

(1) When a slave is unconditionally appointed heir by a will, but is not directed to be free unless he pays ten *aurei* before the *Kalends* of December, and he subsequently obtains his freedom absolutely by a codicil, he will neither be free nor an heir, unless he pays the ten *aurei* before the *Kalends* of December; but if he should not do so, he will become free by reason of the codicil.

(2) If a testator should absolutely appoint a slave to be his heir, but should grant him his freedom under a condition and sell him while the condition was pending, the slave can enter upon the estate by order of his purchaser, because the appointment is valid, and the purchaser has a right to give the slave the order.

(3) When the slave has been alienated, after failure to comply with the condition has occurred, he cannot enter upon the estate by order of the purchaser, because at the time when he passed into the hands of the latter the appointment, having become void, was of no effect.

(4) Therefore, where a slave is directed to become free under a certain condition, and receives a legacy absolutely, and, while the condition is pending, he is either manumitted or alienated, he will be entitled to the legacy, or will obtain it for his master, even though, at the time of the death of the testator, the condition upon which his condition depended had not been fulfilled. If, however, he had been manumitted or alienated after the failure to comply with the condition had taken place, the legacy will become invalid.

(5) Where a vendor orders a slave, who has been appointed heir to a portion of the estate of the purchaser before his delivery to the latter, to accept the bequest, he will be required to return what he has received to the co-heir of the slave, because he should not profit by the right of the slave whom he sold. It is evident that he is not required to return everything which he received, but only the proportionate share which the slave had in common with his co-heir.

39. *Marcianus, Rules, Book II.*

That is to say, the half of the slave and the fourth of the estate, as Marcellus observes in the Thirtieth Book of the Digest of Julianus, and he holds that he ought to surrender this because the vendor could not recover it if the slave had been delivered before he entered upon his share of the estate, which opinion is correct.

40. *Julianus, Digest, Book XXX.*

The head of a family appointed Titius, whom he supposed to be freeborn, his heir, and substituted Sempronius for him, if he should not be his heir; and when Titius, being a slave, entered upon the estate by order of his master, it can be held that Sempronius should be admitted to a share of the estate; because where a man knowing someone to be a slave, appoints him his heir, giving him a substitute, as follows: "If Stichus should not be my heir, let Sempronius be my heir," it is understood that he means to say that if Stichus should not be the heir he cannot transfer the possession to anyone else.

But where anyone appoints as his heir a person whom he thinks to be free, in these terms, namely, "If he should not be my heir," he is considered to intend nothing more than that if he should acquire the estate for himself, or his condition should be changed, he cannot appoint another his heir. This addition has reference to those who are appointed heirs of the head of the family, and are afterwards reduced to slavery; therefore, in this instance, the estate will be divided into two parts, of which one-half will go to him who was the master of the slave appointed heir, and the other half to the substitute.

41. *Pomponius, Various Passages, Book XII.*

Tiberius Cæsar rendered this decision with reference to Parthenius, who had been appointed heir, as being freeborn, and who entered upon an estate while he was the slave of the Emperor; for, as Sextus Pomponius relates, the estate was divided between Tiberius and the person who had been substituted for Parthenius.

42. *Julianus, Digest, Book LXIV.*

A man who was not solvent directed by his will that two slaves named Apollonius should be free and his heirs. One of the said slaves having died before the will was opened, it cannot improperly be held that the survivor would become free and the sole and necessary heir of the testator. If, however, both of them were living, the appointment would be void in accordance with the *Lex Ælia Sentia*, which prohibits the appointment of more than one necessary heir:

43. *Paulus, On the Law of Ælia Sentia, Book I.* For then they stand in one another's way.

44. *Alfenus, Digest, Book V.*

The head of a family appointed two heirs by his will, and ordered them to erect a monument for him within a certain time, and he afterwards inserted in his will: "Let him who does not do this be disinherited". One of the heirs refused to enter upon the estate, and the other, inasmuch as he himself had built the monument, asked for an opinion as to whether he would not be entitled to the estate, because his co-heir had refused to accept it. The answer was that no one can be bound for, or deprived of, an estate by the act of another; but wherever anyone has complied with the condition, he will become the heir to the estate, even though none of the other heirs have entered upon the same.

45. *The Same, On the Epitomes of the Digest, by Paulus, Book II.* "If my mother, Mævia, and my daughter Fulvia, should be living, then let Lucius Titius be my heir." Servius was of the opinion that if the testator never should have a daughter and his mother should survive, Titius would still be his heir, because where anything that is impossible is inserted into a will it has no force.

46. *Africanus, Questions, Book II.*

A certain individual desiring to make a son under paternal control his heir, but in such a way that none of the estate would go to his father, stated his wishes to the son. The latter, fearing to offend his father, requested the testator to appoint him his heir under the condition that he should be emancipated by his father, and gained his consent to appoint one of his friends his heir, and in this way, the friend of the son who was unknown to the testator was appointed his testamentary heir, and nothing was required of him.

The question arose, if the said friend was unwilling to enter upon the estate, or if, after having entered upon it he should refuse to surrender it, whether it could be demanded of him as trustee, or whether any action could be brought against him, or whether one would lie against the father, or the son. The answer was that, even though it was evident that the appointed heir was merely a trustee, still, the estate could not be demanded of him unless it could be proved that the testator himself regarded him in that light.

If, however, the friend, having been requested by the son under paternal control, agreed to enter upon the estate, and to surrender it after he became his own master, it cannot improperly be held that an action on mandate could be brought, and that such an action would not lie in favor of the father, because good faith did not require that he should be given what the testator was unwilling should come into his hands. Nor will the common action on mandate be available to the son, but a prætorian action will be; as it has been settled that one should be granted to a party who while a son under paternal control, has become surety for someone, and after becoming his own master is obliged to make payment.

47. *The Same, Questions, Book IV.*

Where it is stated in a will, "Let Titius, not Seius, be my heir", the opinion was that Seius alone will be the heir. Where, however, the following words are used: "Let Titius be my heir, not let Seius be my heir," the same rule will apply.

(1) A certain testator appointed his heirs as follows: "Let Titia, my daughter, be my heir; and if any children are born to me during my lifetime, or after my death, then let one or more of those of the male sex who are born inherit half and a quarter of my estate, and let one or more of those of the female sex who may be born be heirs to the fourth part of my estate"; a posthumous male child was born to the testator, and it was asked what portion of the estate he would inherit. The answer was that the estate should be divided into seven parts, and that the daughter would be entitled to four of them, and the posthumous child to three; for the reason that the entire estate was bequeathed to the daughter, and three-fourths of it to the posthumous child, so that the daughter was entitled to a fourth more than the posthumous child. Therefore, if a posthumous daughter has also been born, the first daughter should be entitled to as much as both the posthumous children together. Hence, in the case stated, as the entire estate was given to the daughter, and three-fourths of it to the posthumous child, it should be divided into twenty-one shares, so that the daughter might have twelve shares and the son nine.

(2) Where the following provision was made in a will: "Let Lucius Titius be the heir to six shares of my estate, Gaius Attius to one share, Mævius to one share, and Seius to two shares", the question arose as to what the law would be in this case. The answer was that the will should be interpreted in such a way that Lucius Titius should have one-sixth, and the others, as they had been appointed without definite shares, should be the heirs to the remainder of the estate, which should be divided so that Seius would receive five shares, and Attius and Mævius the remaining five between them.

48. *Marcianus, Institutes, Book IV.*

The appointment of an heir is legally made when expressed as follows: "Let Titius be the owner of my estate."

(1) The following appointment is valid: "Let my most unnatural son, who has deserved so ill of me, be my heir"; for he is absolutely appointed heir, although in terms of reproach, and all appointments of this kind are accepted.

(2) Sometimes a slave is not legally appointed an heir with the grant of his freedom by his mistress, as is indicated by a Constitution of the Divine Severus and Antoninus, which is in the following words: "It is reasonable that a slave accused of adultery should not, before judgment has been rendered, be legally enfranchised by the same woman with whom he was implicated, where she is accused of the same crime. Hence it follows that his appointment as an heir by his mistress is of no force and effect."

(3) Where the testator makes a false statement with reference to the father, the nationality, or any similar relationship of his heir, the appointment will be valid, provided the identity of the party designated is established.

49. *Florentinus, Institutes, Book X.*

If I should direct a slave belonging to another to be free and my heir, and the slave should afterwards become mine, neither of these provisions will be valid, for the reason that freedom cannot legally be granted to the slave of another.

(1) So far as foreign heirs are concerned, the rule must be observed that, where all have testamentary capacity, whether they themselves are appointed heirs, or others are appointed who are under their control, the appointment has reference to two different times, that of the execution of the will, in order that the appointment may be made, and that of the death of the testator, in order that it may take effect. Moreover, the execution of the instrument will have

reference to the acceptance of the estate, whether the heir was appointed absolutely or under some condition; for, with regard to the right of the heir, special attention must be paid to the time when he acquires the estate. A change in the right of the heir, if it took place in the intermediate time, that is, during the interval between the execution of the will and the death of the testator or the fulfillment of the condition of the appointment, will not prejudice him, because, as I have stated, we must take into consideration these three different dates.

50. *Ulpianus, Rules, Book VI.*

If, during my lifetime, I should sell my slave, whom I had appointed my heir with the grant of his freedom, to a party who did not have testamentary capacity, and afterwards I should redeem said slave, he can be my heir under the will; nor will the intermediate time during which he was in the hands of another master annul the appointment, because it is certain that he has been mine at both times, namely that of the execution of the will, and that of death. Wherefore, if he had remained in the hands of his other master, the appointment would become void; or if he had been transferred to someone who had testamentary capacity, he would acquire my estate for the latter through entering upon it by his direction.

(1) If the condition upon which the appointment of an heir was dependent stated that some act was not to be performed, and it was impossible, the person designated will be the heir in accordance with the opinion of all authorities, just as if he had been unconditionally appointed.

(2) An estate is generally divided into twelve parts, which are included in the appellation *as.* These parts all have their own names from the *uncia* to the *as*, for example, the following: "The sixth, the fourth, the third, five-twelfths, half, seven-twelfths, two-thirds, three-fourths, five-sixths, eleven-twelfths, the *as.*"

51. *Marcianus, Rules, Book III.*

Certain authorities held that the following appointment was not valid: "Let Stichus be free, and if he should become free, let him be my heir." The Divine Marcus stated in a Rescript that this appointment is valid, just as if the addition, "If he should become free", had not been made.

(1) Where anyone makes the following provisions in a will, namely: "If Stichus should still belong to me when I die, let him be free, and my heir." If Stichus is alienated, he cannot enter upon the estate by order of the purchaser, although, even if the testator had not declared it to be his intention, the slave cannot become free and the heir, unless he was under his control at the time of his death. If, however, he should manumit him during his lifetime, Celsus says in the Fifteenth Book of the Digest that Stichus will become his heir; for it is evident that the testator did not intend to exclude this case, nor are his words at all contradictory, for even though he is no longer his slave, he certainly is his freedman.

52. *Paulus, Rules, Book II.*

A slave belonging to the estate can be appointed an heir, provided that he had testamentary capacity with the deceased, even though this may not have been the case so far as the heir appointed by the testator was concerned.

53. *Marcellus, Opinions*.

Lucius Titius, after having appointed Seius and Sempronius equal heirs to his estate, and his other sons having been disinherited, substituted each of the said heirs for the other, and then bequeathed certain legacies, and manumitted certain slaves, and afterwards added the following: "Let Cornelius, Sallustius, and Varo be heirs to equal portions of my estate, and I substituted them for one another." 1 ask, what portion of the estate the first heirs, who are appointed for the whole of it, and what portion the last heirs should have? Marcellus answered that it was doubtful whether the testator intended to appoint Cornelius, Sallustius, and Varo

his heirs in the first, second, and third degrees; but according to the terms of the will as set forth, it would appear that the estate was given to all of the heirs after the shares had been doubled.

54. *Neratius, Parchments, Book I.*

A father substituted his slave as heir to his minor son, and at the same time granted the latter his freedom, and the minor sold the said slave to Titius. Titius, who had already made one will, in a second ordered the slave to be free and his heir. The first will of Titius was broken because the said slave could be his heir; and as the first will was broken, it is sufficient that the one subsequently executed provided that the heir appointed by it should, in a certain contingency, succeed to the testator.

With reference to the effect of this appointment, the result will be that as long as the heir can succeed to the minor by reason of this substitution, he can not obtain his freedom and the estate under the will of Titius. If the heir should obtain control of himself, he would then obtain his freedom, and the estate by the terms of the will of Titius, just as if he had not been substituted for the minor; and if he should become the heir of the minor, there is the best reason to conclude that he could also be the heir of Titius, if he was willing.

55. *Paulus, On the Lex Ælia Sentia, Book I.*

If a man who is not solvent should, in the first place, appoint Stichus his heir with a grant of his freedom, and in the second, another slave, upon whom he conferred freedom by the terms of a trust, Neratius says that the slave appointed in the second place will be the heir, because he is not considered to have been manumitted for the purpose of defrauding creditors.

56. *The Same, On Second Wills.*

Anyone can appoint an heir as follows: "If I die in my seventieth year, let So-and-So be my heir." In this instance, the person executing the will should not be considered to be partly testate, but to have made the appointment under a condition.

57. *The Same, On the Edict, Book LI.*

If anyone who is insolvent appoints his slave, with the grant of his freedom, his heir, and substitutes a freeman for him, the substitute will be first entitled to the estate, for the *Lex Ælia Sentia* confirms the freedom of the slave only where he has not been appointed heir for the purpose of defrauding creditors, if there is no one else who can be an heir under a will.

58. *The Same, On Vitellius, Book IV.*

No one doubts that an heir can legally be appointed as follows: "Let him be my heir," where the party indicated is present.

(1) If a person is not a brother of the testator, but entertains fraternal affection for him, he can legally be appointed his heir, by mentioning his name with the appellation of brother.

59. *Celsus, Digest, Book XVI.*

A man who is free, but who is serving you as a slave, having been appointed an heir, enters upon the estate by your order. Trebatius says that he is the heir, but Labeo maintains that he is not, if he acted through necessity, and not, on the contrary, because he intended to bind himself.

(1) If anyone should appoint an heir as follows: "Let Titius be my heir to the portion in which he is a partner with me in the lease of the salt-pits," certain authorities hold that if this statement had been made by the testator after the entire property had been divided, even though Titius was a partner to a very large extent, the appointee would not be the heir; but if there was a certain share which had not been bequeathed, he would be the heir to it. This opinion is absurd and incorrect, for what prevents the testator from legally making Titius his

heir for the fourth part, which perhaps was the amount in which he was interested as a partner, after the entire property had been disposed of under the ordinary division?

(2) "Let Titius be my heir, and let Seius and Mævius also be my heirs." It is true, as is held by Proculus, that the estate should be divided into two portions, one of which should be given to the two heirs who were appointed together.

(3) Where one of several heirs who has not been appointed conjointly with anyone else declines to take under the will, his share will accrue to all the others in proportion to their hereditary shares; and it does not make any difference whether any of them was appointed in the first place, or is substituted for someone else.

(4) Where a person appointed heir was a Roman citizen at the time that the will was executed, and was afterwards interdicted from water and fire, he will be the heir if he should return between the time of his sentence and that of the death of the testator, or if he was appointed an heir under a certain condition, and returns at the time that the condition was fulfilled. The same rule also applies to legacies, and the prætorian possession of estates.

(5) "Let Titius be my heir to half of my estate, Seius to a quarter, and Titius to the other quarter if he ascends to the Capitol." If he conducts himself as heir before he ascends to the Capitol, he will be entitled to half of the estate; if he should do so afterwards, he will be heir to a quarter of the same; for it will not be necessary for him to signify his acceptance, since he is already an heir.

(6) Where the following is stated in a will: "Let Titius be my heir to a third part of my estate, and Mævius be my heir to another third, and let Titius be my heir to the remaining third, if a ship should arrive from Asia within three months." Let us see whether Titius will not immediately become the heir to half of my estate, for two heirs have been appointed. Titius will either be an heir to one-half of it, or to two-thirds, so that a sixth of the estate will be in abeyance, and if the condition should be fulfilled, Titius will be the heir to two-thirds of the estate, but if it should not be fulfilled, the sixth will accrue to Mævius.

If, however, Titius should die before the condition is fulfilled, and it should be fulfilled afterwards, the sixth of the estate which remained in abeyance will not accrue to the heir of Titius, but to Mævius; for Titius died when it was still doubtful as to whether he or Mævius would be entitled to the said sixth, since it could not be understood to have been given to him who was no longer in existence at the time it should have been allotted.

(7) If Attius should appoint Titius, Mævius, and Seius heirs to equal portions of his estate, and, in the meantime, Titius was the only one who accepted, and he appointed Seius his heir, Seius would enter upon the estate of Titius, and could either accept or decline that of Attius; but before he accepted or rejected the estate of Attius, he would still be the heir to half of it. If Seius should enter upon the estate of Attius, Titius would only be the heir to one-third of the same, and through inheritance only a third of the estate of Titius would come into the hands of Seius, but he would be entitled to another third by virtue of his appointment. But what if Titius and Seius, having been appointed heirs of Attius, Titius should enter upon the estate, and Seius should become the heir of Titius, could he, or could he not refuse the estate of Attius, or would he necessarily be the heir to the entire estate? As no one else was appointed but the person who was already the heir to a certain portion of the estate, it is just the same as if he had been appointed sole heir by Titius.

60. *Celsus, Digest, Book XXIX.*

A man who was insolvent appointed one slave in the first place, and another in the second place, his heirs. He alone who was appointed in the first place is entitled to the estate, for by the *Lex Ælia Sentia*, it is provided that where two or more are designated in the same way, the first one mentioned becomes the heir.

61. *Modestinus, Opinions, Book VIII.*

A testator who wished to disinherit his daughter inserted the following clause into his will: "As for you, my daughter, I have disinherited you because I desired that you should be content with your dowry." I ask whether she was legally disinherited. Modestinus answered that there was nothing in the case stated which would prevent her from being disinherited by the will of the testator.

62. *The Same, Pandects, Book II.*

It is an act of kindness for an heir to be appointed for the time that he can obtain the benefit of the inheritance, as for instance: "Let Lucius Titius be my heir for the time when he can obtain my estate." The same rule applies to legacies.

(1) Whenever it is not apparent who the appointed heir is, the appointment will not be valid; and this may happen where the testator had several friends of the same name, and in designating the one whom he appointed he used only a single name; unless it is disclosed by the clearest evidence whom the testator had in his mind.

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

Where heirs are appointed without the designation of their shares, it is important to ascertain whether they are appointed conjointly, or separately; because if any one of those appointed conjointly should die, his share will not belong to all the heirs, but only to the remaining ones who are appointed along with him; but where one of those appointed separately dies, his share will belong to all of the heirs appointed under the will.

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

Labeo has frequently stated that the slave of a person born after my death can be appointed my heir. The truth of this is readily established, for the reason that a slave forming part of an estate can be appointed an heir before the estate is entered upon, even though at the time of the execution of the will he did not belong to anyone.

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

An estate cannot, under any circumstances, belong to Statius Primus, since he has not been appointed heir, and it would be of no benefit to him whatever if he were charged with the payment of a legacy, or if the freedman of the deceased was entrusted to his care by testamentary disposition; for he will remain a slave for all time, if he should not be manumitted.

66. *Pomponii, On Quintus Mucius, Book I.*

If anyone should appoint heirs as follows: "Let Titius be my heir, and let Gaius and Mævius be heirs to equal portions of my estate"; although the word "and" is a conjunction; still, if either of the parties should die, his share will not accrue to the other alone, but to all his co-heirs in proportion to their interest in the estate; because it is held that the testator did not mean to unite the two heirs, but intended to mention them more particularly.

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

Where the following was inserted in a will: "Let Tithasus be my heir if he ascends to the Capitol; let Tithasus be my heir"; the second clause will have the greater effect, for it is more complete than the first one.

68. *The Same, On Quintus Mucius, Book VII.*

A certain man appointed Sempronius his heir under the following condition: "If Titius should ascend to the Capitol." Even though Sempronius could not become the heir unless Titius should ascend to the Capitol, and this absolutely depends upon the inclination of Titius, for the reason that the desire of Titius is not expressly referred to in the will the appointment will

be valid. But if the testator had said, "If Titius is willing, let Sempronius be my heir"; the appointment would be void. For certain things which are mentioned in wills have no force or effect, if, when they are obscured by words, they have the same signification as if they had been expressed, and have a certain amount of weight; for instance, the disinheritance of a son will be valid where there is an heir, and still no one doubts that if a testator should disinherit his son as follows: "Let Titius be my heir, and when he is my heir, let my son be disinherited"; that a disinheritance of this kind if of no force whatever.

69. *Proculus, Epistles, Book II.*

"Let Cornelius or Mævius, whichever one of them may desire to have my estate, be my heir." Trebatius holds that neither of them is the heir, but Cartilius maintains that both of them are heirs. Whose opinion do you adopt? Proculus, I agree with Cartilius, and think that the addition, "Whichever one of them may desire to have my estate", is superfluous; for if this addition had not been made, the result would be that whichever of them wished to take under the will would be the heir, and that the one who was not willing would not be.

If, however, these parties were included in the number of necessary heirs, then this clause would not have been added in vain; and it would not only prevent the appearance, but would also have the effect of a condition; still, I would say that both of them would be heirs, if they desired to be.

70. *Papinianus, Opinions, Book VI.*

When the Senate disapproved of testamentary appointments of heirs which were obtained by intrigue, it did not include such as were dictated by mutual affection, but those in which a condition was imposed for the purpose of secretly obtaining an advantage through the will of another.

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

The following appointment does not come under the head of such as are corruptly sought after; for instance, where a testator appoints an heir as follows: "Let Mævius be my heir, to the same portion to which Titius has appointed me to his heir"; for the reason that the appointment has reference to the past and not to the future.

(1) It may be asked, however, whether the same rule established by the Senate should be observed where the testator attempts to secure an estate for some other person; for instance, if he should say, "Let Titius be my heir, if he can show and prove that Mævius had been appointed his heir by his will". There is no doubt that this comes within the terms of the Decree of the Senate.

72. *Terentius Clemens, On the Lex Julia et Papia, Book IV.* Where anyone who has been designated an heir to the entire estate is for some legal reason incapable of acquiring it, and was appointed by a party who died insolvent, Julianus is of the opinion that he can inherit the whole estate, for the law is not applicable to the estate of one who was insolvent.

73. *Gaius, On the Lex Julia et Papia, Book XIII.*

Where an heir is appointed under a condition, and we substitute another for him, unless, when doing so, we repeat the same condition, the substitution of the heir will be understood to be absolute.

74. *Licinius Rufinus, Rules, Book II.*

If anyone should appoint an heir as follows: "Let him be my heir, with the exception of the land and the usufruct", according to the Civil Law, this will be just as if the heir was appointed without the property; and this rule was established by the authority of Gaius Aquilius.

75. *Papinianus, Questions, Book XII.*

Where a son is substituted for an heir who has been passed over, he will be entitled to the estate by virtue of the will, and not on account of his father dying intestate; for if anyone else had been substituted, and the son had been disinherited, the will would begin to be operative from the degree in which the son was disinherited.

76. *The Same, Questions, Book XV*.

Where a slave is given by a husband to his wife, *mortis causa*, he remains the property of the husband, as was held by Julianus. Moreover, if he receives his freedom and the estate at the same time, he will be the necessary heir of the husband, as nothing can be left to him without granting him his freedom.

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

His entire estate not having been distributed, a testator inserted in his will: "Let him be the heir whom I shall appoint by my codicil." He appointed Titius his heir by his codicil. This appointment is valid, for although an estate cannot be bequeathed by a codicil; still, in this instance, it is held to have been left by the will. The heir, however, will only be entitled to that portion of the estate which has not yet been disposed of.

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

A man who was not in the army appointed his freedman heir to certain property derived from his mother which he possessed in Pannonia, and appointed Titius heir to his paternal estate, which he held in Syria. It is established by law that each of the heirs would be entitled to half of his estate; but the court having jurisdiction of the distribution of the same followed the last will of the testator, and adjudged to each of the heirs what he had left them, after having required them to furnish security against any proceedings which might be instituted under the Falcidian Law; that is to say, that they should reserve the right to retain a fourth of the bequest, so that whatever each of them might have to pay could be set off by means of an exception on the ground of bad faith.

(1) Lucius Titius and Publius Mævius, having been appointed heirs, the first to two shares of an estate, and the second to three shares of the same, I gave it as my opinion that the intention was that the estate should be divided into nine parts, for the reason that the value of the two shares had been deducted by the testator from the value of the other three. In this same manner, the ancient authorities decided that where a sum of money was bequeathed to Titius, and the kind of coin was not specified, this could be ascertained by an examination of the other legacies bequeathed by the testator.

(2) Where children were appointed heirs to equal portions of an estate, and afterwards the son of a brother was appointed for two shares, it was decided that the intention was that the ordinary division of the estate should prevail; and accordingly that the children should receive ten shares of the same.

A bequest is understood to have been made with a view to doubling the number of shares where the estate having been specifically bequeathed, or the twelve shares distributed, the remaining share can not be found. It makes no difference, however, in what place an heir has been appointed without a share, provided he appears to have received the remainder of the estate.

(*3*) Seius appointed Mævius heir to a portion of his estate, which he could take according to law, and appointed Titius heir to the remainder. If Mævius could take the entire estate, Titius, who was added to, or substituted for him, would not be an heir.

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

If no mention was made of the remainder, and the number of the shares was doubled, Mævius would only be entitled to as much as Titius would have been entitled to in the first place.

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

But if Mævius was not capable of taking under the will the substitute would be entitled to the entire estate.

81. *Paulus, Questions, Book IX.*

Clemens Patronus provided by his will, "that if a son should be born to him, he should be his heir; if two sons should be born to him they should be his heirs to equal portions of his estate; if two daughters were born to him, the same division should be made; if a son and daughter should be born, two-thirds of the estate should be given to the son, and one-third to the daughter". Two sons and a daughter having been born, the question arose how we should make the division of the estate in the case stated? Since the sons inherit equally, each of them should have twice as much as their sister; therefore the estate should be divided into five parts, out of which four should be given to the male heirs, and one to the female heir.

(1) A testator inserted the following into his will: "Let Sempronius be my heir to the share to which I was appointed heir by Titius, and which I shall apply for in person." This appointment does not come under the head of seeking after an estate; for it is evident that the appointment will be void if the will of Titius is not offered by the testator himself, all suspicion of the appointment for interested purposes having been removed.

82. *Scævola, Questions, Book XV.*

Where a testator appoints an heir as follows: "If my lawful heir refuses to accept my estate", I think the condition of the will is not fulfilled, if the heir should claim the estate.

83. *The Same, Questions, Book XVIII.*

If another law than that of *Ælia Sentia*, or a decree of the Senate, or even an Imperial Constitution prevents the grant of freedom to a slave, the latter cannot become a necessary heir, even though the testator may be insolvent.

(1) In the time of the Divine Hadrian, the Senate decreed that if a testator was not solvent when he died, and granted freedom to two or more slaves, and directed his estate to be given to them, if the appointed heir should say that he suspects that the estate would impose burdens upon him, he will be forced to accept it, in order that the slave first mentioned in the will may receive his freedom, and the estate be surrendered to him. The same rule must be observed in the case of those to whom freedom has been granted by virtue of a trust. Therefore, if the heir appointed in the first place wishes to enter upon the estate, no difficulty will arise; but if those slaves mentioned afterwards allege that they also should be free, and demand the surrender of the estate to them, an investigation must be made by the Prætor as to the solvency of the estate, and he must cause it to be delivered to all of said slaves who will become free. Where, however, the first slave is absent, and the one afterwards mentioned wishes to enter upon the estate, he shall not be heard, because if the first desires the estate to be given to him, he must be preferred, and the second must remain a slave.

84. *Paulus, Questions, Book XXIII.*

Where freedom was granted to a slave by virtue of a trust, and the heir appointed the same slave his own heir with the grant of his freedom, the question arose whether the said slave became a necessary heir. It is more just, and more consonant with the principles of equity, that he should not become a necessary heir, for he who could compel his freedom to be granted him even if the deceased had been unwilling when he ordered him to be free does not seem to have obtained great favor from the deceased, and, indeed, he is regarded rather to have received the freedom to which he was entitled, rather than to have had a favor conferred upon him.

(1) The same principle is applicable to the case of a slave whom a testator purchased under the

condition that he would manumit him, if he should be appointed heir; for leaving the favor of the testator out of consideration, he can obtain his freedom in accordance with the Constitution of the Divine Marcus.

(2) The same rule applies to a slave who was purchased by another with his own money, for he also can compel the same testator to grant him his freedom.

85. *Scævola, Opinions, Book II.*

Lucius Titius, who had a brother, made the following provision in his will: "Let my brother Titius be the heir to my entire estate. If Titius is unwilling to be my heir, or (which is something that I do not wish to happen) if he should die before entering upon my estate, or should not have a son or daughter born to him, then let Stichus and Pamphilus, my slaves, be free, and heirs to equal portions of my estate." I ask, if Titius should accept the estate, and should have no children at that time, whether Stichus and Pamphilus can become free and heirs, by virtue of the substitution. I ask also, if they can be neither free nor heirs under the said substitution, whether they can be held to be co-heirs to a portion of the estate. The answer was that it is clear that it was not the intention of the testator to appoint any co-heir with his brother, whom he had evidently designated as heir to his entire estate. Hence if the brother enters upon the estate, Stichus and Pamphilus will not be heirs, for the reason that the testator did not wish them to be, if his brother should die and leave children before accepting it. The wise disposition of the testator must be noted, as he not only gave preference to his brother over the substitutes, but also to his brother's children.

86. *Marcianus, Trusts, Book VII.*

There is no longer any room for doubt that heirs can be appointed under the following condition, namely: "If they wish to be heirs, and if they do not wish to be, another, who seems to be acceptable, shall be substituted for them." In this instance, it has been denied that it is necessary to disinherit a son under the contrary condition; in the first place, because this is only required when the condition is in his •power, or he is the heir of his father, and its fulfillment is dependent upon some outside influence and must be awaited; second, because no matter what kind of a condition has been imposed, the son should be disinherited under the contrary condition, and in the case stated disinheritance cannot possibly take place; and certainly if it were expressed in words it would be absurd, for what other terms can be conceived which would be contrary to this condition: "If he is willing, let him be my heir", than these: "If he is unwilling to be my heir, let him be disinherited"? It is evident to every one that such a provision is ridiculous.

(1) It does not seem to be foreign to the subject to add here, by way of supplement, that when heirs are appointed under the condition, "If they wish to be heirs", they should not be permitted to reject the estate for the reason that where they are appointed under this condition they are not necessary heirs, but become such voluntarily. Nor are they entitled to the right to reject the estate under other conditions which they are able to comply with, and have fulfilled.

87. *Hermogenianus, Epitomes of Law, Book III.*

Where an heir has been appointed first in order to half of an estate, and a second to two-thirds, and a third to the remaining portion, or if he has been appointed without mentioning what he shall receive, the said third heir will be entitled to five-twelfths of the estate; for if it is divided into twenty-four parts, the rules of calculation will give him ten twenty-fourths of the same, which is equivalent to five shares.

88. *Gaius, On Cases*.

Where a testator, who is insolvent, happens to have an heir in addition to a slave who has been appointed his heir with the grant of his freedom, for instance, where the testator in appointing the slave his heir with the grant of his freedom added: "If Stichus should be my heir, then let

Titius also be my heir"; for Titius cannot be the heir before Stichus becomes such under the will, and as the slave has at once become the heir, he who was added cannot share in the estate; so that where the slave becomes the heir, the other ceases to be one.

89. *Paulus, Manuals, Book II.*

Where a partner is appointed sole heir to an estate, and the legacy is bequeathed to a slave held in common by both partners, without the grant of his freedom, this legacy is void. It is evident that a legacy can legally be bequeathed under a condition, and without the grant of freedom, since a bequest can be made legally to one's own slave, and the heir be charged with the execution of it under a condition. Wherefore, where a partner is appointed an heir, a slave can be also appointed his co-heir, without the grant of his freedom, as, for instance, where he belongs to another; because a slave can be appointed an heir after his master has already been appointed.

90. *Tryphoninus, Disputations, Book XXI.*

Where a slave is appointed an heir with the grant of his freedom, but conditionally, by the will of his master; and while the condition is still pending, he discovers the murderers of his master, and the Prætor decides that he deserves his freedom, even though the condition of the will should afterwards be complied with, the said slave will become free, for another reason, that is to say, he will be liberated by way of reward, and not on account of the will. Hence, he is not the necessary heir of his master, although he can enter upon the estate if he desires to do so.

91. *Paulus, Decisions, Book V.*

It is odious for anyone to appoint the Emperor his heir in order to carry on a lawsuit, for it is not proper to make use of the Imperial authority for the purpose of encouraging vexatious litigation.

92. *The Same, On the First of the Six Books Relating to the Imperial Decisions; or the Second Book of the Decrees.*

Pactumeius Androsthenes appointed Pactumeia Magna, the daughter of Pactumeius Magnus, heir to his entire estate, and substituted her father for her. Pactumeius Magnus, having been killed, and the rumor having been spread that his daughter was also dead, the testator changed his will, and appointed Novius Rufus his heir, with this preamble: "Let Novius Rufus be my heir, for the reason that I have not been able to retain those heirs whom I desired to have." Pactumeia Magna applied to our Emperors, and the case having been heard, it was decided that she was entitled to relief, as this was in compliance with the wishes of the testator; and while there was a certain reason for the appointment of the other heir, still, as it was ill founded, it could not legally be interposed. Therefore, the decision was that the estate belonged to Magna, but that she would be compelled to pay the legacies bequeathed by the second will, just as if she herself had been appointed heir by the said will.

TITLE VI.

CONCERNING ORDINARY AND PUPILLARY SUBSTITUTIONS.

1. *Modestinus, Pandects, Book II.*

Heirs are said to be either appointed or substituted. Those who are appointed belong to the first degree, those who are substituted to the second, or the third degree.

(1) There are two kinds of substitutions, the simple, as, for example: "Let Lucius Titius be my heir, and if Lucius Titius should not be my heir, then let Seius be my heir; if he should not be my heir, or should be and die before arriving at puberty, then let Gaius Seius be my heir."

(2) We can substitute an heir for others who have been appointed, as well as for those who have disinherited; and we can substitute an heir who has already been appointed, or anyone

else.

(3) A father cannot substitute an heir for his children, unless he appoints one for himself; for without the appointment of an heir no provision of a will is valid.

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

It was introduced by custom, that if anyone made a will for his children under puberty, it would only be valid until his sons attained the age of fourteen years, and his daughters that of twelve. This must, however, be understood to apply where the children are under his control. We cannot substitute other heirs for emancipated children, but it is clear that we can do so for posthumous children, as we also can grandchildren and their successors, if they are not liable to again come under the authority of their father.

If, however, they precede their parents, they can only be substituted for them where they have been appointed heirs or disinherited; for, according to the *Lex Velleia* they do not break the will of their grandfather by the succession, since if the principal will is broken, the pupillary one cannot stand. But if anyone appoints as his heir a child who has not yet reached puberty, he can appoint a substitute for him, provided he adopted him instead of his grandson, or arrogated him, and his son precedes him.

(1) Where anyone makes a will for the benefit of a child who has not reached puberty, he must also make one for himself. He cannot, however, make a will for his son alone, unless he happens to be a soldier; therefore, unless he also executes one for himself, it will not be valid, and unless the estate of the father is entered upon, the pupillary will will be of no effect. It is evident that if the estate is not affected under the principal will, it will come into possession of the heir *ab intestato*, and it must be held that the pupillary substitution will be preserved.

(2) Sometimes, in order to establish the validity of a pupillary substitution, the appointed heir can be compelled to enter upon the estate, or this can be done to uphold a trust in the second will; for instance, where the minor has already died. But if he is still living, Julianus thinks that he is despicable who solicits an estate during the lifetime of the owner.

(3) I think that where a minor under the age of twenty-five years is granted restitution because of having entered upon an estate, that this will confirm the second will, and enable the Prætor to grant an equitable action to the substitute.

(4) The testator should first mention his own heir, and then he can appoint a substitute for his son, and he must not reverse this order of appointment. Julianus also thinks that he should first appoint an heir for himself, and afterwards one for his son. If, however, he should first make a will for his son, and afterwards one for himself, his acts will not be valid. This opinion is adopted in a Rescript of our Emperor addressed to Virius Luppus, Governor of Britain, for it is clear that there is but one will, although there are two estates, so that, where anyone appoints necessary heirs for himself, he also appoints them for his son, and a man can substitute his posthumous child for his son who has not yet reached the age of puberty.

(5) Where a testator stated in his will: "If my son should die before reaching the age of fourteen years, let Seius be my heir", and then added, "Let my son be my heir"; the substitution will be valid, although he inserted the provision in a reversed order.

(6) But where he said: "If my son should not be my heir, let Seius be my heir, let my son be my heir"; Seius is appointed heir in the second degree; and if his son should be his heir, there is no doubt that Seius will be the heir of the son; but if the son becomes the heir and dies before attaining the age of puberty; Seius is held to have been properly admitted to the succession, as not the order observed in the will, but the order of the succession must be considered.

(7) Therefore, when it was said that a substitution could be made for each one of the children, this was added in order to show that the father should not begin with the will of a son, who

has not yet reached the age of puberty.

3. *Modestini's, Differences, Book I.*

Where a father made a substitution for his son who had not yet arrived at puberty, as follows: "Whoever becomes my heir, let him also be the heir of my son who has not yet arrived at the age of puberty"; it was decided that only such heirs as had been mentioned with reference to this substitution in the will should be admitted to share in the estate. Hence a master who, by means of his slave, had acquired a portion of the estate, could not become the heir by virtue of his substitution for a child who had not attained the age of puberty, if the slave was no longer under his control.

4. *The Same, Concerning Inventions*.

At the present time, we are governed by the Constitution of the Divine Marcus and Verus, which provides that whenever a father makes a substitution for his child under the age of puberty instead of another, where there are two, he will be understood to have made the substitution in both instances; that is, where his son was not his heir, or was his heir but died before attaining the age of puberty.

(1) It is held that this privilege should also be extended to the third kind of substitution. For if a father should appoint, as his heirs, his two sons who are under the age of puberty, he substitutes them for one another, and the Divine Pius decreed that it should be held that the substitution was reciprocal in both cases.

(2) Where, however, two children, one of whom has reached the age of puberty, and the other has not, are reciprocally substituted by the ordinary formula: "I substitute them each for the other"; the Emperors Severus and Antoninus decided that in this instance only the ordinary substitution should be held to have been made; for it seemed to have been inconsistent that the double substitution should take place with reference to one of the heirs, but that, so far as the other was concerned, only the ordinary substitution should be provided; therefore, in this case, the father ought to have made a substitution for each one separately, so that if the child who had arrived at puberty should not be his heir, the one who had not reached puberty should be substituted for him; but if the one who had not reached puberty should be his heir, and die before attaining that age, his brother might be substituted for the share of his co-heir. Under these circumstances, the brother will be held to have been substituted in both ways; as, if he were not substituted in the ordinary way for the heir who had not arrived at puberty, the question would arise as to the intention of the father, and whether he was understood to have had in mind but one substitution for both his children, since one substitution is only understood to be included in the other, where the wishes of the parent are not opposed; or if, for the particular purpose of avoiding a dispute, he should, in any event, substitute the brother for the child who had not arrived at puberty, as follows: "Whether he does not become my heir, or whether he does, but dies under the age of puberty."

5. *Gaius, On the Lex Julia et Papia, Book III.*

Where several heirs mentioned in a will were substituted for someone, as follows: "If he should not be my heir, let whoever will be inherit his share of my estate", it is settled that each heir will be called to the share of the heir of him who is lacking; and it does not make any difference whether he who becomes heir to the larger portion of the estate does so by virtue of his appointment, or whether he has obtained it through some law by which he was granted the share of another.

6. *Terentius Clemens, On the Lex Julia et Papia, Book IV.* Where anyone who is not capable of acquiring the entire estate of the testator is substituted for the son of the latter who has not yet reached the age of puberty, he can acquire the entire estate for the reason that he obtains it through the minor. Our Julianus holds that this opinion should be interpreted in such a way that the party in question will not be entitled to all the property of the testator. If, however,

anything should subsequently be acquired by the minor from another source, or if he should be disinherited, the substitute will not be prevented from acquiring the estate, since he obtains it from the minor.

7. *Papinianus, Opinions, Book VI.*

In accordance with the terms of the Civil Law, it is not permitted to make a substitution after the fourteenth year. A party who cannot be admitted as a substitute cannot be admitted as an heir, lest, against the will of the testator, the son may in the meantime fail to obtain what his father gave him by his will.

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

Where a father appoints a substitute for his children who have not reached the age of puberty, he usually does so absolutely, or under some condition. He does so absolutely when he says: "If my son should die before reaching the age of puberty, let Seius be my heir." Either Seius is here appointed an heir, and is appointed a substitute for a minor without any condition, or he is merely substituted. But if the testator substitutes an heir who has been appointed, that is to say as follows, "If he should be my heir"; he does not become the heir by reason of a substitution, unless he was the heir by appointment. Such a substitution resembles the following one, namely, "Whoever will have been my heir in accordance with what has been previously stated"; for this substitution contains a condition similar to the former one.

(1) These words: "Let him be heir to my son under the age of puberty who would have been my own heir," have the following meaning, that not every one who might be the heir of the father can be held to be substituted, but only the testamentary appointee. Therefore, neither a father who becomes an heir through his son, nor a master who becomes one through his slave, is admitted to the substitution; nor can the heir of the heir be admitted, because these parties are not entitled to the estate through the wish of the testator. Substitutes have a right to the same shares to which they would be entitled out of the estate of the head of the family himself.

9. *Labeo, Abridgments of the Last Works of Javolenus, Book I.*

Where a father substituted for his son under the age of puberty the same persons whom he appointed his own heirs, and you in addition, you will be entitled to half of the estate of the son, and the other heirs of the father will be entitled to the other half, so that the undivided half will belong to you, and a division of the remaining half will be made in proportion to the shares of the estate of their father to which the others would have been entitled by inheritance.

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

Where, however, several parties have been substituted as follows: "Whoever shall be my heir in accordance with what has been previously stated", and then some of them die after having become the heirs of their father, the surviving heirs, in accordance with the substitution, can only take that portion of the estate to which they are entitled *pro rata* by their appointment, and no one will be entitled to it as a representative of the deceased heirs.

(1) Those whom I can appoint my own necessary heirs, I can also substitute as the heirs of my son, my slave, or my brother, even though they are not yet born. Therefore, a posthumous child can be the necessary heir of his brother.

(2) A certain man was substituted by the testator for a child not yet arrived at puberty, and who had been appointed heir to an entire estate. If the son becomes the heir of his father, can the substitute separate the two estates, so that he may take that of the son, but not that of the father? He cannot do so; for he must either accept or reject the estate of both, because they are undivided.

(3) The same rule applies if a father should appoint me heir to one portion of his estate, and

his son to another portion, and I should reject the bequest of the father, for I cannot have that of the son.

(4) Where anyone is appointed sole heir to an estate, and, having been substituted for a disinherited son, rejects the estate of the father, as he was not substituted, he cannot acquire the estate of the son; for the will of the son will not be valid, unless he accepted the estate of his father, since, in order to establish the validity of the substitution, the will must have been so drawn that the estate could be entered upon by the heir.

(5) Whatever comes into the hands of the pupillary substitute after the death of the testator belongs to him, for the testator did not substitute him for his own estate, but for that of the minor; as anyone can make a substitution for a disinherited son, unless you give as an example the case of a soldier who substitutes an heir for his son, with the intention that only such property as would have come into the hands of the son will belong to the substitute.

(6) We also hold that, in the case of a minor who has been arrogated, the property to which he would have been entitled if this had not taken place will not belong to his substitute, but that alone which the arrogator himself gave him; unless we make the distinction that the fourth part which, in accordance with the terms of the Rescript of the Divine Pius, he is obliged to leave him, cannot be acquired by the substitute.

Scævola, however, holds in the Tenth Book of Questions that the arrogator should be permitted to do this, which opinion is reasonable. I, however, go still further, and think that the substitute will be entitled to any property which has been acquired by reason of the adoption, as for instance, where a friend or relative of the arrogator left anything to the heir.

(7) No one who is appointed, and at the same time substituted for himself, will gain anything without a change of parties; but this occurs when there is only one degree. Where, however, there are two degrees, it can be said that the substitution will be valid, as Julianus holds in the Thirtieth Book of the Digest. Should the testator make the appointment of an heir, when Titius is his co-heir, in the following terms: "If Stichus should not be my heir, let him be free and be my heir", the substitution will not be valid. But if he should say, "If Titius should not be my heir, then let Stichus be free, and be heir to his share", there are two degrees of substitution, and therefore if Titius should reject his portion of the estate, Stichus will become free and the heir of the testator.

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

Where the party who is appointed heir is substituted for a son, he will not be prevented from taking under the substitution, if he can do so after the death of the son. Again, on the other hand, he can be held liable to certain penalties under the will of the minor, although he may not be subject to any under that of the father.

12. *Papinianus, Questions, Book III.*

If a son who has been appointed the heir of his father, and afterwards becomes the heir of his brother through substitution, rejects the estate of his father, but prefers to retain that of his brother, he should be heard. For I think it is more equitable that the Prætor should permit the separation of the estates of the brother and the father; for he has the right to decide that children shall be freed from the burdens of an estate which they have not voluntarily assumed, but no right excludes them from an estate against their will; and especially when, leaving the substitution out of consideration, the substituted brother would be entitled to the estate. Hence, only the legacies should be paid in accordance with the substitution, and the rule of division established by the Falcidian Law should be followed, not with reference to the estate of the father, as is customary, but with respect to that of the child who had not yet arrived at puberty.

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

It makes no difference in what degree an heir may be substituted for children.

14. *The Same, On Sabinus, Book II.*

In a pupillary substitution, even though a longer time may have been fixed, the substitution will, nevertheless, terminate at the age of puberty.

15. *Papinianus, Opinions, Book VI.*

A centurion directly substituted an heir for his son: "If he should die without issue before reaching the age of twenty-five years." The substitution for the son would acquire his estate by Common Law if the latter should die before his fourteenth year; after that age, however, he could not, under military privilege, acquire anything more than the estate of the father and the profits derived from the same found among the effects of the son.

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

If anyone should bequeath a slave by his will, and afterwards order a substitute, whom he had appointed for his son, to liberate said slave, the latter will become free, just as if the bequest of the legacy was annulled; for so far as the legacy is concerned, what was last mentioned in these wills must be considered, as is done in the case of the same will, or where codicils have been confirmed by a will.

(1) Where, after a testator has executed his will, he afterwards makes one for his son in the presence of competent witnesses, this act will, nevertheless, be valid, and the will of the father will stand; but if the father should make a will for both himself and his son, and afterwards one only for himself, both the will and the substitution first made will be broken. Where, however, the father made the second will and appointed his heir, as follows: "If his son should die in his lifetime", it can then be said that the first will is not broken, for the reason that the second, in which the son was passed over, is void.

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

Anyone can be substituted for a child, even though he should be born after the death of the child for whom he was substituted as heir.

18. *Ulpianus, On Sabinus, Book XVII.*

If a slave, owned in common with another, is substituted for a son not yet arrived at puberty, together with the grant of his freedom, and he should be purchased by the testator, he will become a necessary heir of the minor; but if he should be purchased by the latter, he will not be his necessary, but his voluntary heir; as Julianus states in the Thirtieth Book of the Digest. But whether he was purchased by the father or the minor, equity suggests that he himself, if he tenders the price of his master's share, can obtain both his freedom and the estate.

(1) Where a slave is bequeathed to Titius, he can be substituted for the minor son of the testator with the grant of his freedom; just as where he is bequeathed and appointed heir, and the legacy will vanish when the condition on which the substitution depends is complied with.

19. *Julianus, Digest, Book XIII.*

The same rule applies where a slave is substituted after the death of a legatee. . 20. *Ulpianus, On Sabinus, Book XVI.*

The will of the father and that of the son are considered as one, in accordance with the Prætorian law; for (as Marcellus states in the Ninth Book of the Digest), it will suffice for the will of the father to be sealed, if that of the son is also sealed; and the seven seals of the witnesses attached to the father's testament will be sufficient.

(1) Where a father makes a written will for himself and an oral will for his son, or *vice versa*, both will be valid.

21. *The Same, On the Edict, Book XLI.*

If a testator should make a substitution as follows: "If my son dies before reaching his tenth year, let Seius be my heir"; and the son should die after his tenth year, but before reaching his fourteenth, the better opinion is that the substitute cannot demand possession of the estate, for he is not held to have been appointed a substitute in this case.

22. *Gaius, On the Provincial Edict, Book XVII.*

Where a son demands possession of the estate of his father in opposition to the terms of the will of the latter, and he has been substituted by the said will for his brother under the age of puberty, he will be excluded from the substitution.

23. *Papinianus, Opinions, Book VI.*

Where a testator appointed several heirs, and said: "I substitute them all reciprocally", and, after his death, the estate was entered upon by some of them, one of the heirs being dead, if the condition upon which the substitution depended is fulfilled, and another heir rejects his share, all of it will belong to the survivors, because they are held to have been substituted for one another with reference to the entire estate. If, however, the testator should appoint heirs and say: "I substitute them reciprocally", those will be held to have been substituted who accept the estate.

24. *Ulpianus, Disputations, Book IV.*

Where several heirs are appointed for different shares of an estate, and all of them are substituted for one another, they should generally be considered as substituted for the same shares to which they were appointed heirs; for example, if one was appointed heir to one-twelfth, another to one-eighth, and a third to a quarter of the estate, and the latter should reject his share, the quarter shall be divided into nine parts, to eight of which he will be entitled who was appointed heir to two-thirds, unless it was the intention of the testator that he who was appointed heir to one-twelfth should receive one share, and this is hardly to be believed unless it was explicitly stated.

25. *Julianus, Digest, Book XXIV.*

Where a father substituted his two sons under the age of puberty reciprocally, and Titius for the one who would die last; the opinion was that the brothers alone were entitled to the possession of the estate, and that there were in this instance two degrees of appointment, as it were; so that, in the first place, the brothers should be substituted for one another, and if they should not be heirs, then Titius was to be called to the succession.

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

If a father should appoint as his heir his son who is under the age of puberty, and appoint as his substitute a posthumous child, and a child should be born during the lifetime of its father, the will will be broken if the other child is living. If, however, the said child should be born during the lifetime of its father, but after the death of its brother, it will be the sole heir of its father.

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

If Titius should be substituted for his co-heir, and Sempronius should afterwards be substituted for him, I think that the better opinion is that Sempronius was substituted for both shares of the estate.

28. *The Same, Digest, Book XXX.*

The *Lex Cornelia*, which confirms the wills of those who die in the hands of the enemy, not only has reference to the estates of persons who made their wills, but to all estates which can belong to anyone by testamentary disposition, even if they had not fallen into the hands of the

enemy. Hence, where a father died in captivity, leaving in his own country a son under the age of puberty, and the latter died before reaching that age, the estate belonged to the substitute; just as if the father had not been captured by the enemy.

Where, however, the father died at home, and his minor child died in the hands of the enemy, having been captured after his father's death; will it not be proper to hold that his estate belongs to the substitute, under the terms of the said law? But if the son falls into the hands of the enemy during the lifetime of his father, I do not think that the *Lex Cornelia* will apply, because it does not provide that he who left no property in his own country shall have any heirs.

Wherefore, even if the son, having arrived at puberty, should be captured during the lifetime of the father, and should afterwards die while in the hands of the enemy, after the death of his father at home, the estate of his father will belong to his next of kin, by virtue of the Law of the Twelve Tables, but the estate of the son will not belong to the latter by the terms of the Cornelian Law.

29. *Scævola, Questions, Book XV*.

Where a father as well as his son have been captured by the enemy, and both die in captivity; even though the father may die first, the Cornelian Law does not confirm the substitution, unless the minor should die after returning home; although if both should die at home, the substitute will be entitled to the estate.

30. *Julianus, Digest, Book LXXVIII*.

A certain man, by his will, appointed Proculus heir to a fourth part of his estate, and Quietus to the remaining three-fourths of the same; and afterwards substituted, as heirs, Florus for Quietus, and Sosias for Proculus; then, if neither Florus nor Sosias should become the heirs, he substituted the colony of the Leptitians heirs to three-quarters, and several heirs to an amount exceeding the remaining quarter. Proculus and Sosias died during the lifetime of the testator and Quietus entered upon the estate. The question arose whether the fourth left to Proculus should belong to Quietus, or to those who had been substituted in the third degree. I answered that the intention of the testator seemed to have been that those heirs whom he substituted in the third degree should only have a right to the succession where the entire estate had been abandoned; and that this intention was apparent from the fact that he had distributed more than twelve shares among the substitutes; and therefore that the fourth part of the estate, which was in question, would belong to Quietus.

31. *The Same, On Ambiguities*.

A substitution was made as follows: "Let the same person be my heir who will be my heir, as above stated." The question arises what heir is to be understood by this, whether it would be anyone whosoever, or only the party who would be the heir at the time when the son died? It was decided by men learned in the law that he would be the heir who might succeed the testator at any time whatsoever; for even though the appointed heir had died during the lifetime of the minor, and the will had been attacked as being inofficious with reference to a certain part, it should be held that the other is still the heir under the substitution.

(1) The rule cannot be said to be the same in the following case: for instance, where a testator has two sons, Gaius, who has arrived at puberty, and Lucius, who has not, and he makes the substitution as follows: "If my son Lucius should die without reaching the age of puberty, and Gaius should not be my heir, then let Seius be my heir"; for legal authorities have interpreted this to mean that the condition of the substitution should be referred to the death of the son who has not arrived at puberty.

32. *The Same, On Urseius Ferox, Book I*.

Where a testator appointed several heirs, among whom was Attius, to unequal shares of his

estate, and if Attius should not accept, he substituted the others as heirs in proportion to their interest, and then added that Titius should be the co-heir of those who were substituted.

The question arose to what share Titius would be entitled, and what the others would have. I answered that Titius would be entitled to one share and the others to shares in proportion to their rights in the estate; for instance, if there were three of them, Titius would have the fourth part of the share of Attius, and the other heirs would have the three-fourths remaining, in proportion to the shares to which they were entitled by appointment. If, however, the testator should add not only Titius, but other heirs, the latter would be entitled to a portion equal to that of the share of the substitute; for example, suppose that three co-heirs were substituted and two foreign heirs added, the latter would be entitled to five parts of the share of Attius, and the remaining co-heirs would receive the balance in proportion to their respective shares.

33. *Africanus, Questions, Book II.*

If a mother should make a will and appoint her son her heir, as soon as he arrives at the age of fourteen years, and in case he should not be her heir, appoints another for him by pupillary substitution, this will be valid.

(1) Where a son is appointed an heir, and his own posthumous son another, in compliance with the rule of Gallus Aquilius, and Titius is substituted for the grandson if he should not be the heir, if the son becomes his father's heir, the opinion was given that Titius should be absolutely excluded; that is to say, even if a grandson should not be born.

34. *The Same, Questions, Book IV.*

A testator who had two sons not yet arrived at puberty, substituted a certain person as heir of the survivor. If both should die at the same time, it was held that the substitute would be the heir of both, because the survivor is understood to mean not only one who comes after another, but also he whom no one succeeds; just as, on the other hand, the first is understood to mean not only one who comes before another, but also him who has no one before him.

(1) A testator appointed a son, who had not reached puberty, and Titius, his heirs. He substituted Mævius for Titius, and for his son he substituted any of his heirs who had previously been mentioned by him. Titius rejected the estate; Mævius entered upon it. The son having afterwards died, it was decided that the estate of the minor, which was derived from the substitution, would go to Mævius, as the sole heir who had entered upon the estate of the father.

(2) Even though application may be made for the possession of the estate contrary to the will of the father, the pupillary substitution will still be valid, and all the legacies bequeathed under said substitution should be paid.

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

Where prætorian possession of an estate is applied for by a minor in opposition to the will of his father, an action to compel the payment of legacies should still be granted against the substitute; and, for the reason that the son does not owe any legacies bequeathed to strangers, those granted under the substitution shall be increased; just as where legacies are bequeathed under the substitution, if more comes into the hands of the son through prætorian possession of the estate than he would otherwise receive, so, also will he owe more to persons who are privileged.

I think that the result of this will be that where a son who has not arrived at puberty is appointed heir to the entire estate, and he is deprived of half of it through prætorian possession, the substitute will be free from liability to pay half of the legacies, just as the portion which is added through obtaining possession of an estate increases the legacies, so also, in this instance, the amount which is lost diminishes them.

36. *Marcianus, Institutes, Book IV*.

Anyone can establish several degrees of heirs in a will, for example: "If So-and-So does not become my heir, let So-and-So not be my heir", and I appoint several others in succession, so that in the last place, by way of reserve, a slave is appointed a necessary heir.

(1) Several heirs can be substituted instead of one, or one instead of several, or particular heirs instead of each one, or those who have been appointed heirs can be substituted for one another.

37. *Florentinus, Institutes, Book X*.

An heir can be substituted for each of the children of a testator, or for one of them who may survive; for each one, where he does not wish that any of them should die intestate, for the survivor, if he desires the right of legitimate succession to remain unimpaired.

38. *Paulus, On Pupillary Substitutions*.

Where a man has several children, he can substitute an heir for any of them, and it is not necessary for him to do so for all; just as he can make a substitution for one of them.

(1) Therefore, he can make a substitution for a short period during the lifetime of his heir; for instance, "If my son should die before reaching the age of ten years, let Titius be his heir".

(2) Moreover, the substitution will be admitted if he appoints several heirs for different terms of the age of the son, as, for example: "If he should die before reaching the age of ten years, let Titius be his heir; if he should die after his tenth year, but before reaching his fourteenth, let Mævius be his heir."

(3) Where an heir appointed by a father, who has been charged with delivery of the estate, enters upon it, after having been compelled to do so by the beneficiary of the trust, although the other bequests mentioned in the will may be confirmed by this acceptance, as for example, legacies, and grants of freedom; still, where the will has become inoperative under the Civil Law, the pupillary substitution included therein is not revived; as Quintus Cervidius Scævola held.

Many authorities, however, are of a different opinion, for the reason that the pupillary substitution is a part of the former will; and this is the practice at present.

39. *Javolenus, On the Last Works of Labeo, Book I*.

A man had, by his son, two grandsons who were under puberty, one of whom was under his control, and the other was not. He wished them to inherit equal portions of his estate, and provided that, if either of them died before reaching the age of puberty, his share should be transferred to the other; and in compliance with the advice of Labeo, Ofilius, Cascellius, and Trebatius, he appointed as his sole heir the grandson who was under his control, and charged him with the delivery of half of his estate to his other grandson when he arrived at puberty, and substituted the other heir for the one who was under his control, if the latter should die before reaching that age.

(1) We can substitute two heirs under different conditions for a son under the age of puberty; for instance, one of them can be substituted if the son should have no children, and another child should be born and die before reaching the age of puberty.

(2) A certain testator appointed four heirs, and substituted others for all of them except one, and the one for whom no substitute had been appointed, as well as one of the others, died during the lifetime of the father. Ofilius and Cascellius held that the share of the one for whom no one had been substituted also belonged to the substitute of the deceased heir; which opinion is correct.

40. *Papinianus, Questions, Book XXIX*.

An heir who had not reached the age of puberty, and who had been arrogated after proper investigation, died. Just as in the case of heirs-at-law, by Imperial authority, a bond must be furnished, so, if a natural father has substituted an heir for his son under the age of puberty, recourse must be had to the substitute; for only prætorian actions can be granted to heirs-at-law.

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

An heir was substituted for his co-heir, but died before he entered upon the estate, or the condition upon which the substitution depended was fulfilled. Both shares of the estate will belong to him who was substituted, either before the substitution of the heir, or afterwards; nor will it make any difference whether the substitute dies after or before the appointed heir.

(1) By the following words: "I substitute them for one another", the share refused by one of the heirs will go to those mentioned in the will, in proportion to what they themselves obtain by their appointment, or what has been acquired by the person to whose control they are subject.

(2) Where a father makes a substitution for his daughter, or for a grandson who occupies the place of his son, or who has held it after the execution of the will, the pupillary substitution becomes void if any of these should not belong to the family of the testator at the time of his death.

(3) If a father should appoint his son his heir and request him, if he should die before reaching the age of puberty, to give his estate to Titius, it has been established that the lawful heir of the son shall be forced to surrender the estate of his father, with the exception of the right granted by the *Lex Falcidia*, just as if the estate had been granted in trust to the heir of the said minor after his death.

The same rule should be observed when a condition upon which the substitution depends is expressed in ambiguous terms, and extends beyond the age of puberty. This, however, will only apply where the will of the father is valid in law; for if the instrument which he drew up as his will is not valid, it will not be admitted as a codicil unless this is expressly stated, nor will the property belonging to the son be bound by the trust. Therefore, if the father has disinherited the son, and left him nothing, the trust will be void. Otherwise, if the son has received either a legacy or a trust from his father, the trust of the estate with which he is charged will be due in proportion to the property which he has received, without reference to the proportion allowed by the Falcidian Law.

(4) Where a testator bequeathed different shares separately to several heirs, and after doing so said: "I substitute my heirs for one another", he is held to have substituted those joined in the first place reciprocally, and if they do not accept their shares, all the other coheirs should be admitted.

(5) Where a testator appointed a father and his son heirs to a share of his estate, and substituted them one for the other, and then bequeathed the rest of his property to their co-heirs, and afterwards disposed of the entire estate as follows: "I substitute all of these heirs reciprocally", the question arose as to his intention, and whether by mentioning all of them he included the father and son in the substitution of the co-heir, or whether he only intended the will to apply to all the others. The latter opinion appears to be the more probable, on account of the special substitution which he made with reference to the father and son.

(6) Where a co-heir is given to a son under the age of puberty, who has also been substituted for him, he will be obliged to pay any legacies bequeathed under the substitution, just as if he had received a part of the estate absolutely, and another part of it conditionally. The same rule will not apply in case of the substitution of another, for he will bring about the application of the *Lex Falcidia*, just as if the heir had clearly been appointed under a condition in the first place; although the co-heir given to the son would certainly be entitled to the entire fourth of

his share, for where a legacy was granted to Titius by the will, and the same property was given to Sempronius by the substitution, Sempronius will share the property with Titius.

(7) Where a father having two daughters, both under the age of puberty, made a pupillary substitution for the one who should survive, and the daughter who had not reached puberty died, being survived by her sister who had attained that age, it was held that the substitution was void, both with reference to the first daughter above mentioned, because she did not die last, as well as with reference to the second one, because she had reached the age of puberty.

(8) It was held that a substitution expressed in the following terms is not defective: "If my son should die before reaching the age of puberty, which I trust will not be the case, then let Titius be my heir in his stead and to his portion"; any more than if he had directed him to be substituted as his heir, after prescribing a certain condition; for where anyone is appointed an heir to certain property, and a co-heir has not been appointed, he will be entitled to the entire estate.

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

Where a man left two children his heirs who had not yet reached the age of puberty, and made a substitution for them as follows: "If both of them should die", and both died at the same time, after the death of their father, the two estates will belong to the substitute; but if they died at different times, the substitute will find in the estate of the boy who died last that of his brother who died previously, but, according to the terms of the Falcidian Law, the estate of the first boy will not be included; the substitute cannot claim more than an eighth of the estate under the will; and the legacies, with whose distribution the substitute of the son who first died intestate was charged, become of no effect.

43. *Paulus, Questions, Book IX.*

A question arises in the following case. A certain man who had a son past the age of puberty that was deaf, obtained permission from the Emperor to appoint a substitute for him, and substituted Titius. The said deaf son married a wife after the death of his father and a son was born to him. I ask whether the will was broken. I answered that princes themselves are accustomed to explain rights which they have granted, but where the intention of the prince is examined in this case, it can be said that he only intended the right to be conceded to the father so long as his son remained in the same condition; and that, just as, according to the Civil Law, pupillary substitution is terminated by puberty, so the Emperor imitated this rule in the case of the son, who was incapable of making a will on account of his infirmity. For if he had made the substitution for a son who was insane, we would say that the will would cease to be valid when the son became of sound mind, because then he himself could make a will; and indeed the privilege bestowed by the Emperor would become unjust if we should hold that the will was valid after this, for it would deprive a man who was sane of the right to make his own will.

Therefore it must be held that substitution is also annulled by the birth of a legal heir, because it makes no difference whether the son himself subsequently appointed another heir, or whether he received one by law; for it is not probable that either the father or the Emperor, in this instance, had in view the disinheritance of the son who was afterwards born. Nor does it make any difference in what way the privilege granted by the Emperor may interfere with the execution of the will, or whether it has reference to one, or to several persons.

(1) I also ask where a substitution is made as follows: "If my son should die under the age of ten years, let Titius be my heir; if he should die under the age of fourteen years, let Mævius be my heir", and the son died at the age of eight years, will Titius be his sole heir by virtue of the substitution, or will Mævius also be one, because it is certain that the son died under the age of ten years, as well as under the age of fourteen. I answered that the father had a right to make a substitution for his son during the entire time before he attained the age of puberty, but

puberty put an end to this right. The better opinion is that the time prescribed separately for each party should be observed, unless it is clearly evident that the will of the testator was opposed to this.

(2) Lucius Titius, while having children under his control, appointed his wife his heir, and substituted the children for her. The question arose whether the appointment of the wife was of no force or effect, for the reason that the children were not disinherited in this degree. I answered that the degree in which the children were passed over was of no importance, since the same parties were appointed as substitutes who were heirs under the will, that is to say, because the children do not annul the entire will, but only the degree mentioned which was not valid from the beginning; just as it has been determined that if a child is passed over in the first degree, he is disinherited in the second. But it makes no difference for what reason the institution of the second heir is valid, whether because the son was disinherited by his appointment, or because the son himself was appointed a substitute.

(3) Julius Longinus, a father, substituted for his children the heirs that he had appointed for himself as follows: "Whoever shall be my heir." One of the heirs appointed had tacitly agreed to give a share of what he received to a person who was not capable of taking it, having been admitted to the substitution of the son under the age of puberty; what share should he be permitted to have, the one for which he was appointed, or the one which he took, in order that his share might be increased in the substitution. I answered that he who consents to a fraud against the law, by entering upon an estate, becomes the heir, nor does he cease to be such even though he be deprived of the property left to him under such circumstances. Hence, he can be the heir under the pupillary substitution only to the share to which he was appointed, for he is sufficiently punished for what he did contrary to law; and, indeed, I would say the same even though he ceased to be the heir.

The same rule should be understood to apply to anyone who, after he had been appointed heir and entered upon the estate, is reduced to slavery, and is subsequently presented with his freedom, who is permitted to be admitted to the substitution left to him by the will; for although he has lost the inheritance to which he was entitled by his appointment as heir, still, by virtue of the substitution, he can receive the same share which he lost.

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

Marcianus states that the principal will can neither be wholly or partly confirmed by pupillary substitution.

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

Lucius Titius appointed as his heirs his legitimate son and a natural son, and substituted them for one another. The legitimate son, Titius, whom his father left only a year old, died after the death of his father without reaching the age of puberty, being survived by his mother, and his natural brother who was also his co-heir. I ask whether his estate will belong to his natural brother, by virtue of the substitution, or will it go to his mother. I answered that the substitution in question relates to the first case where the parties appointed are not heirs, and not to the second where one of the heirs died subsequently under the age of puberty; because double substitution cannot exist in the person of the natural son, and therefore the estate will belong to the mother of the legitimate son *ab intestato*.

(1) Paulus gave it as his opinion that, "If all the appointed heirs were substituted for one another, the portion of one of them who, after some of his co-heirs have died, rejected his share, will, by virtue of the substitution, belong to the heir alone who was living at the time".

46. *The Same, Opinions, Book XIII.*

The father of a family having appointed his posthumous child his heir by his will, substituted his brother, Gaius Seius, for himself, or his son if he should die before reaching the age of

puberty, and then substituted Titius for Gaius Seius, and afterwards said: "If my brother, Gaius Seius, whom I substituted in the first place, should be my heir, then I appoint Titius trustee." I ask, if the son should be the heir of his father, and having died before the age of puberty, his brother should become the heir of the testator by virtue of the substitution, whether the trust must be discharged when it was created as follows: "If Gaius Seius, my brother, should be my heir"? I answered that the brother of the deceased, who was appointed or substituted in both cases, must deliver the property which the testator bequeathed, if the son should die before reaching the age of puberty, and that the meaning of the following words cannot be disputed: "If Gaius Seius should be my heir, then I desire the property to be given", since it is a fact that he was the heir of the testator.

47. *Scævola, Opinions, Book II.*

A certain person had a son and a daughter, both under the age of puberty, and having appointed his son his heir, he disinherited his daughter, and substituted her for his son, "If the latter should die under the age of puberty"; and then he appointed his wife and his sister as substitutes for his daughter, if she should die before being married. I ask, if the daughter should die first, after having reached the age of puberty, and her brother afterwards, before reaching that age, whether the estate of the son would by the right of substitution belong to the wife and sister of the testator. I answered that, in accordance with the facts stated, it would not belong to them.

48. *The Same, Questions Publicly Treated.*

We own a slave in common; he is appointed an heir; and Mævius is substituted for him in case he should not be the heir. The slave accepts the estate by the direction of only one of his masters, and the question arises whether there is ground for the admission of the substitute, or not. The better opinion is that there is ground for his admission.

(1) "Let Titius be my heir. I give and bequeath Stichus to Mævius. Let Stichus be my heir, if Stichus should not become my heir, let Stichus be free and my heir." In this instance, inquiry must first be made whether there is one degree or two, and whether the condition of the substitution is changed, or remains the same. And, indeed, the question frequently arises whether a party can be substituted for himself, and the answer is that where the condition of the appointment is changed he can be substituted. Therefore, if Titius is appointed heir, and if he should not accept he is ordered to become the heir, the substitution is of no force or effect. Where, however, a party is appointed an heir under a condition, but is substituted absolutely, the case is changed, since the condition upon which the appointment depends may not be fulfilled, and the substitution may be productive of some advantage to the heir. But if the condition should be fulfilled, there are two absolute appointments, and the substitution will have no force or effect.

On the other hand, if anyone appoints an heir absolutely, and then substitutes him for himself under some condition, this conditional substitution is inoperative, nor is anything understood to be changed, since, if the condition had been fulfilled, there would be two absolute appointments of the same individual. According to this, the question stated is as follows: "Let Titius be my heir, I give and bequeath Stichus to Mævius; let Stichus be my heir, if Stichus should not be my heir, let him be free and be my heir". We know that since Stichus was bequeathed and received his freedom by virtue of the same will, his freedom will take precedence, and if it does, the legacy will not be due, and he cannot enter upon the estate by order of the legatee, and therefore Stichus is not an heir and by virtue of the words which follow he is entitled to freedom; as it is held that there is but one degree of appointment.

But what if Titius should not accept the estate?. Stichus would begin to be free and an heir by virtue of the substitution. Hence, as long as he does not enter upon the estate by order of the legatee, it is understood that he does not become the property of the legatee on account of the legacy, and therefore it is certain that he is not an heir; but he becomes free and an heir by

virtue of the following words: "If he should not be my heir, let Stichus be free and be my heir." Julianus also approves of our opinion in his works. (2) If a minor alienates a slave who has been substituted for himself, and the purchaser of said slave appoints him his heir with the grant of his freedom, will the substituted slave be entitled to the entire estate of the minor by reason of the substitution? If the minor should reach the age of puberty, the slave will become the necessary heir of the purchaser by virtue of his will, but if the minor should die before attaining that age, the slave will become free and his heir on account of the substitution, and also will become the necessary heir of the father of the minor, but he will be the voluntary heir of the purchaser.

TITLE VII.

CONCERNING THE CONDITIONS OF APPOINTMENTS.

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

It is established that an appointment made under a condition which is impossible, or through mistake, is not void.

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

Where it was stated in a will: "Let a certain slave, if he should be mine"; or, "If he should be mine at the time I die, be my heir", the question arises how should the term "mine" be understood. If the testator should alienate the usufruct in the slave, the latter will, nevertheless, belong to him; but the question is whether the condition of the appointment would fail if he alienated a portion of his ownership in said slave. The better opinion is, that the condition would not fail, unless it appeared by the clearest evidence that the intention of the testator, when he inserted the words relative to the condition, was that the entire ownership of the slave should remain in him, for then, if any part in him was alienated, the condition would not be fulfilled.

(1) Where, however, there are two slaves who are appointed heirs in the following words: "If the first and second slaves mentioned should belong to me at the time of my death, let them be free and my heirs", and one of them should be alienated, Celsus very properly holds that the language should be understood to mean the same as if the testator had appointed the slaves his heirs separately, and under the same condition.

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

If I am appointed an heir under the condition: "If I pay ten *aurei"*, and the party to whom I am ordered to pay the money refuses to accept it, the condition is held to have been complied with.

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

If certain heirs should be appointed as follows: "If they remain partners in my property until they reach the age of sixteen years, let them be my heirs", Marcellus says that an appointment made in language of this kind is void. Julianus, however, holds that such an appointment is valid, since the partnership can be formed for some future purpose, before the estate is entered upon. This is correct.

(1) Julianus also says, where anyone appoints an heir under the condition: "If he does not alienate a certain slave belonging to the estate", that the condition is fulfilled when the heir furnishes his coheir with security. However, where only one heir is mentioned, he is held to have been appointed under an impossible condition, which opinion is correct.

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

Where several conditions together are imposed upon an heir, all of them must be complied with, for the reason that they are considered as one; where, however, they are imposed separately, each must be complied with by itself.

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

Where an heir has been appointed under the condition: "If he should erect a monument to the testator within three days after his death", and the monument cannot be completed in three days, it must be said that the condition vanished, as being impossible.

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

If anyone should appoint heirs under the condition: "If they give security to one another to pay the legacies left by the will", it is established that they are released from complying with the condition, because it was made in violation of the laws which forbid certain persons to receive legacies; although, even if security should be furnished, the heirs would be protected by an exception in an action at law.

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

Whatever is left by a testator under the condition of taking an oath is disapproved by the Prætor. For he takes care that no one who accepts any property under the condition of taking an oath, or by omitting to comply with the condition, shall lose the estate, or a legacy, or that he shall be compelled shamefully to take an oath on condition of receiving what was bequeathed to him.

The Prætor, therefore, sees that anyone to whom property was left under the condition of taking an oath, can acquire it just as those do upon whom no condition of being sworn is imposed, and in this case he acts very properly, as there are some men who, through their contempt for religion, are always ready to take an oath, and there are others who are timid, even to superstition, on account of their fear of Divinity; hence the Prætor most wisely interposes his authority, in order that neither the latter nor the former may either acquire or lose what was left to them in this manner. For he who wishes, by the influence of religion, to restrain those to whom he left property under the condition of taking an oath, would not be able to accomplish his purpose unless they did so; for the parties complying with the condition would be admitted to the succession, or if they failed to comply with it, they would be excluded on account of non-fulfillment of the condition.

(1) This Edict also relates to legacies, and not merely to the appointment of heirs.

(2) With reference to trusts, it is also necessary for those who have jurisdiction over a trust to obey the Edict of the Prætor; for the reason that trusts are discharged in the same manner as legacies.

(3) In the case of donations *mortis causa*, it must be said that there is ground for the application of the Edict; if, for instance, anyone should provide that the party must surrender whatever he received, unless he swears that he will perform some act. Therefore, it will be necessary for the bond to be given up.

(4) Where anyone has been appointed under the condition of taking an oath, as well as under some other condition, it must be considered whether he can be released from the performance of the condition. The better opinion is, that he should be released from the condition of the oath, although he may be obliged to comply with the other condition.

(5) But where an heir has been appointed under the condition of taking an oath, or of the payment of ten thousand *aurei*, that is to say, that he is required either to pay the money or be sworn, it must be considered whether he should not be released from one condition because he can be secure by complying with the other. The better opinion is, that he should be released from the first condition, lest, by some means, he may be compelled to take the oath.

(6) Whenever an heir is ordered by the testator, "To give something, or to perform some act", which is not dishonorable, he will not be entitled to an action unless he gives or does what he was ordered to swear to do.

(7) When an heir was appointed on the condition that he would swear to manumit Stichus, and Stichus died, or was manumitted during the lifetime of the testator, the condition will not be held to have been violated; although it is true that the heir would have been compelled to manumit the slave if he had lived.

The same rule applies where an heir was appointed as follows: "Let Titius be my heir, in order that he may manumit Stichus"; or, "I bequeath a hundred *aurei* to Titius, in order that he may manumit Stichus". For if Stichus should die, no one can say that the heir will be barred from receiving the legacy, for he is not considered to have failed to comply with the condition, when he was unable to do so, and the will of the testator must be executed if this can be done.

(8) It is not necessary to appear before the Prætor for the purpose of being released from this oath, for where a release is once given by the Prætor it is good for all time; and a release is not obligatory in each individual instance. Therefore, it is held that a release is granted from the day on which the legacy was payable, even though the appointed heir was ignorant of the fact. Hence, it is very properly held in the case of the heir of a legatee, that if the legatee should die after the day appointed for the payment of the legacy, his heir must make use of the action *de legato*, just as if the legacy had been left unconditionally to the party whom he succeeded as heir.

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

A release is also given from conditions which are opposed to good morals, for instance, "If he should not ransom his father from the enemy"; or "If he should not furnish support to his parents or his patron".

10. *Ulpianus, Disputations, Book VIII.*

An appointment like the following: "If I appoint Seius my heir by a codicil, let him be my heir", is not void, so far as the appointed heir is concerned, except where that heir is a son; for this is a conditional appointment, and the estate is not held to be bequeathed by a codicil, which is forbidden by law, but it is a conditional appointment made by will. Hence, if the testator should say: "Let him be my heir whose name I shall insert in a codicil", it must be held, for the same reason, that the appointment will be valid, there being no law preventing it.

(1) If we make an appointment as follows: "Let So-and-So be my heir, if I have appointed him heir by a codicil", the appointment will be valid, even with reference to a son who is under paternal control, because a condition is not imposed every time that the past or present is referred to; for example: "If the King of the Parthians should be living"; "If a ship should be in port."

11. *Julianus, Digest, Book XXIX.*

Where a party makes an appointment by will, as follows: "Let my son be my heir, if he adopts Titius, and if he does not adopt him, let him be disinherited"; and if the son is ready to adopt him, but Titius is unwilling to be arrogated, the son will become the heir, just as if the condition had been fulfilled.

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

The following words: "Let Publius Mævius be my heir if he is willing", establish a condition with reference to the necessary heir, so that he will not become the heir if he is unwilling; for these words are fruitlessly added with reference to a voluntary heir, for even if they had not been added, the appointee would not become the heir against his will.

13. *Julianus, Digest, Book XXX.*

Where anyone receives an estate or a legacy under the condition, "If he should pay ten *aurei"*, neither the estate nor the legacy can be acquired by him, unless, after having fulfilled the condition, he, either as heir or legatee, complies with the legal formalities by means of which

an estate or a legacy is ordinarily obtained.

14. *Marcianus, Institutes, Book IV.*

When conditions are prescribed in violation of the Edicts of the Emperors, or against the laws, or contrary to whatever obtains the force of law, or which are opposed to good morals, or imply derision, or are such as the Prætors would not approve of, they are held not to have been written, and the estate or the legacy will pass to the heir or legatee, just as if the condition had not been prescribed.

15. *Papinianus, Questions, Book XVI.*

Where a son under paternal control is appointed an heir, under a condition which is one that the Senate or the Emperor does not tolerate, it invalidates the will of the father, just as if the condition could not be complied with by the son; for where any acts injuriously affect our piety, reputation, or self-respect, and, generally speaking, are contrary to good morals, it is held that we are unable to perform them.

16. *Marcianus, Institutes, Book IV.*

Julianus states that the following appointment is void, namely: "If Titius should be my heir, let Seius be my heir; if Seius should be my heir, let Titius be my heir", as the condition cannot take place.

17. *Florentinus, Institutes, Book X.*

Where several appointments of heirs to the same share of an estate have been made under different conditions, the condition which is first performed will confer priority on the appointment.

18. *Marcianus, Institutes, Book VII.*

Where a slave was granted his freedom absolutely, and an heir was appointed under a condition, and it was provided that if the latter should not be the heir he would be entitled to a legacy, the Divine Pius stated in a Rescript that the conditions seemed to have been repeated in the legacy.

(1) With a view to this, Papinianus stated that where a grandmother appointed her grandson heir to a portion of her estate, under the condition that he should be emancipated, and afterwards, by a codicil, bequeathed to him whatever she had not left him as an heir, the condition of the emancipation was also held to have been repeated in the legacy; although in bequeathing the legacy, she made no substitution, any more than she did in leaving him a share of her estate.

19. *The Same, Institutes, Book VIII.*

Where it was set forth in a will: "Let Titius be my heir, and if Titius should be my heir let Mævius be my heir", if Titius should accept the estate, which was suspected of being insolvent, Mævius can voluntarily accept it, and retain a fourth of the same.

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

A woman who was indebted to her husband for money promised to him by way of dowry, appointed him her heir, "Under the condition that he would not claim or exact the money which she had promised as dowry". I think that if the husband should notify the other heirs that he is not unwilling to give a release for what was due to him by way of dowry, he will immediately become the heir. If, however, he should be appointed heir under such a condition, I hold that he will, nevertheless, forthwith become the heir, because performance of the condition is impossible, and any such condition must be considered as not having been imposed.

(1) If anyone should be ordered to manumit a slave belonging to an estate, and to become the

heir, even though he should manumit him, and perform an act which is void, he will, nevertheless, become the heir; for while it is true that he manumitted the slave, the freedom granted to the latter after the estate was entered upon will become valid in accordance with the wish of the testator.

(2) If anyone should appoint you an heir under the condition that you appoint him one, or bequeath something to him, it makes no difference in what degree he has been appointed an heir by you, or what has been left to him, provided you can prove that you have done this in any degree whatsoever.

21. *Celsus, Digest, Book XVI.*

A slave belonging to another can be appointed an heir, "When he shall become free"; but a slave belonging to the testator cannot be appointed in this manner.

22. *Gaius, On the Provincial Edict, Book XVIII.*

Because reason suggests that he who can bestow freedom should himself grant it, either at the present time, or after a certain period, or under some condition, and he has not the power to appoint a slave his heir in case he should obtain his liberty in any other way whatsoever.

23. *Marcellus, Digest, Book XII.*

"Let whichever of my brothers, who shall marry our cousin, be my heir to three-fourths of my estate, and let the one who does not marry

her be my heir to one-fourth of the same." The said cousin either marries another, or does not wish to marry anyone. The brother who marries the cousin will be entitled to three-fourths of the estate, and the remaining fourth will belong to the other. If, however, neither of them marries the girl, not because they were unwilling to do so, but because she refused to be married, both of them will be admitted to equal shares of the estate; for generally, the condition: "If he should marry a wife; if he should pay a sum of money; if he should perform some act"; must be understood to mean that it is not his fault if he does not marry the woman, pay the money, or perform the act.

24. *Papinianus, Opinions, Book VI.*

"Let the one of my brothers who marries his cousin Titia be the heir to two-thirds of my estate, and the one who does not marry her be the heir to the remaining third of the same." If the cousin should die during the lifetime of the testator, both of the brothers will be entitled to equal shares of his estate, because it is true that they were appointed heirs, but were entitled to different shares in case the marriage took place.

25. *Modestinus, Rules, Book IX.*

Where a slave is appointed an heir under a certain condition, he cannot comply with the condition without the order of his master.

26. *Pomponius, On Quintus Mucius, Book II.*

If a minor should be appointed an heir under some condition, he can comply with the condition, even without the authority of his guardian. The same rule applies where a legacy has been bequeathed to him under some condition, because when the condition has been fulfilled, he is in the same position as if the estate or the legacy had been left to him unconditionally.

27. *Modestinus, Opinions, Book VIII.*

A certain man appointed an heir by his will under the condition: "If he throws my remains into the sea". As the heir did not comply with the condition, the question arose whether he should be excluded from the succession to the estate. Modestinus answered: "The heir should rather be praised than censured, who did not throw the remains of the testator into the sea, in

accordance with the will of the latter, but gave them up to burial in memory of the duty due to humanity". It must first be considered whether a man who imposes a condition of this kind is of sound mind, and, therefore, if this suspicion is not removed by convincing evidence, the heir-at-law cannot in any way dispute the right to the estate with the heir who was appointed.

(1) A testator, by a codicil, imposed a condition upon his heir whom he had appointed absolutely by his will, I ask whether it is necessary for him to comply with it. Modestinus answers: "An estate can neither be granted, nor taken away by a codicil". The testator, however, is understood, in this instance, to have had in his mind the exclusion of the heir from the succession in case of his failure to comply with the condition.

28. *Papinianus, Questions, Book XIII.*

If a son should be appointed an heir under a condition, and grandchildren by him are substituted; as it is not sufficient for a son to be appointed an heir under any kind of a condition whatsoever, the will is only held to be valid where the fulfillment of the condition is in the power of the son. Let us therefore consider whether it makes any difference what condition was imposed, whether it was one that could not be carried out if the son should die, as, for instance, "If my son should go to Alexandria, let him be my heir", and he dies at Rome; or if it is one which can be fulfilled at the last moment of his life, for example, "If he should pay ten *aurei* to Titius, let my son be my heir", for this condition can be performed by another party in the name of the son.

The first kind of a condition above mentioned admits the grandsons to the succession during the lifetime of the father, who, if he should have no substitute, becomes the lawful heir of his father when he dies. This is established by what is stated by Servius, for he relates that a certain person had been appointed an heir under the condition, "If he should ascend to the Capitol, and even if he should not do so, a legacy shall be given to him", and the heir died before he ascended to the Capitol. With reference to this, Servius gave the opinion that the condition failed through the death of the heir, and therefore at the time of his death he began to be entitled to the legacy.

The other kind of a condition, however, does not admit grandsons to the succession during the lifetime of the son, who, if they should not be substituted, would be the heirs of their intestate grandfather; for the son would not be held to have stood in their way, as after the death of the father, his will becomes of no effect; just as if the son having been disinherited, the grandsons had been appointed heirs at the time that the son died.

TITLE VIII.

CONCERNING THE RIGHT OF DELIBERATING.

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

If a slave should be appointed an heir, we cannot grant him time for deliberation, but it is granted to him to whom the slave belongs; for the reason that slaves are considered by the Prætor as of no importance. Moreover, if the slave belongs to several masters, we grant time for deliberation to all of them.

(1) The Prætor says, "If anyone asks time for deliberation I will grant it".

(2) When the Prætor says that he will grant time, but does not say how much, he undoubtedly means that it is in the power of the court having jurisdiction to fix the term to be allowed.

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

And no less than a hundred days should be granted.

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

It must be noted that sometimes one term, and sometimes several, are granted for deliberation,

when the Prætor is convinced that the time that he allowed when first applied to was not sufficient.

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

This indulgence should not be granted, unless where a very good reason exists.

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

Aristo says that the Prætor should come to the relief not only of creditors, but also of the heir who has been appointed, and that they should furnish the latter with a copy of their claims, in order that he may ascertain whether it is to his interest to accept the estate or not. (1) If the estate is quite valuable, and while the heir is deliberating there is property forming part of it which will be spoiled by lapse of time, upon application to the Prætor, the person who is deliberating can sell the said property for a fair price, without being prejudiced thereby; and he can also sell any property which is too expensive to keep, as, for instance, beasts of burden, or slaves which were for sale; as well as such articles as become deteriorated by delay. He also should take care that any debt which is due, or which is subject to a penalty, or which is secured by valuable pledges, is paid.

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

Hence, where wine, oil, wheat, or money constitutes part of the estate, it should be used to pay the debts. If there are none of these articles, money must be collected from the debtors of the estate, and if there are no debtors, or they contest the claims against them, any superfluous property should be sold.

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

The Prætor says: "If time is requested in the name of a male or female minor, for the purpose of deliberation as to whether it will profit him or her to retain the estate, and this is granted, if there seems to be good reason to diminish the assets of the estate in the meantime, I shall forbid this to be done, unless the report of a reputable citizen recommends it after thorough investigation."

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

Where a proper heir, after having rejected the estate, requests time for deliberation, let us see whether he ought to obtain it. The better opinion is that he should obtain it, where proper cause is shown, and the property of the estate has not yet been sold.

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

While the son is deliberating, he should be supported at the expense of the estate.

10. *Marcellus, Digest, Book XXVIII.*

When there are several degrees of appointed heirs, the Prætor says that he will examine them one by one in regular succession, in accordance with the time granted each for deliberation; in order that, while the estate is passing from the first to the following degrees, he may as soon as possible find the heir who can satisfy the creditors of the deceased.

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

A former slave had a son who was a freedman, and whom he appointed his heir, and he then inserted into his will: "If I should have no son who will become his own master, then let Damas the slave be free". The minor son of the testator had been emancipated. The question arose whether Damas should be free. Trebatius declares that he should not, because the term freedman is also included in the appellation of son. Labeo holds the contrary opinion, because in this instance a true son must be understood. I adopt the view of Trebatius, in case it should become evident that the testator had reference to the said son.

THE DIGEST OR PANDECTS.

BOOK XXIX.

TITLE I.

CONCERNING THE WILL OF A SOLDIER.

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

The Divine Julius Cæsar was the first who granted to soldiers free power to make a will, but this concession was only temporary. The first after him to confer this power was the Divine Titus, and then Domitianus. The Divine Nerva subsequently conceded the greatest indulgence to soldiers in this respect, and Trajanus followed his example. From that time forward there was inserted in the Imperial Edicts the following provision: "It has come to my notice that wills executed by our fellow-soldiers have been frequently presented which would be the subject of dispute if the laws were strictly applied and enforced; so, in accordance with the benevolent promptings of my mind with reference to my excellent and most faithful fellow-soldiers, I have thought that indulgence should be extended to their inexperience, so that no matter in what way they may draw up their wills, they shall be confirmed. Let them, therefore, draw them up in whatever form they desire, in the best way that they can, and the mere wish of the testators will be sufficient for the distribution of their estates."

(1) The term "soldier" is understood to have been derived from *militia*, that is to say *duritia*, the hardships which soldiers endure for us, or from the word "multitude," or from the term "evil," from which soldiers are accustomed to protect us; or from the one thousand men from the Greek tanma, for the Greeks designate a thousand men assembled together by that term, each one being called the thousandth of the entire number, whence the leader himself is styled ciliarcoV. The word *exercitus* (army) derives its name from exercise.

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

The Prætor issued a separate Edict with reference to the wills of soldiers, for the reason that he was well aware that, according to the Constitutions of the Emperors, peculiar and extraordinary rights have been established with reference to their wills.

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

If a soldier who intended to make his will in compliance with the ordinary law should die before having it witnessed: Pomponius is in doubt as to its validity. But why should he not approve of a will thus made by a soldier without observing the ordinary formalities? Is it because he thinks that a soldier who intended to execute his will, in accordance with the ordinary law, by doing so renounced his military privilege? Can it be believed that anyone would select a certain way to make his will for the purpose of rendering it void; and is it not more probable that he would prefer to make use of both ways in the execution of his will, on account of the accidents to which he was exposed; just as civilians, when they draw up their wills, are accustomed to add that they desire that they shall be valid at least as codicils; and in this instance would anyone say that if the will is imperfect it should stand as a codicil? The Divine Marcus stated in a Rescript an opinion which coincides with our own.

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

It is established that a person who is deaf or dumb can make a military will while in the army, and before having been discharged on account of his affliction.

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

Soldiers can make a substitution for their heirs, but only with reference to such property as they have acquired by their wills.

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

Where a soldier appoints a sole heir to a certain tract of land, he is held to have died intestate so far as the remainder of his patrimony is concerned. For a soldier can die partly testate and partly intestate.

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

Where a will is executed in accordance with military law, even though the testator may be ignorant that his wife was pregnant, or, being aware of the fact, he does this with the intention that if a child should be born to him, it shall be disinherited, the will is not broken.

8. *Marcellus, Digest, Book X.*

The same rule applies where a soldier arrogates a son, or his grandson obtains the succession in the place of his son.

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

The same rule must be said to apply where a soldier who had a son born to him in his lifetime preferred to die without making any alteration to his will; for, in accordance with military law, he is held to have renewed his will.

(1) This was stated in a Rescript by the Divine Pius with reference to a man who executed a will while he was a civilian, and afterwards became a soldier; for this will was valid by military law, if such was the desire of the soldier.

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

Anyone who is in the power of the enemy cannot make a will, even in compliance with military law.

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

Those who are condemned to death for some military crime can only make a will disposing of property obtained during their service; but the question arises, can they do so by military, or by civil law? The better opinion is, that they can make a will in accordance with military law; for, as the right of testation is conferred upon a man because of his being a soldier, it must be held that it follows that he can exercise it by reason of his military privilege. This should, however, be understood to apply to cases where he has not violated his oath.

(1) Where a soldier is in doubt whether or not he is his own master, and makes a will, he is in such a position that it will be valid in any event. For if he should execute a will, being uncertain as to whether or not his father is living, it will be valid.

(2) Where a son under paternal control, not knowing that his father is dead, makes a will disposing of his *castrense peculium* while in the service, the estate of his father will not belong to the heir, but only such property as the son has acquired during the time when he was a soldier.

12. *Papinianus, Opinions, Book VI.*

Soldiers only leave by will such property as they own.

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

The same rule applies where a soldier has determined to change his will, not because he desired to deprive the heir he appointed of his property acquired in the service, but in order to make a will disposing of his father's estate, and to appoint another heir.

(1) If, however, the soldier should die after having been discharged, his entire estate, including that derived from his father, will belong to the heir of the *peculium castrense;* as Marcellus says in the Eleventh Book of the Digest. For one who is no longer in the army can not dispose of only a portion of his property by will.

(2) Persons who have been deported, and almost all those who have not testamentary capacity, can be appointed heirs by a soldier. If, however, he should appoint as his heir someone who had become a penal slave, the appointment will not be valid. But if, at the time of the death of the testator, the heir should be in the possession of his citizenship, the appointment will begin to take effect, just as if the estate had just been bequeathed. And, in general, it may be said, in every instance in which a soldier appoints his heir, that the appointment will begin to acquire validity, if at the time of the death of the testator, the party was in such a condition that he could be appointed the heir of a soldier.

(3) Where a soldier appoints as his heir his own slave, whom he believed to be free, without granting him his freedom, the appointment will not be valid.

(4) Where a soldier by his will granted freedom to his slave, and left him his estate in trust, charging the first heir and the substitute with its delivery, even though the first heir and the substitute should die before entering upon the estate, the deceased will not die intestate, as our Emperor and the Divine Severus stated in a Rescript; but it should be held that the case resembled one where his freedom and the estate had been directly given to the said slave; and it cannot be denied that it was the intention of the testator that he should obtain both.

14. *Marcianus, Trusts, Book IV*.

A discussion arose as to whether the same indulgence should be granted with reference to the wills of civilians. It was established that in this instance there was a distinction, for if the parties should die during the lifetime of the testator, and he be aware of the fact, there was no necessity for anything new, but where he was not aware of it, relief must, by all means, be granted after his death.

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

A soldier cannot appoint more than one necessary heir, where it is evident that this is done in order to defraud his creditors.

(1) Just as a soldier can dispose of his estate by merely stating his wish, so he can take it away. Hence, if he cancels or tears his will, the latter will be of no force or effect. If, however, he should cancel his will, and afterwards wish it to be valid, it will be valid through this last expression of his desire. Therefore, where a soldier, having erased his will, afterwards sealed it with his ring, the court having jurisdiction of the case must take into consideration the intention of the testator in doing this; for if it should be proved that he repented of changing his mind, the will will be understood to have been renewed. If, however, he has done this with the intention that what was written in the will should not be read, he will be held to have done so for the purpose of cancelling his will.

(2) The Divine Pius stated in a Rescript that a will executed by a soldier before entering the army is valid by military law, provided the testator died in the service, and did not change his mind afterwards.

(3) Where anyone who draws up the will of a soldier inserts his own name as heir therein, he will not be released from the penalty prescribed by the Decree of the Senate.

(4) A soldier can appoint an heir for a certain time, and another after that time, or he can appoint one on the fulfillment of a certain condition, or another after the condition has been complied with.

(5) He can also, by military law, execute a will not only for himself but also for his son, and he can do this for his son alone, even though he does not execute one for himself, and such a will is valid if the father should die in the service, or within a year after his discharge.

(6) Papinianus, in the Fourteenth Book of Questions, states that application for the possession of the property of an estate cannot be made after the time prescribed by the Edict, because this

provision is a general one.

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

If a soldier should bequeath a dotal estate to anyone, the legacy will not be valid, according to the *Lex Julia*.

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

Where a soldier appoints heirs to certain property, as for instance, one to certain property in a city, another to certain lands in the country, and still another to other property, the appointments will be valid, for it will be considered just as if he had appointed the said heirs without assigning them their shares in the estate, and that he had distributed all his property through making his bequest to each one by preference.

(1) Julian also says that where a testator appoints one heir to his property obtained while a soldier, and another the heir to the remainder of the estate, this is to be understood to be the disposal of two distinct estates belonging, as it were, to two different men, so that that heir alone who was appointed for the property obtained while in the service shall be liable for debts incurred by the soldier while in the army, and he alone who was appointed heir to the remainder of the estate shall be bound to pay any debts contracted outside of the service. In this instance it seems to be proper to hold that where anything is due to the soldier from any source, it will be due by operation of law to either the former or the latter heir. If, however, either of the shares of the property should not be sufficient to pay the debts for which it is liable, and for this reason the party appointed heir to this share does not accept it, the other who did accept must be compelled either to take up the defence of the entire estate, or to pay the creditors in full.

(2) Where, in the same will, a soldier appoints a certain person his heir, and afterwards disinherits him, he will be held to have been deprived of the estate, while by the will of a civilian, an estate cannot be taken away by a mere disinheritance of this kind.

(3) If a father should be appointed heir to the *castrense peculium* by his son under paternal control, who is serving in the army, and he fails to take advantage of the will, and has some of the property in possession, or fraudulently relinquished it to avoid having possession, an action will be granted to the legatee against him.

(4) If a soldier should make a will while he is in the army, and a codicil after his term of service has expired, and he dies within a year of his discharge, it is held by many authorities that the codicil should be considered to have been made in accordance with the rule of the Civil Law; because it was not executed by a soldier, and it should not be held that it is confirmed by the will. Therefore there is no room for the application of the Falcidian Law in the case of any legacies bequeathed by the will, but this law is applicable to such legacies as are included in the codicil.

18. *Tryphoninus, Disputations, Book XVIII*.

Where, however, the legacies granted by the will, as well as those granted by the codicil, taken together, amount to more than three-fourths of the estate, the question arises as to what extent should those to which the Falcidian Law applies be diminished. It would be most convenient, however, for it to be decided that the legacies which the soldier bequeathed by his will, having been fully paid out of the assets of the entire estate, the remainder should be divided between the heirs and those to whom legacies were given by the codicil, in the proportion of three-fourths to the former, and one-fourth to the latter.

(1) But what if the legacies bequeathed by the will should absorb the entire amount of the estate, would those to whom property was left by the codicil be entitled to anything, or would they not? Since, if the soldier had made these bequests while still in the service, all would be liable to contribution, and that portion which he bequeathed in excess of his estate must be

deducted pro rata from all the legacies, the same must also be done in this instance. Then, the amount of the legacies bequeathed by the codicil having been ascertained from the sum which is found to be due (where the legacies belong to the same class) the heir can then deduct his fourth from those legacies alone which were bequeathed by the codicil.

(2) If, however, all the legacies had been included in the computation, and what remains in the hands of the heir should not be sufficient to make up the fourth of his share of said legacies, whatever is lacking must be taken from those legacies alone which were bequeathed by the codicil.

19. *Ulpianus, Disputations, Book IV*.

The question arose, where a soldier having already made one will makes a second, and in the latter charges his heir as trustee to carry out the provisions of the first, what would be the rule of law in this case? I said, "A soldier is permitted to make several wills, but whether he makes them all at once or separately, they will be valid only where the testator expressly stated that he desired this to be the case; nor will the first will be annulled by the last, as he can appoint an heir to a portion of his estate, that is to say, he can die partly testate and partly intestate.

Again, if he had, in the first place, made a codicil, he can arrange it by providing in the will which follows that the codicil can have the effect of an appointment, and can render a direct appointment effective which was formerly precarious; hence, I will say that, in the case stated, if the soldier had intended that the will first executed should be valid, what he provided must stand, and the consequence is that there will be two wills. However, where the execution of the first will is committed to the heir as trustee, it is evident that he did not intend that it should be valid by operation of law, but rather through the acts of the trustee, that is to say, that he has converted the effect of the first will into that of a trust and a codicil.

(1) The question, however, arises, whether the entire will is converted into a codicil, that is to say, whether the appointment of the heir is included, or in fact only the legacies, the trusts, and the grants of freedom. It seems to me that not only the other matters, with the exception of the appointment of the heir, but also the appointment itself is included in the trust, unless it is proved that the intention of the testator was otherwise.

(2) Where anyone has been appointed by a soldier heir for a certain time, and another person an heir for the ensuing time, the question arises whether the last heir should be responsible for the distribution of the legacies not distributed by the first one. I think that this obligation does not rest upon him, unless it is established that the soldier's intention was different.

20. *Julianus, Digest, Book XXVII*.

A military tribune made a codicil while in camp, after his successor arrived, and then died. As he ceased to occupy the position of a soldier after his successor had arrived in the camp, his codicil must be considered as having been executed under the common law governing Roman citizens.

(1) Where anyone, after executing a will, enters the military service, this will is also considered that of a soldier, under certain circumstances; as, for instance, if he opened the will and read it, and sealed it a second time with his seal; and still more so, if he erased part of it, defaced it, or made any additions to, or corrections in it. If, however, none of these things took place, his will will not enjoy any of the privileges attaching to the testament of a soldier.

21. *Africanus, Questions, Book IV*.

The decision that a will executed during military service is also valid for a year after the discharge of the testator from the army seems by its terms to show that this privilege can only be enjoyed by those who are regularly discharged. Hence, neither prefects, tribunes, or other officers who cease to serve when their successors arrive will be entitled to it.

22. *Marcianus, Institutes, Book IV*.

Where a son under paternal control, who is serving as a soldier, loses his civil rights, or is emancipated, or is given in adoption by his father, his will will be valid, just as if a new one had been executed.

23. *Tertullianus, On the Castrense Peculium*.

The same rule applies where the head of a household, while a soldier, only disposes of his *peculium castrense* by will, and subsequently gives himself to be arrogated. If, however, he should do this after having been already discharged, his testament will not be valid.

24. *Florentinus, Institutes, Book X*.

The Divine Trajanus stated in a Rescript addressed to Statilius Severus that: "The privilege accorded to persons serving in the army which imparts validity to their wills, no matter how they have been executed, must be understood as follows, namely, in the first place, it must be established that the will was executed, which can be done without committing it to writing, which also applies to others who are not soldiers. Therefore, where a soldier, with reference to whose estate application has been made to you, has called together persons to witness his will, and declared in their presence whom he desired to be his heir, and to what slave he wished to grant freedom, it may be held that he, in this way, made a will without reducing it to writing, and his wishes must be carried into effect.

If, however (as frequently happens), he should say to someone: "I constitute you my heir, or I leave you my property"; this must not be regarded as a will. Nor does it make any more difference to others than those to whom this privilege is granted, that such a disposition of property should not be allowed; for otherwise, it would not be difficult for witnesses to be found after the death of a soldier, who would assert that they had heard the latter say that he left his property to those whom they desired to benefit, and in this way the wills of soldiers would be overthrown."

25. *Marcellus, Opinions*.

Titius, before he became a legionary tribune, made a will, and after obtaining the office died, without having altered it. I ask whether such a will should be considered a military one. Marcellus answers, The will which he made before becoming tribune would be subject to the rules of the Common Law, unless after it had been executed, it is proved that the testator declared that he wished it to be valid. For, by the Imperial Constitutions, not the wills of soldiers, but wills made by soldiers while in the army, are confirmed. It is evident, however, that a soldier should be understood to have made a will, who declares in any way whatsoever that he desires that a previous will which he had executed should be valid.

26. *Macer, Military Wills, Book II*.

The wills of soldiers who have been dishonorably discharged immediately cease to be valid by military law; but the privilege is extended for the term of a year to the wills of those who have obtained an honorable discharge, or one for some good reason.

(1) The right to dispose of *castrense peculium* by will, which is granted to sons under paternal control, serving in the army, is not conceded to such as are dishonorably discharged, because this privilege is only bestowed by way of recompense upon others who deserve it.

27. *Papinianus, Opinions, Book VI*.

A centurion, by a second will, appointed his posthumous children his heirs, but did not appoint any substitutes for them; and, as none were mentioned, stated that reference should be had to his first will. It was held that everything included in the second will was void, except the appointment of the posthumous heirs; unless, after having referred to his first will, he expressly confirmed all that was contained in the second.

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

Where a son under paternal control died while in the army, after having appointed as his heir his son, who had not yet reached the age of puberty, and also appointed a substitute as well as guardians for him while under the control of his grandfather, the Divine Brothers stated in a Rescript that the substitution was valid, but that the appointment of the guardians was not, for the reason that a soldier in disposing of his estate can make any substitution that he desires, but he cannot do anything injuriously affecting the rights of another.

29. *Marcellus, Digest, Book X.*

If an heir appointed by a soldier should voluntarily accept an estate, and, having been requested to do so, surrenders the whole of it, the rights of action arising out of the Trebellian Decree of the Senate are transferred.

(1) Where a soldier by his will manumits a slave whose freedom is not allowed to be granted by the *Lex Ælia Sentia*, or any other law, his act is void.

(2) The Edict of the Prætor, by which appointed heirs as well as legatees are excused from taking an oath, is also applicable to the wills of soldiers, just as in the case of trusts. The same rule applies where a condition is dishonorable.

(3) It is established that prætorian possession of the share of the estate to which he was entitled should be granted to a father who had personally emancipated his son, this being done in opposition to the provisions of the latter's will, except with reference to such property as the son had acquired while in the service, and which he was free to dispose of testamentarily.

30. *Paulus, Questions, Book VII.*

For the Divine Pius Antoninus stated in a Rescript that prætorian possession of the estate of a son serving as a soldier should not be granted in violation of the will of the latter, so far as property obtained while in the army was concerned.

31. *Marcellus, Digest, Book XIII.*

Where a soldier bequeathed a slave to Titius and Seius, and while Seius was deliberating as to whether he would accept the bequest or not, Titius manumitted the slave, and Seius afterwards declined the legacy, I say that the slave should be free, for the reason that if an heir manumits a slave bequeathed to anyone, and the legatee afterwards rejects the bequest, the slave will become free.

32. *Modestinus, Rules, Book IX.*

Where the estate of a soldier is not entered upon in accordance with the evident desire of the testator, the heirs will not be entitled to his property acquired while in the service.

33. *Tertyllianus, On the Castrense Peculium.*

Where a son under paternal control, while in the army, makes a will according to military custom, and subsequently, after the death of his father, a posthumous child is born to him, his will is broken. If, however, he is still of the same mind, and wishes the said will to continue to be valid, he can render it so, just as if he had made another; provided he was serving as a soldier up to the time when the posthumous child was born.

(1) Where, however, a son under paternal control, who is serving as a soldier, makes a will, and then afterwards, during his lifetime, and during that of his grandfather, a posthumous child is born to him, his will will not be broken, because the said child will not come under his control, and is not held to be born a proper heir. Nor indeed, can this posthumous grandchild, since it was born during the lifetime of the son, become at once a proper heir to its grandfather, and therefore the will of the grandfather is not broken; as, although it at once comes under the control of its grandfather, the son will, nevertheless, be entitled to priority.

(2) It follows that if a son under paternal control makes a will while serving as a soldier, and through mistake, and not because he wished to disinherit him, omits to mention a posthumous child; and if the said posthumous child should be born after the death of his grandfather, but during the lifetime of the son, that is to say his own father, his testament will certainly be broken.

If, however, it should be born after its father has become a civilian, the validity of the testament which has been broken will not be restored. But if it should be born while its father is still in the army, then, if the latter should desire the will to be valid, it will become so, just as if it had been executed a second time.

(3) If, however, a posthumous child should be born during the lifetime of its grandfather, this will not at once break the will of the father, but only where it survives its grandfather, while its father is still living, as it now for the first time becomes the heir of the latter. For this is the case because it never can break two wills at once, that is to say, those of its father and its grandfather.

34. *Paulus, Questions, Book XIV*.

The Divine Hadrian stated in a Rescript that the will of a soldier who preferred to die rather than to suffer pain, or the annoyances of life, was valid, and that his estate could be claimed by those entitled to it by law if he died intestate.

(1) A soldier who had been discharged began a will within the year but was unable to finish it. It can be said that, by this act, the will which he executed while in the army was rendered void, if it was drawn up in accordance with military law; otherwise it would not be legally rescinded if it was valid at Common Law.

(2) This distinction does not apply to the will of a soldier executed while in the service, for in whatever way he may make a will, it is rendered inoperative by a following one, as the wish of a soldier, however expressed, is a testament.

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

Where a soldier leaves an imperfect will, the instrument when offered has the effect of a perfect one, for the testament of a soldier is perfected by the mere statement of his wishes. Where anyone makes several wills on different days, he is considered to make his will frequently.

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

An estate is also held to be legally bequeathed where a codicil to a will is executed; hence, if the testator bequeaths half his estate by a codicil, the heir, appointed to all of it by the will, will be entitled to half, and any legacies left by the will must be divided in common, when they are paid.

(1) A soldier, after having appointed different heirs, some to what he obtained in the service and others to property otherwise acquired, subsequently designated still other heirs for his property obtained in the service. He is held to have taken from the first will whatever he bestowed by the second, but he is not considered to have changed his first will, even though but one heir was appointed thereby.

(2) A soldier, when drawing up his last will, not being aware that his wife was pregnant, made no mention of the unborn child. A daughter having been born after his death, the will appeared to have been broken, and the legacies not to be due. If, however, in the meantime, the appointed heir should have paid the legacies, prætorian actions would be granted the daughter to recover the property, on account of this unexpected event, and the appointed heir, since he was a *bona fide* possessor, will not be obliged to make good anything which he can not recover from the estate.

(3) A discharged soldier, at the time of his death, wished that a will which he had executed in accordance with the Common Law during his term of service should be void, and preferred to die intestate. It was decided that the appointments of heirs and the substitutions for them would remain unaltered, but that those who claimed legacies under the will would be barred by an exception on the ground of bad faith, in accordance with the Common Law, and that the force of this exception would be regulated according to the standing of the persons who made the demand; otherwise, all other things being equal, the condition of the possessor is preferable.

(4) A soldier having made a will according to the Common Law, subsequently made one in accordance with military law disposing of all his property a year after his discharge from the service. It was held that the force of the first will was destroyed and could not be restored.

37. *Paulus, Questions, Book VII.*

A soldier, who was a freedman, appointed two heirs by his will, and one of them having refused to accept, the testator was held to have died intestate with reference to that particular share, for the reason that a soldier can die partly testate, and prætorian possession can be acquired by a patron *ab intestato;* for unless the intention of the deceased was proved to have been that if one of the heirs should reject his portion, the entire estate should go to the other heir.

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

When it is said that if a soldier should die within the year after his discharge, his will, which he executed in accordance with military law, is valid; this is true even if the condition of his appointment is to be fulfilled after the lapse of the year, provided that he dies within twelve months. Therefore, if he should appoint a substitute for his son who was his heir, it will make no difference when the son dies, for it is sufficient if his father should die within the year.

(1) A soldier executed a will, and afterwards, having been discharged for no dishonorable reason, he again enlisted in another corps of soldiers; the question arose whether the will which he had executed while in the service, would be valid. I ask whether he executed it in accordance with military law, or the Common Law. If he executed it according to the Common Law, there is no doubt that it would be valid; but if he made it as a soldier, I thought it proper to inquire when he enlisted the second time, after he was discharged, whether within the year, or afterwards. I ascertained that he enlisted within the year, and, therefore, as his will was still valid in accordance with military law, and he could make another under the same law, would his will be valid after the year had elapsed, if he should die? I have some doubt on this point, for the reason that his other term of service was more recent.

It is, however, better to hold that the will is valid, the two terms of service being, so to speak, united. I do not allude to him who, having enlisted a second time, stated that he wished his will to be valid; for in this instance, he made it, as it were, during his second term of service, in the same way as where a civilian makes one and afterwards becomes a soldier.

39. *The Same, Questions, Book IX.*

Where a son under paternal control, while serving in the army, was captured and died in the hands of the enemy, we say that the Cornelian Law is also applicable to his will. We may ask, however, whether his father died before him at home, and if a grandson was born to him by the said son, whether the will of the father would be broken, in like manner. It must be held that the will will not be broken, for the reason that he is considered to have died at the very time that he was taken prisoner.

40. *The Same, Opinions, Book XL*

Lucius Titius, a soldier, dictated his will to his secretary to be made from notes, and before it was fully written out he died. I ask whether this dictation can be valid. I answered, that it is

conceded to soldiers to make their wills in whatever way they desire, and in whatever way they can, provided this is done so that it can be established by lawful evidence.

(1) It was also held that where a slave was entitled to a legacy (although under a condition), by a will drawn up in accordance with military law, he could also demand his freedom.

(2) An opinion was likewise given in the following case. Lucius Titius, a soldier, stated in his will: "Let Pamphila be the heir to my entire estate", and then by another clause, left the same bequest to Sepronius, one of his comrades, and charged him to manumit the said slave. I ask whether Pamphila would be his heir, just as if she had received her freedom directly at the hands of the testator? The answer was, that it should be understood that the soldier did not know, at the time when he appointed his female slave his heir, that she would obtain her freedom by virtue of her appointment; and therefore he afterwards had no reason to request his comrade to manumit her, since she had become free and his heir under the first clause, and as the bequest was of no force or effect, the intention of the testator was not interfered with.

41. *Tryphoninus, Disputations, Book XVIII.*

A soldier can appoint an heir as follows: "As long as Titius lives let him be my heir, and after his death, let Septicius be my heir". If, however, he should say: "Let Titius be my heir for ten years", without appointing any substitute, he will be intestate after the lapse of ten years; and, for the reason we have already stated, as a soldier can appoint an heir from a certain time, and up to a certain time, the result is that before the time arrives when the heir appointed can be admitted to the succession it will become intestate; and since a soldier is permitted to bequeath a portion of his property, so also, by the same privilege, he can remain intestate for a period of considerable extent.

(1) A woman who is suspected of being dissolute cannot take anything under the will of a soldier, as the Divine Hadrian stated in a Rescript.

(2) A soldier cannot appoint a guardian for a minor who is under the control of another.

(3) If a soldier should disinherit his son, or, knowing him to be his son, should pass him over in silence, the question arises whether he can charge a substitute with the payment of a legacy. I held that he could not do so, even though he left an ample legacy to the disinherited son.

(4) A soldier can substitute anyone for an emancipated son; the former, however, can only exercise his right with reference to property which came from the father to the son, and so far as any which he already possessed, or subsequently acquired, is concerned. For if, during the lifetime of his son, or while the grandfather was still living, he made the substitution, no one can say that the estate obtained from the grandfather will belong to the substitute.

Where the estate of a soldier was not entered upon, the question arises whether the substitution which he made for a minor will be valid. The result is, that is must be considered valid, because a soldier is allowed to make a will for his son, even though he may not make one for himself.

42. *Ulpianus, On the Edict, Book XLV.*

Anyone can make a will by military law, from the very day he entered the service, but he cannot do this before; hence those who are not yet actually enrolled in the army, even although they may have been drafted and travel with it at the public expense, are not yet considered soldiers, as to be such they must be included in the ranks.

43. *Papinianus, Opinions, Book VI.*

A son under paternal control, who belongs to the Equestrian Order and is enrolled in the retinue of the Emperor, as soon as he is ordered to join the army, can make a will disposing of his *castrense peculium*.

44. *Ulpianus, On the Edict, Book XLV.*

The Rescripts of the Emperors disclose that if anyone belonging to the class whose members are not allowed to make a will in accordance with military law happens to be in the enemy's country, and dies there, he can make a will in any way that he wishes, and in any way that he can, whether he is the Governor of the province, or some one else who has no right of testation under military law.

TITLE II.

CONCERNING THE ACQUISITION OR REJECTION OF ESTATES.

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

Anyone who has the right to acquire an entire estate cannot, by dividing it, accept only a portion of the same.

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

If anyone should be appointed an heir to several portions of the same estate, he cannot accept some of them and reject the others.

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

As long as the first heir who was appointed can enter upon an estate, the substitute cannot do so.

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

An heir who has no right to enter upon an estate is not considered to have refused to do so.

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

It is established that a person who is dumb or deaf, even if he was born so, can act as an heir and obligate himself for an estate.

(1) It is also settled that anyone who is interdicted by law from disposing of his property, if he should be appointed an heir, can enter upon an estate.

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

Anyone who is subject to the authority of another cannot bind him under whose control he is for the debts of the estate, without his consent, unless the father is liable for the debts.

(1) It is established with reference to the possession of property, that that shall be considered to have been ratified which a son has acknowledged contrary to the will of his father, while under the control of the latter.

(2) Where, however, the estate of a mother is transferred to her son as heir-at-law, in accordance with the Orphitian Decree of the Senate, the same rule should be adopted.

(3) If the son did not accept the estate, but, nevertheless, remained in possession of the same for a considerable time, he must be held to have accepted it; as the Divine Pius and Our Emperor stated in a Rescript.

(4) Where he who thought he was a son under paternal control enters upon an estate by the order of his father; it is held that the said estate was neither acquired by him, nor by his father who ordered him to accept it, even though the father may have died after doing so, if he enters upon the estate after his father's death, and thereby bound himself for its debts; as Julianus states in the Thirty-first Book of the Digest. For when anyone is in doubt as to whether or not he is a son under paternal control, and by the death of his father becomes his own master, the better opinion is that he can enter upon the estate.

(5) Sometimes a son under paternal control acquires an estate without acceptance from him

under whose control he is; for instance, where a grandson is appointed the heir instead of a disinherited son, and his father constitutes him his heir, and even his necessary heir, without his formal acceptance of the estate.

(6) Where anyone is appointed an heir by a disinherited son, he does not make him his necessary heir, but he should order him to enter upon the estate, since he was not under his control at the time of his death; for no one can become a necessary heir by the act of a party who himself cannot acquire the estate.

(7) Celsus stated in the Fifteenth Book of the Digest that where anyone, through fear of corporeal punishment, or impelled through any other kind of duress, pretends to accept an estate;. if he is a freeman, he is not considered an heir, and if he is a slave, he does not make his master an heir.

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

If anyone should appoint a son under paternal control his heir, and afterwards says: "If the said Titius, a son under paternal control, shall not be my heir, let Sempronius be my heir"; and the son enters upon the estate by the order of his father, the substitute will be excluded.

(1) If the son, before he knew that he was the necessary heir of his father, should die leaving a son as his necessary heir, the grandson should be permitted to reject the estate of his grandfather for the reason that this privilege would also have been granted to his father.

(2) In every succession, anyone who is the heir to a party who is the heir of Titius, is also held to be himself the heir of Titius, nor can he reject the estate of the latter.

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

In accordance with the custom of our country, neither a male nor a female ward can bind themselves without the authority of their guardian. It is, however, perfectly evident that the acceptance of an estate, even if it is not solvent, renders us liable for its debts. In this instance, we refer to an estate to which parties do not succeed as necessary heirs.

(1) A child not arrived at the age of puberty, who is under the control of another and enters upon an estate by order of the latter, acquires it, even though he is not legally capable of deliberation.

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

Where a ward is competent to act for himself, even though he may be of such an age as to be unable to understand the meaning of the acceptance of an estate (although a boy of this age is not supposed to know, or to be able to decide anything, any more than an insane person) he can, nevertheless, acquire an estate by the authority of his guardian; for this privilege is granted to wards by way of favoring them.

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

Where an heir to an entire estate intends only to accept a portion of the same, he is held to have acted as heir to the entire estate.

11. *Pomponius, On Sabinus, Book III.*

Power is granted to children under the age of puberty to absolutely reject the estates of their fathers, but those who have arrived at puberty can only do so where they have not meddled with the affairs of the estate.

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

When a child has not interfered with the affairs of his father's estate, whether he is of age or a minor, it is not necessary for him to make application to the Prætor, but it is sufficient if he has not concerned himself with the business of the estate. It was stated in a rescript in the

Semestria to Vivius Soter and Victorinus: "It is not necessary to make complete restitution to wards, on account of a contract made by their grandfather, if their father intended that they should not accept his estate, where nothing has been done, nor any business transacted in behalf of the heir."

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

A party who has been appointed an heir, or one to whom the estate has descended by law, loses it by rejecting it. This is true only where the estate is in such a condition that it can be entered upon, but where the heir is appointed under a condition, and rejects the estate before the condition has been fulfilled, his act will be void, no matter what the condition may be, and even if it is dependent upon his will.

(1) Where an heir is in doubt as to whether the testator is living or not, and rejects the estate, his act is void.

(2) In like manner, if a substitute rejects an estate before the appointed heir makes up his mind with reference to it, his rejection will not be valid.

(3) If a son under paternal control, or a father, rejects an estate neither will prejudice the rights of the other, but both of them can reject it together.

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

The same rule also applies where an estate descends by law to children.

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

He who thinks that he is the necessary heir, when he is a voluntary heir, cannot reject an estate; for, in this instance, more weight is attached to opinion than to the truth.

16. *The Same, On the Edict, Book XXIV*.

And, on the other hand, anyone who thinks that he is a necessary heir cannot become a voluntary heir.

17. *The Same, On Sabinus, Book VII*.

Nor can anyone who thinks that a will is void, or forged, reject it. But if it is certain that a will which is said to be forged is not so; since by entering upon the estate, he can acquire it, so also by rejecting it he will lose it.

(1) Where an appointed heir, who is at the same time heir-at-law, rejects the estate by reason of his appointment, he cannot be admitted to the succession on account of his being the heir-at-law; if, however, as the heir-at-law he should reject the estate, knowing at the same time that he has been appointed heir to the same, it should be held that he has rejected it in both capacities. If he was not aware of his appointment, his rejection will not prejudice him in either respect, not with reference to the testamentary succession, as he did not reject this, nor with reference to the legal succession, as it was not yet granted him.

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

Anyone who can acquire an estate can also reject it.

19. *The Same, On the Edict, Book LIX*.

Where anyone desires to enter upon an estate, or to claim prætorian possession of the same, he must be certain that the testator is dead.

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

He is held to act as an heir who does anything in the capacity of one. And, in general, Julianus stated that he only acted in the capacity of heir who transacted any business as such; but to act as heir is not so much a matter of fact as of intention, for he must intend to perform the act as

an heir. Where, however, he does anything on account of filial affection, or to protect the property of the estate, or where he acts, not as the heir or the owner, but by some other right, it is evident that he should not be held to have acted as heir.

(1) And therefore children who are necessary heirs are accustomed to allege that, where they transact any business for the estate, they do so only on account of natural affection or for the sake of protecting the property, or because it is theirs; as, for instance, where *a* child buries his father, or does only what is just and is required of him. If, however, he proceeds with the intention of becoming an heir, he acts in the capacity of one, for if, induced by filial reverence, he does anything, he will not be held to have acted as an heir. In instances of this kind, he provides food for slaves belonging to the estate, or for beasts of burden, or sells them. If he does this in the capacity of heir, he acts as heir, and if he does not do so, but merely attempts to preserve the property because he believes it to be his; or, while he is deliberating what course he shall pursue, he merely takes measures that the property of the estate may be preserved; and if he should conclude not to conduct himself as heir, it is evident that he cannot be held to have acted in that capacity.

Hence, if he has either leased or repaired any lands or houses belonging to the estate, or has done anything else of this kind, not with the intention of acting as heir, but merely for the benefit of the substitution, or of the heir *ab intestato*, or sells property which is perishable; he is not in the position of a person who acts in the capacity of an heir, because he had not the intention of doing so.

(2) If, however, he should claim any property as heir which does not pass to the foreign heir, let us see whether he becomes liable for the debts of the estate; for instance, where he claims the services of a freedman of his father, which a foreign heir cannot claim, but he can obtain by demanding them; it is established that he does not act as an heir; for such a demand can be made by the creditors, and especially for future services to be rendered.

(3) A son who buries a corpse in the family tomb of his father, should not, by this act, be held to have rendered himself liable to the creditors of the latter; which opinion is held by Papinianus, and is the more equitable one, although Julianus states the contrary.

(4) Papinianus says that certain authorities hold that where a son has been appointed the heir of his father, and declines to accept the estate, if he receives money from a slave who was to be free on condition of payment, he can be sued by the creditors of the estate, whether the money paid was, or was not, a part of the *peculium* of the slave; because it was received, as it were, by the wish of the deceased, for the purpose of complying with the condition.

Julianus thinks that the same rule will apply even where the son did not accept the estate. Finally, Papinianus says that he acts in the capacity of heir only where he is the sole heir, but if he should have a co-heir, and the latter enters upon the estate, the son who received the money from the slave should not be compelled to defend actions brought by the creditors; for, as he rejected the estate as a son, he should also be entitled under Prætorian Law to the rights enjoyed by an emancipated child who rejects an inheritance.

Hence, if the slave had been expressly ordered by the testator to pay the money to his son, he could obtain his freedom even if he did not pay him. He is therefore said to have acted in the capacity of heir, since he received what he could not obtain without assuming the name and rights of an heir.

(5) Where a son brings an action against a person who has violated a tomb, even though it belongs to the estate, he is not considered to have interfered with the affairs of the same, as he takes nothing from the estate of his father; for the object of this action is a penalty and punishment rather than the recovery of property. 21. *The Same, On Sabinus, Book VII.*

Where a stranger has in his possession property belonging to an estate which he has purloined

or stolen, he does not act in the capacity of heir, for his act shows a contrary intention.

(1) Sometimes the mere intention of the heir makes him responsible for the estate; as, for instance, when, in the capacity of heir, he makes use of some property which does not belong to it.

(2) Still, no one can acquire an estate by acting in the capacity of heir, where it has already descended to him. But we say that in those cases where we have held that the rejection of an estate is void, it must be noted that where the party acts as heir, his acceptance will also be void.

(3) Where anyone does not know to what portion of the estate he has been appointed heir, Julianus says that this does not prevent him from acting in that capacity. This opinion is also approved by Cassius, if the party was aware of the condition under which he was appointed; provided that the condition has been complied with. But what if he did not know that the condition had been complied with? I think that he can enter upon the estate in the same way that he could if he was not aware that the portion of his co-heir, for whom he was substituted, had been increased by the rejection of the latter.

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

If anyone entitled to the legitimate succession, believing that the deceased was his slave should, in consequence obtain his *peculium*, it is held that he will not be liable to the estate. We therefore say (as Pomponius holds), that the same rule applies if he should take possession of the estate of one whom he thought to be his freedman, when, in fact, the latter was freeborn. For, as anyone by acting in the capacity of heir, renders himself liable to the estate, he should ascertain under what title the said estate belongs to him; for example, if the next of kin is appointed heir by a valid will, and before the latter is produced, and while he thinks that the testator died intestate, even though he should act in every respect as the owner, he, nevertheless, will not be the heir.

The same rule of law will apply where he is appointed heir by a will not properly executed, and the latter having been produced, he thinks that it is legal, still, he will not acquire the estate; even though he should administer all the property belonging to it as the owner thereof.

23. *Pomponius, On Sabinus, Book III*.

Where anyone rejects an estate or a legacy, he must be certain of his rights.

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

The question arose whether a person is held to have acted in the capacity of heir who receives a sum of money as compensation for rejecting an estate. It was decided that he who received the money in consideration of relinquishing the estate did not act as heir; but that he would still be liable to the penalty imposed by the Edict of the Prætor. Therefore whether he received the money from the substitute, or from the heir-at-law, he is held to have received it *mortis causa*. The same rule will apply if he did not receive the money, but it was merely promised to him, for he obtains it by virtue of the stipulation, *mortis causa*.

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

When a slave belonging to another, who is serving me in good faith, enters upon an estate by my order, he will commit an act which is void, and he will not acquire the said estate for me, nor will such an act be valid if performed by a slave of whom I am the usufructuary.

(1) A slave belonging to a municipality, corporation, or a *decuria*, who is appointed an heir, can enter upon the estate after having been manumitted or alienated.

(2) If the said slave belongs to the Treasury, he can enter upon the estate by order of the Imperial Steward, as has been frequently stated in rescripts.

(3) Where it is evident that someone has become a penal slave, by having been condemned to fight with gladiators, or wild beasts, or to work in the mines, and he is appointed an heir, his appointment will be considered as not having been made, as the Divine Pius stated in a Rescript.

(4) The order of a man who has another under his control does not resemble the authority of a guardian which can be interposed after the transaction has been completed, but should precede the acceptance; as Gaius Cassius says in the Second Book of the Civil Law. He also thinks that this order can be communicated by means of a messenger, or by a letter.

(5) Should the order, however, be given generally, as follows: "Whatever estates may pass to you", or specifically? The better opinion is (as Gaius Cassius holds) that it should be given specifically.

(6) The question also arises whether the order can be given expressly with reference to the estate of a man still living. I think that where it is given with reference to the estate of a person who is still living, it should not be obeyed. It is evident that if the report was current that Lucius Titius was dead, or if the will was not yet opened, and it was still uncertain whether the son was designated the heir, the party appointed heir could be ordered to enter upon the estate.

(7) But what if the order should be given to "acquire the estate"? Would it be held that the party had been directed to enter upon it? What if he should be ordered to "apply for prætorian possession of the estate", or "to sell the property belonging to it"? Or what if the son should enter upon the estate, after the father had ratified his demand for prætorian possession of the same? Or what if the son should enter upon the estate, after having been ordered to act in the capacity of heir? Can it be doubted that he would be held to have entered upon it by order of his father? Indeed, the better opinion is, that in all these cases, attention should be called to the entry upon the estate.

(8) A father wrote to his son as follows: "I know, my son, that you will watch with prudence over the estate of Lucius Titius, which has been conferred upon you." I think that the son enters upon the estate by order of his father.

(9) What if he ordered, as follows: "Enter upon the estate, if it is expedient for you to do so"; "If you think it is expedient to enter upon the estate, do so"? The entry upon the estate will be by order of the father.

(10) If a father should order his son to enter upon the estate, "In the presence of Titius", or with the consent of Lucius Titius, I think that the order is given in accordance with law.

(11) Where, however, the order is given to a son as heir to the entire estate, and it should be ascertained that he is heir only to a portion of the same; I do not think that he can enter upon it under such an order. But, if his father orders him to accept only a portion of the estate, he can accept the whole of it. The case is different where he orders him to enter upon it as *ab intestato*, and he does so by virtue of a will, for I think that then his act is not valid; but if the order was to enter upon the estate by virtue of a will, the son can likewise do so *ab intestato;* since he does not make the condition of his father any worse.

The same rule applies where the father directs the son to enter upon the estate as an appointed heir, and it is ascertained that he is a substitute, or *vice versa*.

(12) Where, however, a father directs his son to enter upon an estate, he being a substitute of a child under the age of puberty, the order will not be sufficient.

(13) It is clear that if the order was as follows: "If any estate passes to you by the will of Lucius Titius", it can be maintained that he can enter upon it under an order of this kind.

(14) But if after he has given the order, he should change his mind before the son has entered

upon the estate, and he does so, his act will be void.

(15) Likewise, if he should give his son to be arrogated before the latter enters upon the estate, the estate will not be acquired by him.

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

If I am appointed an heir together with my slave or my son, and I order my son or my slave to enter upon the estate, Pomponius says that I will immediately become the heir through my own appointment. Marcellus and Julianus both concur in his opinion.

27. *Pomponius, On Sabinus, Book III*.

Labeo says that no one can act as heir during the lifetime of the person, the administration of whose estate is in question.

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

Aristo thinks that the Prætor should give the heir who is deliberating with reference to his acceptance of the estate the right to enter upon the same, in order to demand the papers of the deceased from the party with whom they have been deposited.

29. *Pomponius, On Sabinus, Book III*.

Where anyone who has been appointed an heir is prevented by another heir, who was appointed along with him and has already entered upon the estate, from examining the papers of the deceased, from which he may ascertain whether he ought to accept it or not, he is not held to have acted in the capacity of heir.

30. *Ulpianus, On Sabinus, Book VIII*.

Where a man absent on an embassy is not able to order his son who was appointed an heir, and is in a province, to enter upon the estate; the Divine Pius stated in a Rescript addressed to the Consuls that relief should be granted him when his son died, for the reason that he was absent on business for the State.

(1) Where it is said that: "The next of kin to a posthumous child cannot enter upon the estate so long as the woman is pregnant, or is thought to be so, but if he knows that she is not pregnant, he can enter upon it"; it is understood that this is applicable to the next of kin to the unborn child, who, when born, will be the proper heir of the deceased. These words not only have reference to persons dying testate, but also to intestates. And the same must be understood to apply to an unborn child who will be either the proper heir, or a blood relative; since the former at the time of the death is considered as already born, so far as deferring the succession of more remote heirs and making a place for itself therein if it should be brought forth, is concerned. The same rule applies to the possession of property granted by the Prætorian Edict. Finally, the Prætor places the unborn child in possession of the estate.

(2) Therefore, if I think that the woman is pregnant, or if she actually is pregnant, and the child which she is to bring forth will be the proper heir of the deceased, I cannot enter upon the estate, as the will is liable to be broken by the birth of the heir, unless you suppose the case that the unborn child is either appointed an heir, or disinherited.

(3) The statement, "If he thinks that she is pregnant", must be understood to mean if she asserts she is in that condition. But what if she should not say that she is pregnant, but denies it, and others say that she is in that condition? The estate cannot then be entered upon, even though you may suppose midwives to confirm the existence of her pregnancy. What if the heir alone thinks that the woman is pregnant? If he has good reason for thinking so, he cannot enter upon the estate; but if his opinion agrees with that of many others he can do so.

(4) But what if the woman was pregnant, and the heir thought that she was not, and entered upon the estate, and afterwards an abortion was produced? There is no doubt whatever that his

act will be void. Hence this opinion will benefit the heir as often as it agrees with the truth.

(5) Where, however, the woman herself is appointed heir, and pretends to be pregnant, she will acquire the estate by entering upon it. On the other hand, she will not acquire it, if she thinks she is pregnant and this is not the case.

(6) It is certain that a proper heir is entitled to the entire estate, even though he thinks that the woman is pregnant, when this is not true. What course must be pursued if she is pregnant of one child? Will it be heir to half of the estate, whether you suppose the case of the appointment of a posthumous child, or that the father died intestate? This opinion which Tertullianus states in the Fourth Book of Questions, was held by Sextus Pomponius; for he thought that when the woman was not pregnant the proper heir was entitled to the whole estate; as when she is only pregnant of one child, a second cannot be formed in accordance with the nature of the human race, for this only happens a certain time after conception, and the heir already born, even though he was not aware of the fact, will be entitled to half, and not to a fourth of the estate, as is held by Julianus.

(7) When a son under paternal control or a slave is appointed an heir, shall the knowledge or opinion of the master or the father as to the pregnancy be adopted? Suppose the father thinks that the woman is pregnant, and the son is certain that she is not, and, in accordance with his belief, he enters upon the estate, will he obtain it? I think that he will, but in the opposite case I hold that he will not do so.

(8) If I am certain that a will is not forged, void, or broken, although it is said to be, I can enter upon the estate.

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

Where an heir is appointed along with a posthumous child, the remainder of the estate bequeathed to the latter will accrue to the other heir, if it is certain that the woman is not pregnant, even though the heir may be ignorant of the fact.

32. *Ulpianus, On Sabinus, Book VIII*.

An appointed heir cannot enter upon the estate if he thinks that the testator is living, even though he may already be dead.

(1) But even if he knows that he has been appointed an heir, but is ignorant as to whether his appointment was absolute or conditional, he cannot enter upon the estate, even though he may have been appointed heir absolutely, or if he was appointed under a condition, even though he may have complied with it.

(2) Where, however, the heir is uncertain as to the condition of the testator, namely, as to whether he was the head of a household or a son under paternal control, he cannot enter upon the estate, even though his condition was in fact such as to enable him to make a will.

33. *Paulus, On Plautius, Book XII*.

When the heir is in doubt as to whether the deceased died in the hands of the enemy, or as a Roman citizen at home, since in both cases he has the right to enter upon the estate, and is in a condition to do so, it must be said that he can enter upon it.

34. *Ulpianus, On Sabinus, Book VIII*.

Where anyone is in doubt as to his own condition and whether he is a son under paternal control, it has already been stated that he can acquire an estate. But why can he enter upon an estate if he is ignorant of his own condition, but if he is ignorant of that of the testator he cannot do so? The reason is that he who is ignorant of the condition of the testator does not know whether his will is valid or not; but he who is aware of his own is certain of the validity of the will.

(1) If an heir was appointed absolutely, but thinks that he was appointed under a condition, and, after complying with it, enters upon the estate, can he acquire it? It follows that he can legally enter upon it, especially when the opinion which he entertains places no obstacle in his way, nor causes him any risk. This would be more readily admitted, where someone who was absolutely appointed thought that he was appointed under a condition, and that the condition which depended upon some event had been fulfilled; for this opinion presented no obstacle to his acceptance of the estate.

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

Where anyone has been appointed an heir to a portion of an estate, and was afterwards substituted for Titius, his co-heir, and acted in the capacity of heir before the estate vested in him by virtue of the substitution; he will also be heir on account of the substitution; since the share of his co-heir accrued to him without his consent. I hold that the same rule will apply where a son under paternal control or a slave, by order of his father or master, enters upon an estate, and, after having been emancipated or manumitted, acquires it by reason of the substitution, for they become heirs through the effect of the preceding appointment.

(1) Where a father, who was excluded on account of the condition imposed upon him not having been fulfilled, orders his son to enter upon the estate, it must be held that he cannot, by this means, obtain his share.

(2) But when he orders one of two sons to enter upon the estate, he must also order the other to do so.

36. *Pomponius, On Sabinus, Book III*.

If a father or a master should enter upon his share of an estate, he must order his son or his slave, who is his co-heir, to enter upon it also.

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

An heir succeeds to every right of the deceased, and not merely to the ownership of certain property, for any liabilities which were contracted also pass to him.

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

Where there are two necessary heirs, one of whom refuses to accept his share of the estate, and the other, after the refusal of the first, busies himself with its affairs; it must be held that he cannot decline to assume all the liabilities of the estate; for he either knew, or could have ascertained, that when the other refused he would be liable for the indebtedness, and he is held to have entered upon the estate under this condition.

39. *The Same, On the Edict, Book XLVI*.

As long as an estate can be entered upon by virtue of a will, it does not descend as intestate.

40. *The Same, Disputations, Book IV*.

The question arose, where a son had not obtained any portion of his father's estate, but had still received something, or performed some act in accordance with his father's will, whether he could be compelled to be liable to his father's creditors, just as if he had been substituted for a son under the age of puberty? In a case of this kind, Julianus slated in the Twenty-sixth Book of the Digest that he would come within the scope of the Edict, if he had meddled with the affairs of the minor's estate, for where anyone opposes the will of a parent, he ought not to obtain anything from his estate.

Marcellus, however, makes a very nice distinction in this instance, since it makes a great deal of difference whether the son was appointed heir to the entire estate of his father, by the will of the latter, or only to a portion of the same; as if he was only an heir to a portion, he could obtain the estate of the minor after it had been separated from that of the father.

41. *Julianus, Digest, Book XXVI.*

If a son should reject the estate of his father, and, acting in the capacity of heir, meddles with that of his disinherited brother, he can obtain the said estate by virtue of the substitution.

42. *Ulpianus, Disputations, Book IV.*

Julianus says in the Twenty-first Book of the Digest that if a minor rejects the estate of his father, and someone appears as his heir, the latter cannot be compelled to be liable to the father's creditors, unless he was substituted for the said minor; for he is inclined to believe that in this case the substitution must be responsible for the father's debts.

This opinion is very properly rejected, by Marcellus, as being opposed to the interest of the minor, who himself, at all events, can have a successor; for anyone would enter upon the estate with great reluctance if he was apprehensive of being liable for the debts of the father. Otherwise, he says, if he had a brother who rejected the will in order to obtain the estate as heir-at-law, he could do so with impunity; for he would not be held to have intended to evade the Edict, which provides for this, in order to prevent the estate of the minor from being burdened with the debts of the father.

What, however, was stated with reference to the brother, I think should be understood to apply to the brother of the testator, and not to that of the minor. But if another brother was substituted for the minor, he would undoubtedly be his necessary heir.

(1) If a son, after the death of his father, should continue to belong in the same firm of which he was a member during the lifetime of his father, Julianus very properly says, by way of distinction, that it makes a difference whether he merely finishes some business which had been begun by his father, or he himself does something which is entirely new; for where he commences something entirely new which is connected with the partnership to which he belongs, he will not be considered to have interfered with the estate of his father.

(2) If a son should manumit a slave that belongs to his father, he will undoubtedly be held to have interfered with his father's estate.

(3) The following case has been suggested, namely: A son purchased slaves from his father with his *castrense peculium*, and was appointed heir by his father and charged to manumit said slaves. The question arose, if he should reject his father's estate, and manumit the slaves, would he be considered to have interfered with the estate of his father? He says that unless it was evident that he had manumitted them while acting as heir, he should not be apprehensive of being held responsible for having interfered with the estate.

43. *Julianus, Digest, Book XXX.*

An heir cannot, by means of a slave belonging to an estate, acquire a share of said estate, or any property forming part of the same.

44. *The Same, Digest, Book XLV1I.*

Whenever a minor is the heir of his father, and refuses to accept his estate, although the property of the deceased passes into the hands of his creditors, still, whatever the minor has done in good faith should be confirmed. Therefore, if anyone should purchase a tract of land from a ward, with the consent of his guardian, relief should be granted him; and it makes no difference whether the ward is solvent or not.

45. *The Same, On Urseius Ferox, Book I.*

The acceptance of an estate is not included in the service of a slave.

(1) Therefore, if a dotal slave should enter upon an estate, the wife can recover it in an action on dowry, even though the property acquired by the labor of dotal slaves belongs to her husband.

(2) Where a partnership for profit and gain is entered into, each partner must pay into the common fund whatever he earns by his labor, but each one can acquire an estate for himself.

(3) Moreover, a slave in whom someone has an usufruct cannot enter upon an estate by order of him who enjoys said usufruct.

(4) The opinion has been stated by certain authorities that if a freeman who is serving me as a slave in good faith should be appointed an heir on my account, he can enter upon the estate by my order. This is true where it is understood that he does not acquire the estate as the result of his own labor, but on account of his having charge of my property; just as in making a stipulation and by accepting delivery he acquires property for me by virtue of his transacting my business.

46. *Africanus, Questions, Book I.*

A will is said to be forged even if the heir himself is accused of having fabricated it, since he must be sure that he did not commit the forgery in order to be able to legally enter upon the estate; but where another is accused of having done this without the knowledge of the heir, he cannot enter upon the estate if there is any doubt of the will being genuine.

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

A certain man ordered his slave, who had been appointed an heir to accept the estate, and before he did so, the master became insane. It is said that the slave cannot legally enter upon the estate, as an estate cannot be acquired without the consent of his master, and an insane person cannot give his consent.

48. *Paulus, Manuals, Book I.*

Where one person directs another to demand prætorian possession of an estate for him if he should deem it advisable, and, after the demand is made, he becomes insane, he will, nevertheless, acquire possession of the property. If, however, before the demand is made, he whom he ordered to make it should become insane, it must be said that he will not immediately acquire possession of the estate. Therefore, the demand for prætorian possession should be confirmed by ratification.

49. *Africanus, Questions, Book IV.*

It is held that a ward, who enters upon an estate even with the consent of his guardian who does not transact his business, is rendered liable.

50. *Modestinus, On Inventions.*

Where a guardian by a letter orders the slave of his ward to enter upon an estate, and dies after having signed it, before the slave has entered upon the estate in obedience to the letter, no one can say that the ward will subsequently be liable for the debts of the estate.

51. *Africanus, Questions, Book IV.*

Where an heir is appointed by two wills executed by the same testator, and is in doubt as to whether the last one may not be forged, it is held that he cannot enter upon the estate by virtue of either.

(1) A son under paternal control, having been appointed an heir, notified his father that the estate appeared to him to be solvent. His father replied that he had been informed that there was a question as to its solvency, and therefore that he should examine it more carefully, and accept it if he found that it was solvent. The son having received the letter of his father, entered upon the estate. It was doubted whether he did so according to law. It may be said to be more probable that if he was not thoroughly convinced that the estate was solvent, his father would not be liable.

(2) If anyone should say, "If the estate is solvent, I will accept it", such an acceptance is void.

52. *Marcianus, Institutes, Book IV*.

A son that was under the control of his father who was insane was appointed an heir; the Divine Pius stated in a Rescript that he would be indulgent, and that if the said son should enter upon the estate, it would be considered just as if his father had done so, and that he would allow him to manumit the slaves belonging to said estate.

(1) When anyone is appointed an heir to one portion of an estate absolutely, and to the remaining portion under a condition, if he enters upon the estate while the condition is still pending, he will become the heir to the whole of it; for the reason that he will be the heir under all circumstances, unless he has a substitute for that part of the estate which depends upon the fulfillment of the condition.

53. *Gaius, On the Lex Julia et Papia, Book XIV*.

Where an heir has been appointed to two shares of an estate, to one absolutely, and to the other conditionally, and accepts the share left to him absolutely, and then dies, and the condition is subsequently fulfilled, that share of the estate dependent upon it will also belong to his heir.

(1) Where anyone becomes the heir to one share of an estate, he will also even without his consent, acquire the shares of his co-heirs who refuse to accept them; that is to say, their shares will tacitly accrue to him, even contrary to his will.

54. *Florentinus, Institutes, Book VIII*.

Where an heir enters upon an estate, he is understood to have succeeded the deceased from the date of his death.

55. *Marcianus, Rules, Book II*.

When a necessary heir rejects the estate of his father, his co-heir whether he be a proper heir, or a stranger, can either accept the entire estate or reject it; and where he cannot reject it himself, he can do so on account of its refusal by his co-heir. If, however, the creditors should say that they will be content with his share because he cannot be discharged from liability unless he be allowed to make his choice, they should relinquish the other's share in order that the rights of action growing out of it may be assigned to the co-heir who is sued.

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

Where one of two heirs meddles with an estate and dies, and afterwards the other rejects it, his heir will be entitled to the same choice that the deceased himself would have had; which is the opinion of Marcellus.

57. *Gaius, On the Provincial Edict, Book XXIII*.

The Proconsul gives necessary heirs — not only those who are under the age of puberty but also all over that age — the power to reject an estate; so that although they are liable to the creditors of the same under the Civil Law, still, an action is not granted against them if they wish to relinquish the estate. And, indeed, he grants this privilege to those under the age of puberty, even if they have busied themselves with the affairs of the estate, but he also grants it to those over that age, where they have not done so.

(1) Nevertheless, where minors under the age of twenty-five years have rashly interfered with the affairs of the insolvent estate of their father, relief can be granted them by the general terms of the Edict, with reference to minors who are under that age; for if, being strangers, they should enter upon an insolvent estate, complete restitution can be granted them in compliance with the Edict.

(2) This privilege, however, is not conferred upon slaves who are necessary heirs, whether they are over, or under, the age of puberty.

58. *Paulus, Rules, Book II.*

Where a slave is appointed heir to a portion of an estate, and his co-heir has not yet entered upon the estate, he becomes free and a necessary heir, because he does not receive his freedom from his coheir, but from himself; unless his appointment was made as follows: "When anyone becomes my heir, let Stichus be free and be my heir."

59. *Neratius, Parchments, Book II.*

Where anyone becomes the heir of his father, and is also appointed the substitute of a child under the age of puberty, he cannot reject the estate of the latter. This must be understood to apply, even if the heir should die during the lifetime of the minor, and then the minor himself should die; for whoever becomes the heir will necessarily also be the heir of the minor. For if the second heir binds himself against his will, it must be held that the estate of the minor is united with that of the father, and, by the right of accrual, it is acquired by whoever becomes the heir of the father.

60. *Javolenus, On the Last Works of Labeo, Book I.*

A father appointed his emancipated son his sole heir, and ordered that, if he should not become his heir, his slave should be free and be his heir. The son demanded prætorian possession of his father's estate on the ground of intestacy, alleging that he was insane, and in this way obtained possession of it.

Labeo says that if his father should be proved to have been of sound mind when he made his will, the son will be his heir by virtue of the will. I think that this opinion is incorrect, for where an emancipated son declines to accept an estate given to him by will, it immediately passes to the substituted heir; nor can he be held to have acted in the capacity of heir who demands prætorian possession under another section of the Edict, in order to avoid taking advantage of his rights under the will. Paulus: "Proculus disapproves of the opinion of Labeo, and adopts that of Javolenus."

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

Where a minor, after having accepted an estate, obtains complete restitution, the Divine Severus decreed that his co-heir is not bound to assume liability for the debts of his share of the estate, but that prætorian possession of the same should be granted to the creditors.

62. *Javolenus, On the Last Works of Labeo, Book I.*

Antistius Labeo says that if an heir is appointed as follows: "Let him be my heir, if he will make oath", he will, nevertheless, not become the heir at once, even though he should be sworn before he performs some act in that capacity; because by taking the oath he is held merely to have disclosed his intention. I think, however, that he has acted in the capacity of heir if he has taken the oath as such. Proculus entertains the same opinion, and this is our practice.

(1) Where a slave is appointed an heir, and is alienated after having been ordered by his master to accept the estate, before he does so, a new order by his second master, and not that of his old one, is required.

63. *Notes of Marcellus, On the Rules of Pomponius.*

An insane person cannot, under a will, acquire for himself the benefit of an estate, unless he is the necessary heir of his father, or the heir of his master; but he can acquire the estate through the agency of another, as for instance, by a slave or someone whom he has under his control.

64. *Javolenus, On the Last Works of Labeo, Book II.*

The slave of two masters was appointed an heir and ordered to enter upon the estate; if he did so, by the order of one of them, and then was manumitted, he could himself become the heir of half the said estate by entering upon the same.

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

Hence, if the same slave was given a substitute in the following terms: "If he should not be my heir, let So-and-So be my heir", the substitute will be excluded from the succession.

66. *Ulpianus, On the Edict, Book LXI.*

Where a slave owned in common becomes the necessary heir of one, or several, or all of his masters, he cannot refuse to accept the estate of any of them.

67. *The Same, Rules, Book I.*

Where a slave owned in common is appointed an heir by a stranger, and enters upon the estate by the order of one of his masters; this does not, in the meantime, constitute him the heir of a larger amount than his master is entitled to. If, however, his other masters do not order him to accept the estate, their shares will accrue to him tacitly by operation of law.

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

Where a slave is appointed sole heir, just as he is permitted, at the same time, to enter upon the estate by the order of all his masters, so also he can legally enter upon it by the order of each one of them, at different times; for, because he enters upon it frequently, he is considered to do so for the sake of convenience, and on account of the right of his masters, and not by virtue of the will, in order to prevent the right of one from being prejudiced by the undue haste of another.

69. *Ulpianus, On the Edict, Book LX.*

So long as the appointed heir is entitled to be admitted to the succession there is no place for the substitute, for he cannot succeed until the appointed heir has been excluded; the result therefore will be that the remedy of the Prætor becomes necessary, as well with reference to the refusal of actions to the heir, as to the granting of time to the substitute, because the latter cannot accept the estate, or perform any act as heir within the term granted by law to the one who was appointed. But a substitute appointed in the third degree, if the second heir dies while the first is deliberating, can himself succeed. Hence we wait for each one in order that the estate may pass to them, then, after this has taken place, we wait during the prescribed time, and if within this time the parties do not enter upon the estate, or perform any acts as heirs, we refuse them rights of action.

70. *Paulus, On the Edict, Book LIX.*

The following rule must be observed with reference to the different degrees of heirs, namely, where a will is produced, the appointed heir shall be given the preference; then we pass to those to whom the estate belongs by law, even if there should be but one heir who is entitled to it under both heads; for this order must be followed so that the heir may first reject the estate left him by will, and afterwards that given him by law. The same rule applies to prætorian possession to enable the testamentary heir to reject the estate, and the one who was entitled to it by law on the ground of intestacy.

(1) If, however, a condition is prescribed for the party to whom the estate will belong by law, he cannot come to any conclusion before the time appointed for the fulfillment of the condition has passed. Therefore it must be said, in this instance, if he answers that he does not desire that the estate shall belong to him by either title, prætorian possession of the estate of the deceased shall be granted his creditors.

71. *Ulpianus, On the Edict, Book LXI.*

If anyone should ransom a slave belonging to another from the enemy, and appoint him his heir with the gift of freedom, I am inclined to think that he will be free, and the necessary heir of the testator. For the latter, when he granted him his freedom, released him from his bond, and gave him power to enjoy the right of *postliminium*, so that he would not again become the slave of the party to whom he belonged before he was captured (for this would be extremely wicked), but to enable him to tender to his former master the price of his ransom, or remain obligated to him until he could pay it; which provision was introduced in favor of freedom.

(1) If a slave should be purchased under this law in order to be manumitted within a certain time, and he is appointed heir with the grant of his freedom, let us see if he will be entitled to relief if he declines to accept the estate. The better opinion is, that until the prescribed time has elapsed, he can become the necessary heir of the testator, and cannot reject the estate; but where the time has expired, he then becomes not the necessary, but the voluntary heir, and can reject it in the same way that he, to whom freedom is due under the terms of a trust can do.

(2) If a slave should give money to his master in order that he may be manumitted, I think that, by all means, relief should be granted him.

(3) The Prætor says: "If either a male or a female heir should have committed an act by which any property has been taken from the estate."

(4) If a proper heir should state that he is unwilling to retain the estate, and has removed any property belonging to it, he shall not have the privilege of refusal.

(5) The Prætor did not say: "If the heir should take anything"; but, "If either a male or a female heir should have committed an act by which any property has been taken from the estate." Therefore, if the heir should himself remove any of the property, or cause this to be done, the Edict will apply.

(6) We understand anyone to have taken the property belonging to an estate, to mean that he has concealed, embezzled, or squandered said property.

(7) The Prætor says: "By which any property has been taken from the estate", and the Edict applies whether one article or several have been taken, or whether the property in question forms a portion of the estate, or is connected with the same.

(8) A person is not held to have taken property, where he did not act with fraudulent or malicious intent. Nor will he be held to have done so who was mistaken with reference to the property, and was not aware that it belonged to the estate. Hence, if he took it without the intention of misappropriating it, or causing damage to the estate, but under the impression that it did not belong to it, it must be held that he should not be considered to have appropriated it to his own use.

(9) These words of the Edict apply to him who, in the first place, took some of the property and afterwards rejected the estate; but if he rejected it in the first place, and then misappropriated the property, let us see whether the Edict will apply. I think that it is better in this instance to adopt the opinion of Sabinus, namely, that the heir will be liable to the creditors of the estate in an action of theft; for where the heir has refused the estate, he afterwards becomes liable on account of the crime.

72. *Paulus, On Plautius, Book I.*

If an heir should be appointed as follows: "Let him enter upon the estate within a certain time, and if he should not do so, let another be substituted for him", and the first heir dies before entering upon the estate, no one can doubt that the substitute will not be obliged to wait until the last day fixed for acceptance.

73. *The Same, On Plautius, Book VII.*

Where anyone, not acting as heir, but as the son of his patron, being in want, asks for support

from the freedman of his patron, there is no doubt that he does not, by so doing, interfere with the management of his father's estate. Labeo also very properly holds this opinion.

74. *The Same, On Plautius, Book XII*.

If an heir thinks that he was ordered to pay ten *aurei*, when in fact he was ordered to pay five, and he pays ten, he will become the heir by entering upon the estate.

(1) But if he thinks that he was ordered to pay five, when he was ordered to pay ten, and he pays five, he does not comply with the condition. This, however, will be of some advantage to him, for if he should pay the remainder, the condition will be held to have been complied with by the payment of the other five *aurei*.

(2) Where a freeman serves as a slave in good faith, and enters upon an estate by the order of his supposed master, he will not become liable.

(3) The position of a slave who is to be liberated upon a certain condition is similar to the one where he is ordered by the heir to enter upon an estate, and does so after the condition upon which his freedom depends has been fulfilled, even if he is not aware of it.

(4) Where a slave has been appointed heir by someone, there is some doubt whether he is entitled to his freedom by virtue of the will of his master, when he does not know whether the condition upon which his freedom depends has been fulfilled or not; or where the estate has been accepted, whether he can become the heir by entering upon the same. Julianus says that he will become the heir.

75. *Marcellus, Digest, Book IX*.

Titius was appointed heir to half of an estate, and, through mistake, demanded possession of only one-fourth of it. I ask whether such a demand is not void, or whether all his rights are saved just as if the fourth of the estate had not been mentioned by him. The answer was, that the better opinion is that the demand is of no force or effect, just as if in the case where a party has been appointed heir to half of an estate, he erroneously only accepts a quarter of the same.

76. *Javolenus, Epistles, Book IV*.

If you have been appointed heir to one-sixth of an estate, under a certain condition, and Titius, to whom you were substituted, refuses to take his share, and you accept the estate by virtue of the substitution, and the condition under which you were entitled to a sixth is fulfilled, I ask whether it will be necessary for you to enter upon the estate in order to avoid losing your sixth. The answer was, that it makes no difference whether the estate is entered upon by reason of the substitution, or on account of the first appointment; since in either instance a single acceptance will be sufficient. Hence the sixth part which was granted to me under a condition belongs to me alone.

(1) Moreover, if you fail to accept the sixth of the estate to which you were appointed the heir, do you think that by accepting under the substitution you will be entitled to a part of the share of Titius? I do not doubt that if I can become the heir by accepting under the first appointment, it will be in my power either to reject, or claim any part of the estate which may be desired.

77. *Pomponius, On Quintus Mucius, Book VIII*.

A doubt may arise whether, after I have been appointed heir by the will of a person whose estate, even if he should die intestate, would belong to me as heir-at-law, I can reject both titles to the estate at the same time, for the reason that the estate did not belong to me by law, before I rejected it as bequeathed by will. It is true that I am understood to have rejected at the same time the estate bequeathed by the will and the one conferred by law, just as if I wished the latter to belong to me, when I knew that it also had been left to me by will; hence I shall

be held to have first rejected the testamentary estate, and in this way to have acquired the one conferred by law.

78. *The Same, on Quintus Mucius, Book XXXV*.

Two brothers held their property in common, one of them who died intestate did not leave any direct heir, and his brother, who survived him, refused to be his heir. The question was asked whether the latter rendered himself liable for the debts of the estate, because he had made use of the common property after he knew that his brother was dead. The answer was, that if he had not used said property because he wished to be the heir, he would not be liable. Therefore he should be careful not to exercise ownership upon any more of the property than he was entitled to as his share.

79. *Ulpianus, On the Lex Julia et Papia, Book II*.

It is established that whenever an estate, or anything else, is acquired through some person who is under the control of another, it is immediately acquired by the latter, and does not remain for a moment vested in him by whom it is acquired, and hence it is directly obtained by the party entitled to it.

80. *Paulus, On the Lex Julia et Papia, Book IV*.

If I should be appointed sole heir to several shares in an estate, I cannot reject one share, nor does it make any difference whether or not I have a substitute for said share.

(1) I think that the same rule will apply, even where I have been appointed together with other heirs, or have been appointed heir to several shares, because by the acceptance of one of the shares, I will acquire all of them, if they should be rejected.

(2) Moreover, if one of my slaves has been absolutely appointed an heir to a portion of an estate, and conditionally appointed to another portion, having, for example, a co-heir, and he enters upon the estate by my direction, and after he has been manumitted, the condition upon which the other portion of the estate depends is fulfilled; the better opinion is that the first portion is not acquired by me but follows the slave himself. For everything should remain in the same state at the time when the condition of the second share was fulfilled, in order that it may be acquired by him who was entitled to the first portion.

(3) Therefore, I think that if the slave remains under the control of his original master, he must enter upon the estate a second time, if the condition should be fulfilled; and when we stated that the heir should only enter upon the estate but once, this has reference to the heir himself personally, and does not apply where the estate is acquired through the intervention of another.

81. *Ulpianus, On the Lex Julia et Papia, Book XIII*.

An appointed heir is held to have signified his acceptance even in case of substitution, whenever he can acquire the property for himself; for if he should die, he will not transfer the substitution to his heir.

82. *Terentius Clemens, On the Lex Julia et Papia, Book XVI*.

If the slave of a person who is incapable of taking under a will should be appointed an heir, and is manumitted or alienated before entering upon the estate by order of his master, and commits no act for the purpose of evading the law, he himself will be admitted to the succession. If, however, his master can take but a certain share of the estate, the same rule will apply to that portion which he cannot take under the will. For, generally speaking, it makes no difference where the question is raised whether someone cannot take anything under a will, or can only take a part of the estate.

83. *Ulpianus, On the Lex Julia et Papia, Book XVIII*.

If anyone should be tacitly requested to surrender to another the entire share of an estate to which he has been appointed heir, it is evident that he can receive nothing by accrual, because he is not considered to be entitled to the property.

84. *Papinianus, Questions, Book XVI.*

Where an unborn child is passed over, and an emancipated son or a stranger is appointed heir, as long as the will can be broken by the birth of the child, the estate cannot be transferred in accordance with the terms of the will. If, however, the woman should not prove to be pregnant, and, while this is uncertain, the son remaining in the family should die, he is understood to have been the heir; and whether he be either an emancipated son or a stranger, he cannot acquire the inheritance unless he knows that the woman was not pregnant.

Therefore, if the woman should actually be pregnant, would it not be unjust if, in the meantime, the son who died could leave nothing to his heir? Hence relief should be granted to the son, under the decree, because, whether a brother should be born to him or not, he will still be the heir of his father.

The same course of reasoning makes it plain that relief should also be granted to an emancipated son who, in either instance, will certainly be entitled to possession of the estate.

85. *The Same, Questions, Book XXX.*

If anyone, induced by fear, should enter upon an estate, the result will be that, because he becomes the heir against his will, the power to reject the estate may be granted him.

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

Pannonius Avitus, while acting as the Imperial Steward in Cilicia, was appointed an heir, but died before he learned of his appointment. His heirs, as representatives of the deceased, petitioned for complete restitution, because in that capacity, they could not take possession of the estate now claimed by his deputy, and which, according to the strict construction of the law, he was not entitled to; because Avitus had died within the time appointed for its acceptance.

Marcellus, in the Book of Questions, states that the Divine Pius rendered a contrary decision with reference to a party who was at Rome as the member of an embassy, where his son, being absent, had failed to obtain the possession of property which descended from his mother, and that, without respect to this distinction, there was ground for restitution. This rule should also in the interest of justice be applicable in this case.

(1) The emancipated son of a person accused of treason, who is certain of the innocence of his father, can obtain his estate while the examination of the case is pending.

(2) It is established that a son has acted in the capacity of heir, when, at the time of his death, he knew that his mother had died intestate, and asks his heir in a codicil to manumit a slave belonging to his mother's estate, and to erect a monument for himself and his parents on land forming part of her estate.

87. *The Same, Opinions, Book X.*

It is held that a son meddles with the estate of his father, if he appears to act in the capacity of heir, where the family ties have been broken. Therefore, a son who accepts the estate of his mother, and obtains land belonging to the estate of his father, of which he takes possession, not being aware that it is part of his mother's estate, is not held to have lost the right to reject the estate.

(1) It has been decided that mixed actions should be granted to minors, who, it has been held, must be released from liability for the debts of an estate.

88. *Paulus, Questions, Book I.*

A person acts in the capacity of heir, who signifies his intention of accepting an estate, even though he does not touch any of the property forming part of the same. Hence, if he should keep a house as belonging to the estate but which had been given by way of pledge, the possession of which was, in any way, held by the estate, he will be considered to have acted as the heir.

The same rule will apply if he should retain possession of any other property as a part of the estate.

89. *Scævola, Questions, Book XIII*.

If a minor rejects an estate, relief must be granted to the sureties given by him, if suit should be brought against them on account of some contract relating to the estate.

90. *Paulus, Opinions, Book XII*.

Paulus holds that an estate cannot be acquired through the intervention of a curator.

(1) He also gives it as his opinion that if a grandson should enter upon the estate of his father who made a will disposing of his *castrense peculium* by the order of his grandfather, he will acquire for the benefit of his grandfather all that his father was able to dispose of by will; because castrensial property ceases to be such by the change of persons.

91. *The Same, Opinions*.

Paulus holds that where a son who declines to accept the estate of his father is proved to have purchased the said estate by the intervention of anyone, he can be sued by the creditors of the estate, just as if he had taken upon himself the management of it.

92. *The Same, Opinions, Book XVII*.

A son under paternal control married; and his wife died leaving children; and the latter entered upon the estate of their mother, by order of their father, and not by that of their grandfather. I ask whether the estate is acquired by the grandfather? Paulus answers that, in accordance with the case stated, the act is void.

93. *The Same, Decisions, Book III*.

Every time that a father directs his son to enter upon an estate, he must be certain whether his son is an heir to a portion, or to the whole of it; and also whether his right is derived from an appointment as heir, or from substitution, or by virtue of a will, or through intestacy.

(1) Where the father or the master is dumb, the better opinion is, that if a son or a slave has been appointed heir, he can, by a nod,

direct him to enter upon the estate; provided he has sufficient intelligence to enable him to legally acquire the estate, which can be the more readily ascertained if he knows how to write.

(2) A slave who is dumb, and acts in the capacity of heir by the direction of his master, renders the latter liable for the debts of the estate.

94. *Hermogenianus, Epitomes of Law, Book III*.

He who refuses to accept the property of a person who is living is not forbidden to enter upon his estate, or demand prætorian possession of it after his death.

95. *Paulus, Decisions, Book IV*.

An estate can be rejected not only by words, but also by any act or other indication of the will.

96. *Hermogenianus, Epitomes of Law, Book III*.

Where anyone, erroneously supposing himself to be a minor, when, in fact, he has arrived at puberty, acts as an heir, his rights will not be prejudiced by a mistake of this kind.

97. *Paulus, Decrees, Book III.*

Clodius Clodianus, having made a will, afterwards appointed the same heir by another will, which was drawn up in such a way as to be of no force or effect. The appointed heir, thinking that the second will was valid, desired to enter upon the estate by virtue of it, but it was afterwards ascertained to be void.

Papinianus held that he had rejected the estate granted by the former will, and could not accept it under the second. I held that he did not reject the first will, as he thought that the second was valid. It was finally decided that Clodianus died intestate.

98. *Scævola, Digest, Book XXVI.*

A certain woman promised Sempronius in the name of her granddaughter, whom she had by Seiua, her daughter, a sum of money by way of dowry, and paid him a certain amount as interest for household expenses. She then died, Seia being her heir, together with others, against whom Sempronius brought an action, and the different heirs were held liable for their shares of the estate, among whom was Seia, who, with the rest gave security to Sempronius that they would pay the sum for which each one of them had had judgment rendered against him or her, with the same interest which had been paid by the testatrix for the support of the family. Afterwards, the other heirs, with the exception of Seia, rejected the estate through the indulgence of the Emperor, and it was entirely vested in Seia. I ask whether a prætorian action should be granted against Seia, who was now the sole heir, and as such administered all the affairs of the estate, to recover the amount of the shares of those who, through the indulgence of the Emperor, had been able to reject the estate. The answer is that actions involving the shares of those who decline to accept an estate are usually granted against the party who accepts the same, and prefers to discharge the liabilities of the entire estate.

99. *Pomponius, Decrees of the Senate, Book I.*

Aristo stated, with reference to the Decrees of Fronto: Two daughters were the necessary heirs of their father; one of them declined to accept his estate, and the other took possession of her father's property and was ready to discharge all its liabilities. The venerable Prætor Cassius, after hearing the case, very properly decided that prætorian actions should be granted to her who had accepted the estate of her father, but should be denied to the other daughter who had refused it.

TITLE III.

IN WHAT WAY WILLS SHOULD BE OPENED, EXAMINED, AND COPIED.

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

The Prætor promises that he will grant the privilege of examining and copying a will to all who desire to inspect one or copy it. It is plain that he will grant this permission to anyone who desires it either in his own name or in that of another.

(1) The reason for the adoption of this Edict is plain; for one cannot, without judicial authority, carry out the provisions of a will, nor can the truth be ascertained by the court in those controversies which arise out of the interpretations of wills, except by the examination and investigation of the language contained therein.

(2) Where anyone refuses to acknowledge his seal, this does not prevent the opening of a will, but it becomes suspicious for this reason.

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

The instrument containing the provisions of the will does not belong to one person, that is to say, to the heir, but it is the property of all those to whom anything has been bequeathed; and, indeed, it is rather a public document.

(1) That is properly said to be a will which is legally perfect; however, we also improperly call certain papers wills which are forged, illegal, void, or broken, and we are also accustomed to designate as wills such as are defective.

(2) It is held that whatever has been done with reference to a will is subject to the same rules as the will itself, no matter upon what material it has been written; provided that it contains the last wishes of the deceased, and the will itself, as well as the substitution, is embraced in the Edict.

(3) Where anyone desires to produce several wills, authority to produce them all should be granted.

(4) If any doubt should exist whether the person whose will someone desires to have examined or copied is living or dead, it must be held that the Prætor shall decide this after proper investigation, so that if it is proved that the testator is living, he shall not permit the will to be examined; otherwise, he can allow the applicant to examine the writing, the seals, and anything else belonging to the instrument which he may desire to inspect.

(5) The examination of a will also includes the perusal of the same.

(6) The Prætor does not permit the date of the will or the name of the Consul under whose administration it was drawn up to be copied or examined, in order to avoid opportunity for fraud; for even the examination of these may furnish material for the perpetration of forgery.

(7) Can the Prætor order that power to examine or copy a will be accorded without delay, or shall he grant time for its production to the person having possession of the same if he wishes it? The better opinion is that he should grant a certain time, dependent upon the difficulty of communication, and the distance of the place.

(8) If anyone does not deny that he has possession of a will, but will not allow it to be examined and copied, he should, by all means, be compelled to do so. If, however, he denies that the will is in his possession, it must be said that recourse should be had to the interdict which provides for the production of wills.

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

The heir is, nevertheless, entitled to an action for the recovery of the will, just as for property belonging to the estate, and on this account he can bring an action to compel the production of the will.

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

When the will is about to be opened, it is the duty of the Prætor to require the witnesses to appear and acknowledge their seals,

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

Or deny that they have sealed the will; for it is expedient that the last will of men should be carried into effect.

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

If the majority of the witnesses are found, the will can be opened and read in their presence.

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

If one of the witnesses should be absent, the will must be sent to him wherever he may be, in order that he may acknowledge his seal. For it would be a hardship to compel him to return for this purpose, as frequently it causes great inconvenience for us to be taken from our business under such circumstances; and it would be unjust for anyone to suffer injury for having performed his duty. Nor does it make any difference whether one or all of the witnesses are absent.

If all of them should happen to be absent, and, for some cause or other, there is an urgent necessity for opening the will, the Proconsul should take care that it is opened in the presence of men of excellent reputation; and after it has been copied and examined in their presence, it must be sealed by the same parties before whom it was opened, and then sent to the place where the witnesses are, in order that they may acknowledge their seals.

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

The Prætor does not permit the opening of a pupillary will, even if there is no endorsement on it forbidding this to be done; still, if the testator left his will partially sealed, the Prætor can allow it to be opened, if proper cause be shown.

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

Where a woman is placed in prætorian possession of an estate in the name of her unborn child, the pupillary will should be opened, in order that it may be ascertained to whom the curatorship of the child was entrusted.

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

Where there are two copies of a will, and one of them remains unsealed, the will is held to be opened.

(1) Where the will itself is unsealed, there is no doubt that it should be considered as opened; for we do not inquire by whom it is to be opened.

(2) If a will should not be produced, or has been burned, it follows that relief should be granted to the legatees; and the same rule applies where the will has been suppressed, or concealed.

11. *Gaius, On the Lex Julia et Papia, Book XL*

Just as a codicil is considered to be part of a will, so a pupillary substitution is also held to constitute a part of the same.

12. *Ulpianus, On the Lex Julia et Papia, Book XIII*.

Where anyone makes a will and also a copy of it, and the copy is open, the will is not considered to be open; but when the original will is open, everything else is likewise.

TITLE IV.

WHERE ANYONE, THROUGH THE REJECTION OF HIS APPOINTMENT AS TESTAMENTARY HEIR, OBTAINS POSSESSION OF THE ESTATE THROUGH INTESTACY OR IN ANY OTHER WAY.

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

The Prætor attempts to carry out the wishes of deceased persons, and opposes the cunning of those who, by refusing to take under the will, obtain possession of the estate, or a portion of the same, on the ground of intestacy; in order to defraud legatees to whom something may be due under the will of the decedent, if the estate should not be obtained *ab intestato;* and he promises to grant an action against them.

(1) It makes little difference whether the party in question acquires the estate himself, or through someone else; for in whatever way he may be able to do so, if he does not acquire it under the will, he is in a position to be affected by the Edict of the Prætor.

(2) An heir is held to have omitted to take advantage of the benefits granted him by will, who, when he can order someone to enter upon the estate, declines to do so.

(3) But what if his slave, when ordered to enter upon the estate, after receiving the order should not obey it? The slave, however, can be compelled to do this, and therefore his master

comes within the scope of the Edict.

(4) If, however, the master has not been informed by his slave of his appointment as heir, and he himself afterwards obtains possession of the estate on the ground of intestacy; he will not be liable under the Edict, unless he pretends ignorance of the facts.

(5) Where the proposed case is, that the same party was, at the same time, appointed heir and substituted, and neglected to take advantage of his appointment; the question arises whether he comes within the scope of the Edict. I do not think that he does, as the testator who appointed him as substitute for himself granted him the privilege of rejection.

(6) Where anyone rejects an estate, he forfeits any rights to which he may be entitled under the will.

(7) Where children subject to the authority of their father immediately become heirs by his will, there is no reason why they cannot reject his estate. If, however, they subsequently interfere with it, they are considered to be heirs by virtue of the will, unless they refrain from taking under it, and claim possession of the property on the ground of intestacy; for, in this instance, they come within the terms of the Edict.

(8) Where an heir is appointed under a condition, and being able to comply with it, does not do so, when the condition is such that it depends upon the consent of the said heir, and he afterwards obtains possession of the estate on the ground of intestacy, he should be held liable under the Edict; for the reason that a conditional appointment of this kind should be considered as an absolute one.

(9) When parties who have refused to take under the will obtain an estate on the ground of intestacy, we do not inquire whether they have acquired possession of the same as heirs-at-law or not, for by whatever title they may acquire possession of the estate, or a portion of it, they can be sued under the Edict, provided they do not acquire it on some other ground; for instance, where anyone rejects an estate and acquires it by means of a trust, and is placed in possession for the purpose of discharging the trust; or if you should state that be obtained possession in order to preserve a claim; as, in this instance, he cannot be compelled to answer in a suit brought by the legatees.

Therefore, the Edict of the Prætor will apply whenever any one holds possession as an heir-at-law, or acquires the estate on the ground of intestacy, or holds it as a depredator, pretending that he has some title to possession on the ground of intestacy; for no matter in what way he may be pecuniarily benefited by obtaining the estate, he must pay the legacies.

(10) Security, however, must be furnished by the legatees, that in case the heir should be deprived of the estate by a better title the legacies shall be repaid to him; and even if the party may not have the estate in his possession, but has acted in bad faith to avoid being in possession, the result is that he will be held liable, just as if he had entered upon the estate.

(11) A person is considered to have acted in bad faith to avoid being in possession, who fraudulently transfers possession to someone else, in order that the legatees and others who have received anything under the will may be deprived of whatever was bequeathed to them.

(12) The question was asked whether anyone should not be held to have acted in bad faith who, in order to avoid being in possession, fraudulently relinquished it after having held it for some time; or whether he is also liable who did this maliciously to avoid obtaining possession in the first place.

Labeo says that it seems to him that he who avoided obtaining possession in the first place is not less guilty than he who fraudulently relinquishes it, after having obtained it. This is one prevalent opinion.

(13) Where anyone fraudulently rejects an estate in order that it may descend to the heir-at-

law, he will be liable to an action brought by the legatees.

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

Although he who relinquishes an estate in consideration of the payment of a sum of money may not be considered to have assumed the part of an heir, an action should, nevertheless, be granted against him, as in the case of a party who, having declined to take an estate under a will, obtains possession of it on the ground of intestacy, as the Divine Hadrian stated in a Rescript. For this reason he will be liable to be sued by the legatees and other beneficiaries of the estate.

(1) But should the action be brought against him in the beginning, and recourse then be had to the heir; or shall we change the order? The more equitable opinion seems to me to be that proceedings should first be instituted against the possessor of the estate, especially if the possession of the same is profitable to him.

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

If you receive money from a substitute in consideration of your relinquishing your claim to an estate, and he enters upon the same, it may be doubted whether an action should be granted to the legatees. I think that if the substitute should also relinquish his claim for the reason that the estate vests in him by law, and he obtains possession of it, both of you will be liable; and an action will be granted in favor of him to whom a legacy has been bequeathed, against whichever one of you he may elect to sue.

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

In case the heir should not receive any money, but refuses to take under the will, because he desires to confer a favor either on the substitute, or the heir-at-law, will there be ground for the application of the Edict? It would be intolerable for him to be able to prevent the execution of the will of the deceased; and therefore if it is clearly established that this was done for the purpose of injuring the legatees — even though no money was received but the act was prompted by excessive partiality — it must be said that there will be ground for an equitable action against the party who is in possession of the estate.

(1) It is very properly held that whenever anyone wishes to confer a favor upon another who will become the heir by his rejection of the estate, and he would not have rejected it unless he had intended to confer the favor, and especially if he did so for the purpose of preventing the execution of the will, it must, in this instance, be said that an action will lie against the possessor of the estate, with this distinction, however, that where money having been accepted, the heir rejected the estate, we can, under these circumstances, say that suit should be brought against him; but where he acted through partiality and for the purpose of defrauding those to whom something was bequeathed, the possessor of the estate should be sued in a prætorian action.

(2) Although the Prætor seems to refer to appointed heirs, still, this provision also extends to others; for instance, where there is a legatee who has been charged with a trust, and he causes the estate to be rejected through his fraudulent act, suit should be brought against him.

(3) Where anyone sells his right to an estate, he is held to remain in possession of the same, and not to have acted fraudulently in order to avoid being in possession.

5. *Marcellus, Digest, Book XII.*

A patron is held to be excused who rejects an appointment as heir, when he has been appointed heir by his freedman in a different way than he ought to have been. For if his slave should have been appointed sole heir to an estate, and on account of some accident was not able to enter upon it by order of his master, he can, with impunity, decline to accept the estate given him by the will.

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

For the reason that a party who is in possession of an estate on the ground of intestacy can be sued if he relinquishes his rights under the will, the question arose whether he can be compelled to make payment if he seems to have relinquished them in compliance with the wishes of the testator. For example, a man appointed a brother his heir, and then executed a codicil requesting his brother, if the estate should come to him by law, to discharge a trust in favor of certain individuals; and therefore it should be considered, he having renounced his rights under the will and obtained possession of the estate on the ground of intestacy, whether he will be liable to the legatees.

Julianus states, in the Thirty-first Book of the Digest, that he can be compelled in the first place to pay the legacies, and afterwards, they having been settled, should anything be remaining from the three-fourths of the estate, he can be required to discharge the trust. If, however, the legacies exhaust three-fourths of the estate, then nothing shall be paid under the trust, for the heir-at-law must have the fourth undiminished. Hence the order was established by Julianus that the legacies should first be discharged, and the trusts paid out of the remainder, with the understanding that the fourth should remain intact.

I think that the opinion of Julianus should be adopted, so that if the estate was rejected under the will, in order that it might be obtained *ab intestato*, the party ought by all means to be compelled to pay the legacies, for the reason that the testator who left him the trust to be discharged in case the succession was intestate did not authorize him to reject the estate under such circumstances.

(1) If, however, it is evident that the testator expressly authorized him to do this, he will not become liable under the Edict, because he availed himself of the privilege which the testator granted him. But if the testator did not under the will specifically grant him the privilege of rejecting the estate, the order prescribed by Julianus should be followed.

(2) But what shall we say where legacies are left by will, and trusts in case of intestacy, to the same person, and, in addition to this, trusts are left to other parties? Shall we follow the same order established by Julianus, or shall we subject all the trustees to contribution as if they were equal? The better opinion is to ascertain whether it makes much difference if the heir becomes liable under the Edict, or not; for if he does become liable, those are to be preferred to whom something was left by the will; but if he does not, as it was the wish of the testator to grant him the privilege of succeeding *ab intestato*, or because he was admitted for some other reason, which, in accordance with what we have above stated, is not in violation of the Edict, it must be said that all the trusts ought to contribute as if they had all been placed on the same footing.

(3) The Prætor does not promise to grant the action indiscriminately, but only where proper cause is shown; for if he should ascertain that the testator was the author of this arrangement, and himself had permitted the heir to succeed *ab intestato*, or if he should find that there was any other good reason for the rejection of the estate, he will not grant the legatees an action against him.

(4) Also if the Prætor should ascertain that the property belongs to another, he will not grant an action, provided no suspicion of collusion influences the decision of the Prætor.

(5) Where, however, the person who can be deprived of the estate has in his possession any portion of the same, and relinquishes possession of it without being guilty of fraud, the better opinion is that he ceases to be liable to be sued.

(6) What time then shall we consider, when investigating as to whether he is in possession or not? The time when issue was joined should be considered.

(7) It is evident that where anyone is in possession of the property of an unclaimed estate, and

that the term of four years has elapsed, suit can undoubtedly be brought against him, under this Section of the Edict, both for the reason that he refused to take under the will and because he is in possession on the ground of intestacy, and, indeed, as he is rendered safe by prescription on account of the expiration of four years.

(8) Where a patron is appointed heir to the share of an estate to which he is entitled, and a co-heir is appointed with him, and he rejects the appointment for his share, because what is due to him has been already exhausted, and the co-heir also rejects his portion; and then the patron obtains possession of the entire estate *ab intestato*, by operation of law; Celsus says in the Sixteenth Book of the Digest that the same action should be granted against him which could have been brought against his co-heir Titius, and that it will be sufficient for the patron to have for himself the entire share to which he was legally entitled.

This, however, is correct only where the co-heir is in collusion with the patron, for otherwise, the latter cannot be compelled to pay the legacies, as it is not forbidden for anyone to refuse an estate, if he does so without being guilty of fraud.

(9) The better opinion is, that this Edict also applies to the prætorian possession of an estate contrary to the provisions of the will, so that, where a party, by taking possession of the estate in opposition to the will, must pay the legacies to the children, and the parents, and if he should fail to obtain possession of the estate, and should acquire possession of it on the ground of intestacy, he can be compelled to pay whatever he would have paid if he had obtained possession of the estate in opposition to the will.

(10) Where freedom has been given to a slave on the condition of his paying ten *aurei*, and his rights under the will are relinquished by the heir, the slave will not be liberated unless the condition is complied with.

7. *Marcellus, Digest, Book XII.*

A certain man appointed Titius and Mævius his heirs, and bequeathed a hundred *aurei* to Titius, and both of them relinquished their rights under the will, and entered upon the estate as heirs-at-law. Titius cannot properly bring an action to recover his legacy.

The same rule will apply where the testator bequeathed legacies to both the heirs.

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

Where a person becomes an heir under the condition of paying ten *aurei*, or under any other condition which consists of either giving or doing something, and the heir, having relinquished his rights under the will, obtains possession of the estate on the ground of intestacy, it should be considered whether or not relief should be granted to him for whose benefit the condition was imposed. The better opinion is that he is not entitled to relief, for he is not a legatee.

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

But if the parties still have time to comply with the condition, he will not be liable under this section of the Edict.

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

Where he who has relinquished his rights under the will is not alone, but together with another party has possession of the estate, Julianus very properly says, and his opinion is approved by Marcellus, that an equitable action should also be granted against him in favor of the legatees, for he ought not to object because the act of the appointed heir prejudices him, since he also profited by it. This, however, is correct where the person who relinquishes his rights under the will did not receive any money for doing so, for he will then be liable for the entire amount.

(1) Where legacies have been left to be discharged by appointed heirs in favor of substitutes,

and the said appointed heirs as well as the substitutes have obtained possession of the estate on the ground of intestacy, after their rights under the will have been relinquished by them, the Divine Pius stated in a Rescript that the appointed heirs can honorably refuse to pay the legacies bequeathed to the substitutes; for they may very properly refuse to pay any legacy or trust to a substitute who claims it, if he was free to enter upon the estate, and to obtain all the property belonging to it without demanding the discharge of the trust.

(2) Where there are two heirs, one of whom was appointed and the other substituted, and both of them having relinquished their rights under the will obtain possession of the estate *ab intestato;* the question arises whether both of them can be compelled to pay the legacies, and whether each one of them is obliged to pay those legacies, with which he was charged, or whether both of them should pay the legacies together.

I think an action should be granted in favor of the legatees against each one of them, for the payment of all the legacies; but let us consider whether each one is obliged to pay the legacies with which he himself was charged, or also those with which the other heir was charged. Let us also suppose that the appointed heir alone was in possession of the estate: will he be liable to an action for the payment of the legacies with which he was charged, or will he be also responsible for those with which the substitute was charged?

It must be held that he will only be liable for the legacies with which the substitute was charged in case the estate should come into the hands of the heirs appointed under the will, on account of the bad faith of the substitute, where no money was paid; for if the substitute received any money, he himself should be sued.

Moreover, if the substitute alone is in possession of the estate, and the appointed heir should reject it in consideration of having received a sum of money, we say that he will be liable to his legatees, and the substitute to his own; but where no money has been paid, we will grant an action against the substitute. If, however, both parties are in possession, the better opinion is that each one will be liable to his respective legatees.

11. *Javolenus, Epistles, Book VII.*

Where the same property has been bequeathed to me to be delivered by both the appointed and the substituted heirs, and they, having relinquished their rights under the will, have possession of the estate by operation of law, the entire legacy is due to me from both of them; still, if I have obtained it from one, I cannot collect it from the other, hence I can proceed against whichever one of them I choose.

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

The question also arose in this case with respect to grants of freedom, whether it was proper that they should be conferred by both of the heirs, when the one appointed as well as the substitute were charged with their execution.

The better opinion is that both those which were direct and those which were granted in trust become operative.

(1) It is established that the heir of anyone who relinquished his rights under a will in order to obtain possession of the estate on the ground of intestacy is liable in an action brought by the legatees to recover the entire amount; for the proceeding rather has reference to the recovery of the property than the penalty, and therefore the action is a perpetual one. This, however, will not be the case if the heir is sued on account of the bad faith of the deceased, for then an action can be brought against him for the property which came into his hands.

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

Even if the heir should not come into possession of the entire estate, or a large portion of the same on the ground of intestacy, but only of a very small part of that for which he was

appointed, and also where he only holds a single article belonging to it, he will be liable under this Edict.

14. *The Same, Concerning Testaments; On the Edict of the Urban Prætor, Book II.*

Even though, properly speaking, a single article is not understood to be part of an estate.

15. *The Same, On the Provincial Edict, Book XVII.*

For this is not unjust, since the person suffers this inconvenience through his own fault,

16. *The Same, Concerning Testaments; On the Edict of the Urban Prætor, Book II.*

For since an estate can be claimed on the ground of hereditary right by a party, who is in possession of a single article belonging to it, it cannot be doubted that what we have stated is true.

17. *The Same, On the Provincial Edict, Book XVII.*

If anyone, having relinquished his rights under the will, should not be in possession of the entire estate, the legatees are excluded; for everyone should be free to reject even a profitable inheritance, even though in this way legacies and grants of freedom may be annulled. It has been provided, however, with reference to estates bequeathed in trust, that if the appointed heir should decline to accept the estate, he can be compelled to do so by order of the Prætor, and to surrender it to the beneficiaries of the trust; but this advantage is not enjoyed by those to whom separate articles have been bequeathed by way of trust, any more than it is by legatees.

18. *The Same, Concerning Testaments; On the Edict of the Urban Prætor, Book II.*

Where two appointed heirs, both having relinquished their rights under the will, obtain possession of an estate on the ground of intestacy, then, in accordance with the Prætorian Law, both will be considered as having entered upon the estate under the will, and an action will lie against each of them for his respective share.

(1) We should note that the benefit of the *Lex Falcidia* must be accorded to the heir against whom an action is granted in favor of the legatees by this section of the Edict.

19. *The Same; On the Provincial Edict, Book XVII.*

Moreover, where a patron has been appointed heir to the whole estate, and by renouncing his rights under the will obtains possession *ab intestato*, he should always be entitled to the benefit of the share which is due to him, and which he would have obtained if he had entered upon the estate by virtue of the will.

20. *Ulpianus, Disputations, Book IV.*

Where the same property was left to different persons, and both the appointed heir and the substitute were charged with its delivery, both of said legatees are not entitled to recovery, but only the one who received it from the appointed heir.

21. *Julianus, Digest, Book XXVII.*

If my son should be appointed heir by his mother, and I, having relinquished my testamentary rights, demand possession of the estate in the name of my said son, an action in favor of the legatees should be granted against me, just as if I myself had been appointed the heir, and, having relinquished my rights under the will, had obtained possession of the property of the estate on the ground of intestacy.

22. *The Same, Digest, Book XXXI.*

Where the following provision was inserted into a will: "Let Titius be my heir, and if Titius becomes my heir, let Mævius become my heir"; and Titius, having relinquished his

testamentary rights, obtains possession of the estate as heir-at-law, the petition to recover the estate should not be granted against him in favor of Mævius for the share of the estate to which he would have been entitled, if Titius had not relinquished his hereditary rights. For, as the heir obtains possession of the estate when testamentary rights are relinquished, the legacies and grants of freedom must be taken into account, since otherwise they cannot be granted except by the heir. The Prætor, however, cannot intervene where an estate is disposed of in this way, for the testator is to blame for having bequeathed a part of it under such a condition, when he could have bequeathed it absolutely.

(1) Wherefore, if the following provision was inserted into a will: "Let Titius be my heir, and if any of the above-mentioned persons whom I have appointed becomes my heir, let Stichus be free and my heir", and Titius having relinquished his rights under the will obtains possession of the estate, the Prætor cannot assure Stichus of his freedom, nor can he grant him an action for the recovery of the estate.

(2) Where anyone draws up a will as follows: "Let Titius be my heir, and if Titius should not become my heir, let Mævius be my heir, and if any of the heirs whom I have previously appointed becomes my heir, I bequeath a hundred *aurei* to Mævius, if he should not become my heir". Titius relinquished his rights under the will and obtained possession of the estate by operation of law, and the question arises whether an action for the recovery of the estate should be granted to Mævius, in whose power it was to acquire it all by entering upon the same by virtue of the substitution. It was decided that Mævius would be entitled to the action, because nothing prevented him from having a good reason for not involving himself in the affairs of the estate.

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

Where a son, who is under the control of his father, and also a daughter were appointed heir, an emancipated brother, having been passed over, obtained possession of the estate in opposition to the will. By this means the heirs acquired the estate of their father on the ground of intestacy, and paid all the legacies. The daughter, however, did not divide her dowry with her brother, as she was held to be entitled to her share of the estate as an appointed heir.

24. *Paulus, On the Edict, Book LX.*

Where a ward relinquishes his testamentary rights through the fraudulent representations of his guardian, and obtains the estate as heir-at-law, actions to recover the legacies should be granted against the ward, but only to the extent that the estate had been acquired by him. But what if he had obtained possession of the estate along with another?

(1) Many authorities think that this rule should be observed only with reference to a youth who has arrived at puberty, and that he should only be liable for the share of the estate in his possession; even though the Prætor grants an action against him just as if he had entered upon the estate.

25. *Celsus, Digest, Book XVI.*

A man for whom his own slave was substituted ordered him to enter upon the estate. If he did this for the purpose of avoiding payment of the legacies, he shall pay them all, both for the reason that he is the heir, and because having relinquished his rights under the will he has possession of the estate by virtue of the substitution, with the exception of the portion reserved by the Falcidian Law.

26. *Papinianus, Questions, Book XVI.*

Julianus says that where a father ordered his daughter, who had been appointed a substitute for himself, to accept an estate; he will, by the terms of the Edict, be compelled to pay the legacies with which he was charged, since his daughter was substituted instead of her father, and the latter was not given the right of choice. Where, however, the different legacies

amount to more than three-quarters of the estate, an account must be taken, in the first place, of those with which the daughter was charged, for fraud will be imputed to the father, if, having rejected the honor conferred upon him, he prefers the appointment of another as heir, on account of the benefit which may accrue to him therefrom.

(1) Julianus thinks that if a father who is substituted for his daughter enters upon an estate, he will not be guilty of bad faith, for no one is considered to have substituted a father for his daughter against the will of the parent, but in order that he might have the power of making his choice.

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

Where a mother is substituted for her son under the age of puberty, there is ground for the application of the Edict, if, having relinquished her testamentary rights, she obtains possession of the estate of her son by operation of law. The same rule applies if she should be appointed the heir and also the substitute of her son.

(1) A brother is not considered to come within the terras of the Edict, so far as the legacies are concerned, who did not emancipate his son who had been substituted for a boy under the age of puberty by the will of his brother; but he will obtain possession of the property of the estate through him on the ground of intestacy.

(2) An action in favor of the legatees will be granted by the decree of the Prætor against a party who was not appointed testamentary heir, if he participated in a fraudulent agreement with the appointed heirs in order to obtain sole possession of the estate by operation of law.

28. *Marcianus, Trusts, Book IV*.

Where a master sells a slave whom he had appointed his heir, and who himself had been charged with a trust, and he does this before he orders him to enter upon the estate, he should discharge the trust, because by obtaining the price of the slave he also obtained the value of the estate.

(1) Where a party is appointed heir and is requested to deliver the estate, and having relinquished his testamentary rights, obtains possession of the estate by operation of law, there is no doubt that he can be compelled to surrender the estate, and also the legacies and other property left in trust, as well as execute any grants of freedom direct, as well as indirect. Where, however, he is charged to manumit slaves belonging to others, he should redeem them, and he to whom the estate was surrendered, as well as he who surrenders it, must both share the loss.

29. *Ulpianus, Trusts, Book V*.

Where anyone, having relinquished his rights under the will, obtains possession of an estate on the ground of intestacy, he must bestow freedom on the slaves, nor can this act of him who declines to take under the will injure them, as they become his freedmen.

30. *Hermogenianus, Epitomes of Law, Book III.*

Where an heir, having relinquished his rights under the will, obtains possession of the estate as a purchaser, or on account of a dowry, or by way of donation, or by any other title except that of heir or possessor, he will not be liable to an action brought by the legatees.

TITLE V.

CONCERNING THE SILANIAN AND CLAUDIAN DECREES OF THE SENATE BY THE PROVISIONS OF WHICH WILLS CANNOT BE OPENED.

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

As no household can be safe unless slaves are compelled, under peril of their lives, to protect

their masters, not only from persons belonging to his family, but also from strangers, certain decrees of the Senate were enacted with reference to putting to public torture all the slaves belonging to a household in case of the violent death of their master.

(1) A person is included in the appellation of master who possesses the ownership of the slaves, even though the usufruct of the same may belong to another.

(2) Where anyone is in possession of a slave in good faith, but who is, in fact, free, he is not included in the appellation of master; nor is he, either, who has only the usufruct of a slave.

(3) A slave given by way of pledge is, so far as the death of the debtor is concerned, in every respect considered as if he had not been pledged.

(4) Those also are included in the appellation of slaves, who are bequeathed under a certain condition; for in the meantime they belong to the heir, and as, when the condition is fulfilled they cease to belong to him, it follows that meanwhile they should not be held to constitute part of his property. The same rule must be said to apply to the case of a slave who is to be free under a certain condition.

(5) A Rescript of the Divine Pius to Jubentius Sabinus is extant which has reference to a slave whose unconditional freedom was due under the terms of a trust; from which it is evident that too much haste should not be employed in the torture of a slave who is entitled to his freedom under a trust, and the better opinion is that he should not be punished, for the reason that he lives under the same roof with the testator, unless he participated in the crime.

(6) It must be said that he who has only a share in the ownership of a slave is also included in the appellation of master.

(7) Sons under paternal control, and other children who are in the power of their father, are also included in the appellation of master; for the Silanian Decree of the Senate not only refers to the heads of families, but also to the children.

(8) But what shall we say if the children are not subject to the authority of their father? Marcellus, in the Twelfth Book of the Digest, expresses uncertainty on this point. I think that the most liberal construction should be given to the Decree of the Senate, so that it may also include children who are not under paternal control.

(9) We do not think that the Decree of the Senate is applicable to the case of a son who has been given in adoption, even though it may apply to an adoptive father.

(10) The Decree of the Senate does not apply where a youth who is being reared is killed.

(11) Torture shall not be inflicted upon the slaves of a mother, where a son or a daughter have been killed.

(12) Scævola very properly says that where a father has been captured by the enemy, and his son is killed, the slaves of the father should be put to the torture and punished. He approves of this also being done, even after the death of the father, if the son was killed before he became the proper heir.

(13) Scævola also says that it may uniformly be maintained, where a son has been appointed heir and is killed before entering upon the estate, that the slaves can be put to the torture and punished, even if they have been unconditionally bequeathed or manumitted. For although even if he had lived and had become the heir, the slaves would not belong to him, therefore when he died, as both the legacies and the grants of freedom will be extinguished, he holds there is ground for the application of the Decree of the Senate.

(14) If the father is killed, should torture be inflicted upon the slaves of the son, if they form part of the *castrense peculium?* The better opinion is that the slaves of the son should be put to the torture, and subjected to punishment, even though the son is not under the control of his

father.

(15) In the case of murder of a man and his wife, torture should be inflicted upon their slaves, although, properly speaking, the slaves of the husband do not belong to the wife, nor her slaves to him, but, for the reason that the two sets of slaves are commingled, and there is but one household, the Senate decreed that punishment should be inflicted, just as if the slaves belonged equally to both of them.

(16) But where the wife or the husband was killed, the Senate did not decree that the slaves of the father-in-law should be put to the torture. Marcellus, however, very properly says, in the Twelfth Book of the Digest, that what has been determined with reference to the slaves of the husband also applies to those of a father-in-law.

(17) Labeo states that those are understood to be included in the term "killed" who have been put to death by violence, or murdered; for instance, by having their throats cut, by being strangled, or thrown down from some height, or struck with a stone or a club, or deprived of life by the use of any other kind of weapon.

(18) Where a man is killed, for instance, by poison, or by some other agency which it is customary to employ secretly, this Decree of the Senate will not apply to the avenging of his death; for the reason that slaves are punished whenever they do not assist their master against anyone who is guilty of violence towards him, when they are able to do so. But what could they effect against those who insidiously make use of poison or any other method of this kind?

(19) It is evident that the Decree of the Senate will be applicable where poison is forcibly administered.

(20) Therefore, whenever such force is employed as usually causes death, it must be held that there is ground for the application of the Decree of the Senate.

(21) But what if the master was killed by poison, and not by violence, will the deed go unpunished? By no means. For although the Silinian Decree of the Senate may not apply, nor torture and punishment be inflicted upon those who are under the same roof, still, any who knew of the crime or were participants in it must be subjected to punishment, and the estate can be entered upon, and the will opened, even before torture is inflicted.

(22) Where a person lays violent hands upon himself, there is indeed no ground for the application of the Decree of the Senate; still, his death should be avenged. For example, if he committed the act in the presence of his slaves, and they could have prevented it, they should be punished, but if they were unable to prevent it, they will be free from liability.

(23) Where anyone lays violent hands upon himself, not through remorse for some crime which he has committed, but through being weary of life, or unable to suffer pain, the manner of his death does not prevent his will from being opened and read.

(24) It should also be noted that, unless it is established that a man has been killed, his slaves ought not to be tortured. Hence, it must positively be ascertained that the party owed his death to crime, for the Decree of the Senate to be applicable.

(25) We, however, understand the term torture to mean not merely being put to the question, but every inquiry and defence that may be made in the investigation of the death of the master.

(26) Again, this Decree of the Senate punishes, without exception, all those slaves, "Who live under the same roof"; but such as are not under the same roof, but in the same neighborhood, shall not be punished, unless they have knowledge of the crime.

(27) Let us consider what must be understood by the term "under the same roof"; whether it means within the same walls, or outside, within the same enclosure, within the same

apartment, or the same house, or the same garden, or the entire residence. Sextus says that it has often been decided that wherever slaves were if they could have heard the voice of their master, they shall be punished just as if they has been under the same roof; although some persons have louder voices than others, and all cannot be heard from the same place.

(28) With reference to this, it appears that the Divine Hadrian also stated the following in a Rescript: "Whenever slaves can afford assistance to their master, they should not prefer their own safety to his. Moreover, a female slave who is in the same room with her mistress can give her assistance, if not with her body, certainly by crying out, so that those who are in the house or the neighbors can hear her; and this is evident even if she should allege that the murderer threatened her with death if she cried out. She ought, therefore, to undergo capital punishment, to prevent other slaves from thinking that they should consult their own safety when their master is in danger."

(29) This Rescript contains many provisions, for it does not spare anyone who is in the same room, and does not excuse a slave who fears death, and requires slaves to summon aid to their masters by crying out.

(30) Where a master is killed while on one of his estates in the country, it would be extremely unjust if all the slaves who are in that neighborhood should be subjected to torture and punishment, if the said estate is very large. It will then be sufficient for those to be put to the torture who were with him when he was said to have been killed, and who appeared to be liable to suspicion of having committed the murder, or of having knowledge of it.

(31) Where a master was murdered while on a journey, the slaves who were with him at the time he lost his life, or those who had been with him and took to flight, should be subjected to punishment. If, however, no one was with him at the time he was killed, these Decrees of the Senate do not apply.

(32) A male or a female slave who has not yet reached the age of puberty is not included in this category, for their age is deserving of excuse.

(33) Shall we grant a slave, who has not yet attained puberty, indulgence merely with reference to punishment, or does this also relate to torture? The better opinion is that torture should not be inflicted upon a slave under the age of puberty; and, besides, it is the custom ordinarily observed that minors shall not be put to the torture, but only be frightened, or be whipped with a rod, or a leather thong.

(34) Slaves are excused who have obtained aid without fraudulent intent; for if one should pretend to be of assistance, or should bring it merely for the sake of appearance, this will be of no advantage to him.

(35) A slave is considered to have rendered assistance to his master not only when he has preserved him from harm, that is to say, when he could have exerted his power to the extent of saving him, but also when, although he did all that he could, he was unable to prevent his master from being killed; for example, where he cried out for the purpose of obtaining aid, or frightened the persons who were attacking his master, or if he assembled a crowd of people, or interposed his body between them and his master, or afforded him protection in any other way by means of his body.

(36) A slave who cries out is not, however, always considered to have aided his master; for what, if when he could have averted the danger from him, he chose to cry out in vain? He should undoubtedly be punished.

(37) But what if the slaves should be wounded while they are protecting their master? It must be said that they should be excused unless they inflicted wounds upon themselves purposely in order to avoid being punished; or if they did not receive wounds sufficiently serious to prevent them from still assisting their master, if they had desired to do so.

(38) Where the master, being mortally wounded, survives for a certain time, without complaining of any of his slaves, even if they should be under the same roof with him, they must be spared.

2. *Callistratus, Concerning Judicial Inquiries, Book V*.

The Divine Marcus Commodus stated in a Rescript to Piso the following: "Since it has been proved before you, my dear Piso, that Julius Donatus, after having been alarmed by the approach of robbers, took refuge in his country-house, and was wounded, and afterwards, having executed a will, manifested his affection for his slaves, neither his regard for them, nor the solicitude of the heir should allow punishment to be inflicted upon those whom the master himself has absolved".

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

Where a slave who was suffering from serious illness could not render his master assistance, he must be granted relief.

(1) If anyone while dying says that he was killed by his slave, it must be held that the master should not be believed, if he made this statement at the point of death, unless it can otherwise be proved.

(2) If a husband should kill his wife, or a wife should kill her husband at night, while they were together in their bedroom, the slaves will not be liable to punishment under the Decree of the Senate; but if they heard cries, and did not render assistance, they shall be punished, not only if they belong to the wife, but also if they belong to the husband.

(3) Where, however, a husband kills his wife caught in the act of adultery; for the reason that he himself is excused, it must be held that his slaves, as well as those of his wife, are free from liability, if they did not resist their master while seeking just reparation for a grievance.

(4) Where several masters, owning a slave in common, are attacked, and the slave only assists one of them, shall he be excused, or, indeed, shall he be punished for not assisting all of them? The better opinion is, that he should be subjected to punishment, if he could have assisted all of them, but only assisted one. If, however, he could not assist all at the same time, he must be excused, because he only afforded aid to one, for it would be harsh to claim that where a slave could not protect two of his masters, that he was guilty of crime for having chosen to protect but one of them.

(5) Wherefore, if a slave belonging to the wife should assist her husband rather than his mistress, or *vice versa*, it must be said that he ought to be excused.

(6) Those slaves must be excused who, at the time their master or mistress was killed, were shut up without bad faith on their part, so that they could not break out for the purpose of rendering assistance, or of seizing those who committed the murder. Nor does it make any difference by whom they were shut up, provided this was not done on purpose to prevent them from bringing aid. We understood the term "shut up" also to mean where they are bound, provided they have been bound in such a way that they cannot release themselves, and render assistance.

(7) Those also are excused who are incapacitated on account of age.

(8) A deaf slave also should be included among those who are infirm, or who do not live under the same roof; because as the latter cannot hear anything on account of the distance, so the former can hear nothing on account of his affliction.

(9) A blind slave also deserves to be excused.

(10) We must likewise except a dumb slave, but only where he could render aid by means of his voice.

(11) There is no doubt whatever that slaves who are insane should be excepted.

(12) Where anyone knowingly receives, or conceals through fraud a male or a female slave who belonged to the deceased, and who is liable to punishment on account of not having assisted him when the crime was committed, he is in the same position as if he had been guilty of the crime as prescribed by the law enacted with reference to assassins.

(13) Where a slave is due by reason of a stipulation, and discloses who committed the murder of his master, and on this account is directed to be free by way of reward, an action based on the stipulation shall not be granted to the stipulator, for it would not be granted if the slave had been subjected to punishment. Where, however, the slave did not live under the same roof with his master, an equitable action based on the stipulation will be granted to the creditor to recover the estimated value of the slave.

(14) But does this only apply to a slave who seems to have indicated or proved who committed the crime, if he did this voluntarily; or shall he also be included who, when he was accused, threw the responsibility of the crime upon another? The better opinion is, that he is entitled to the reward who voluntarily came forward with the accusation.

(15) Those slaves also, who otherwise would be unable to obtain their freedom, for instance, where they have been sold on condition that they will never be manumitted, can become free by an act of this kind, because it is conducive to the public welfare.

(16) Punishment must also be inflicted upon slaves who have been manumitted by will, just as upon other slaves.

(17) Torture and punishment must also be inflicted upon any slaves who, before the will of their murdered master or mistress has been opened, take to flight, and who afterwards, when the will is opened are found to have been left their freedom, just as upon other slaves. For it is perfectly just that the kindness of their masters should not stand in the way of their being avenged, and the more the slave has enjoyed their favor, the more serious punishment he deserves for his crime.

(18) It is provided by the Edict that where anything has been bequeathed by will by the person who is said to have been killed, no one who is aware of this shall open, read, or copy the will, before the slaves have been tortured and punishment is inflicted upon the guilty, in compliance with the Decree of the Senate; otherwise he will be guilty of bad faith.

(19) He is considered to have opened a will who opens it in the ordinary way, whether it is sealed, or not fastened with a cord, but merely closed.

(20) We must understand the term "to open", to mean that we are forbidden to open the will in the presence of anyone, or publicly, or secretly; for every kind of opening is prohibited.

(21) Where anyone who did not know of the murder opens a will he should not be held liable under this Edict.

(22) And if he should be aware of the death of the testator, but does not open the will in bad faith, he will also not be liable, or if he does this through inexperience, or through rusticity is not aware of the existence of the Edict of the Prætor, or the Decree of the Senate.

(23) Where anyone does not open a will in the ordinary way, but cuts the cord with which it is tied, he will be excused, because he is not guilty of bad faith who does not open the will itself.

(24) Where, not the entire will, but only a portion of the same, is opened, it must be said that the person who opens it comes within the terms of the Edict, for it makes but little difference whether the entire will, or only a part of it, is opened.

(25) Where anyone opens a codicil, but does not open the will, he becomes liable under the Edict, because the codicil forms a part of the will.

(26) There is ground for the enforcement of the Edict whether the will that is opened is valid, or not.

(27) The same rule applies to those matters which relate to the substitution, where a male or a female minor is alleged to have been killed.

(28) When one person opens a will, and another reads it publicly, and a third copies it, all of those who did these things separately will be liable under the Edict.

(29) This Edict has reference not only to testamentary estates but also to intestate successions, in order to prevent anyone from entering upon the estate, or demanding prætorian possession of property belonging to the same, before torture has been inflicted upon the slaves, lest an heir might conceal the crime of his slaves for his own advantage.

(30) Scævola very properly says that anyone will transmit to his heir the right to bring prætorian actions if he should happen to die before entering upon the estate, and it should be ascertained that he did not do so because he feared to become liable under the Decree of the Senate and the Edict.

(31) If I should order a condition to be complied with between a certain day and the time of my death, and the heirs do not comply with it through ignorance, and, for the reason that such ignorance existed, the will could not be opened without incurring the penalty of the Decree of the Senate; relief should be granted to the heirs to enable them to fulfill the condition.

(32) Where any other impediment than fear of violating the Decree of the Senate exists to prevent entrance upon the estate or opening of the will, that arising from the Decree of the Senate, if there is any other, will be of no advantage to the heir; as, for instance, if the wife of the murdered man was pregnant, or was even supposed to be in that condition, and for this reason the appointed heir could not enter upon the estate.

4. *Papinianus, Opinions, Book VI.*

A man appointed his posthumous children his heirs, and, in case none should be born, substituted his wife, and he was said to have been killed by his slaves, and his wife died; the woman's heirs petitioned that the estate should be given to them by virtue of the substitution. I gave it as my opinion that they should only be heard if the wife was proved not to have been pregnant, and declined to enter upon the estate on account of the Decree of the Senate. If, however, she should die while pregnant, no complaint could be made that any injury had been done to them.

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

I think that necessary heirs are included in the Edict, if they interfere in the business of the estate.

(1) The Prætor does not permit the possession of the estate to be demanded under these circumstances; and I think that the Edict applies to all prætorian possession.

(2) Property belonging to an estate shall not be confiscated, unless it is established that the head of the household was killed, and that the heir entered upon the estate before the slaves were put to the question, and punished.

(3) Where anyone dies through neglect, or through the treachery of a physician, his estate can be entered upon; but the duty of avenging his death devolves upon the heir.

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

Even if the murderer should be well known, torture must still be inflicted, in order that the instigator of the crime may be detected. Moreover, the murderer himself shall, by all means, be put to the question, and the other slaves also punished.

(1) Although slaves shall not be tortured except where their master is accused of a capital crime; still, torture can be properly inflicted even if the heir is accused, whether he be a foreign, or the proper heir.

(2) Where one of two masters does not appear, the slaves held in common shall be put to the question to ascertain what has happened to him; for they are tortured to ascertain something with reference to the fate of the master who does not appear, rather than to avenge his death, or to obtain information which may implicate the master who is present in a capital crime.

(3) Where a master has been attacked, but not killed, nothing is provided by the Decree of the Senate, for he himself can punish his own slave.

7. *The Same, On the Silanian Decree of the Senate*.

And in this instance, he will enjoy an extraordinary privilege with reference to his freedman.

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

It is provided by the Pisonian Decree of the Senate that: "Where a slave is liable to some penalty and is about to be punished, the vendor shall refund the price paid for him to the purchaser;" which was enacted by the Senate to avoid any injury being done to the purchaser.

(1) Where a son under paternal control, who has made a testamentary disposition of his *castrense peculium*, is killed, it should undoubtedly be maintained that under these circumstances the estate of the deceased will belong to the Treasury, if his heirs have entered upon his estate, and did not avenge his death; just as in a similar instance, the estate of the head of a household will also be forfeited.

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

When the property of a deceased person is confiscated by the Treasury because his death was unavenged, an action is granted against it in favor of the legatees, and all grants of freedom to slaves shall be perfected; that is to say, of such as are excepted from the provisions of the Decree of the Senate.

10. *Paulus, On the Silanian Decree of the Senate*.

Where a disinherited son is killed before the estate of his father has been entered upon, consideration must be paid to what takes place, so that, if the estate is accepted, the slaves will not be held to belong to another; but if the will should become void, measures must be taken just as if the son had been their master, because they would have belonged to him if he had lived.

(1) It was established by a Constitution of the Divine Trajanus that freedmen whom the deceased had manumitted could be put to the question.

11. *Tryphoninus, Disputations, Book II*.

The same rule will apply to those who have obtained the right to wear rings.

12. *Paulus, On the Silanian Decree of the Senate*.

Where a slave has been bequeathed by a testator who was murdered, and the Prætor decides that he was entitled to his freedom by way of reward, it must be said that his freedom cannot be prevented.

13. *Venuleius, Saturninus, On Public Prosecutions, Book II*. During the Consulate of Taurus and Lepidus, the term of five years was established by a Decree of the Senate for the institution of criminal proceedings, where the will of a man who was said to have been killed by his slaves had been opened contrary to the Decree of the Senate, which provision, however, only applies to strangers; for, by the same Decree of the Senate, those who are liable to punishment for parricide can always be accused without reference to lapse of time.

14. *Marcianus, On Public Prosecutions, Book XL*

Slaves who have not reached the age of puberty are excepted from the operation of the Silanian Decree of the Senate. The deputy, Trebius Germanus, however, ordered punishment to be inflicted upon a slave under the age of puberty; and this was not without reason, because the boy was very little under that age, and was sleeping at the feet of his master at the time when he was killed, and did not afterwards disclose that he had been murdered. As it was proved that he was unable to have assisted him, it was also certain that he afterwards kept silent; and it was held that boys under the age of puberty could only be excused from liability under the Decree of the Senate, where they had merely been under the same roof with their master, but where such slaves had been the principals or accomplices in the crime, and were of such an age as to understand what they were doing (even though they may not have reached the age of puberty), they should not be excused from responsibility for the murder of their master any more than for anything else.

15. *Marcianus, On Informers*.

Where substitutes avenge the death of the testator, shall the estate be transferred to them? Papinianus says that it should not, for the penalty of the first degree ought not to be the reward of the second.

(1) Where a legacy was bequeathed to an heir appointed to a portion of the estate, and he failed to avenge the death of the deceased, the Divine Severus and Antoninus stated in a Rescript that he should be deprived of the share of the estate which had been bequeathed to him.

(2) Estates bequeathed by will, as well as those derived from intestate succession, must be taken away from heirs who have been derelict in avenging the death of the deceased (even if they appear as patrons), although they may be entitled to the succession as direct heirs.

16. *Marcellus, Digest, Book XII*.

Where a master was killed by one of his slaves, and a slave who was owned in common by the deceased and another party detected the criminal, he should be liberated on account of the favor due to freedom, but the partner should be paid his share of the value of the slave.

17. *Modestinus, Rules, Book VIII*.

The slaves should first be put to the torture, and if they confess should then be interrogated, in order that it may be ascertained at whose instigation they committed the crime.

18. *The Same, Rules, Book IX*.

It is not forbidden to complain of an inofficious testament, and to avenge the death of the defunct at the same time. Paulus rendered this opinion.

19. *The Same, Pandects, Book VIII*.

When a master is attacked, his slaves should attempt to assist him with arms, and with their hands, with cries, and with the interposition of their bodies. If anyone should not offer assistance when he is able to do so, he shall deservedly be subjected to punishment for this reason.

20. *Papinianus, Opinions, Book II*.

An heir, who is instituting a prosecution for poisoning, is not forbidden to transact urgent business relating to the estate, if he preserves all evidence and proofs of the crime.

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

The time for demanding the possession of the property of an estate shall not be delayed on account of any question arising out of the poisoning; and the claim may properly be made

while the proof of the crime is still in abeyance. The Senate determined otherwise where a master was said to have been killed by his slaves, because as it was necessary that the freedom of said slaves should not be granted them at once, in order that they might be put to the torture.

A granddaughter, who had demanded possession of the estate of her grandmother, being aware that she had been killed, did not avenge her death. It was held that a trust which the grandmother owed to her granddaughter, by virtue of the will of another, should not be deducted from the estate of the grandmother, when it was confiscated by the Treasury, for the bad faith of the heir must be punished.

(1) If, however, the woman had lost the benefit of the bequest through mere negligence, it is just that the trust should be deducted, the right of the obligation remaining unimpaired.

(2) Where persons guilty of murder have been discharged through the injustice of the Governor, it is held that the heirs should not be deprived of the estate if they have properly discharged their duty, even though they may not have appealed from the decision.

22. *Paulus, Opinions, Book XVI.*

Gaius Seius, while in a feeble condition, complained that he had been poisoned by his slaves, and then died. His sister, Lucia Titia, became his heir, and after his death neglected to prosecute his murderer. She herself died ten years afterwards, and someone gave notice that the estate of Gaius Titius was liable to forfeiture. I ask whether the criminal prosecution was extinguished by the death of Titia. Paulus answered that, in the case stated, it did not appear to be extinguished by the death of the ungrateful heir, as a pecuniary penalty was involved.

23. *Marcianus, Concerning Trusts, Book XIII.*

If a will should be opened before it was known that the testator had been killed, and then the crime should be ascertained to have been committed, I think that, where proper cause is shown, the appointed heir should be compelled to enter upon the estate which he declared was insolvent, and make restitution in accordance with the Trebellian Decree of the Senate.

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

Where anyone is compelled to enter upon an estate which he has reason to suspect of being insolvent, he will not be liable under the Edict.

25. *Gaius, On the Provincial Edict, Book XVII.*

It is provided by the Cornelian Law with reference to the reward to which an accuser is entitled who seeks out and gives information of the whereabouts of slaves who have fled before torture was applied, that he shall receive five *aurei* out of the estate of the deceased for each slave that he convicts, or if this sum can not be obtained from that source, it shall be paid out of the Public Treasury. This reward shall not be given for the apprehension and conviction of every slave who was under the same roof and in the same place with the deceased, but only for those who are found guilty of the murder.

(1) It is also provided with reference to those slaves who fled before torture was applied, that if, after the will has been opened, it should be found that they were granted their freedom thereby, judgment shall be rendered in accordance with the law relating to assassins: so that they cannot defend themselves after having been imprisoned, and that if they are convicted, they shall be punished just like slaves, and ten *aurei* shall be taken out of the estate, by way of reward, and given to the party who convicted them.

(2) Proceedings are instituted under this Edict against a person who, contrary to the provisions of the Edict of the Prætor, is said to have opened the will, or to have committed some other act, in violation of them; for (as in evident from what has been previously stated) there are many things on account of which the penalty prescribed by the Edict can be imposed.

It is clear that this action is a popular one, and its penalty is a hundred *aurei* to be taken from the property of the person who is convicted; and the Prætor promises that half of said sum shall be given by way of reward to him by whose efforts the criminal was found guilty, and the other half shall be turned into the Public Treasury.

26. *Scævola, Digest, Book XXXIV*.

Gaius Seius owed Titius property under a trust established by the will of his cousin, and Titius received it from the heirs of Seius. The question arose, as the heirs of Gaius Seius did not avenge his death, whether Titius could, nevertheless, accuse these heirs as being unworthy to obtain the estate, because they had not avenged his death; and whether the fact that he had received from them the trust to which he was entitled under the will of his cousin, the deceased, would not stand in his way. The answer was that, in accordance with the facts stated, there was no reason that it should be considered an obstacle.

27. *Callistratus, On the Rights of the Treasury, Book I.*

Where there are several heirs, and the will is opened against the consent of some of them, or without their knowledge, those who are free from blame will not lose their shares of the estate.

TITLE VI.

WHERE ANYONE PREVENTS ANOTHER FROM MAKING A WILL, OR COMPELS HIM TO MAKE ONE.

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

The Divine Hadrian decreed that if anyone, while endeavoring to obtain possession of an estate to which he was entitled either by descent or by will, should prevent a person from entering, who had been sent for, either to draw up a will which the testator desired to execute, or to change one already made, he shall be denied the right to bring any action, and when this is done, the Treasury will be entitled to the estate.

(1) Where a master acting in bad faith prevents a will from being changed by which his slave had been appointed heir, even though, having been manumitted, the latter should enter upon the estate, he shall be denied all rights of action, and his children, if anything has been left to them, shall also lose their rights, even though they are not under his control. Where, however, a legacy has been left to the master in trust, and he is requested to pay it, it must be said that he can receive the legacy, since he himself is not entitled to it, but it must be transferred to another.

(2) Where several heirs have been appointed, and all of them are guilty of bad faith in preventing a will from being changed, it must be said that rights of action shall be refused all of them, because all have acted fraudulently.

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

Where anyone acts in bad faith in order to prevent the appearance of witnesses to a will, and by this means the power of making the will is lost, all rights of action shall be refused to the party responsible for the fraud, whether he is the heir-at-law, or was appointed under a former will.

(1) The act of a brother, however, under these circumstances, does not injure his brother.

(2) Where he who committed the fraudulent act was charged with the transfer of the estate, it will be forfeited with all liabilities, so that the Treasury will obtain the benefit of the Falcidian Law, and the beneficiary of the trust will receive three-fourths of the estate.

3. *Papinianus, Opinions, Book XV*.

Where a husband does not, by employing either force or fraud, interfere to prevent his wife from changing, by means of a codicil, a will which she had made in his favor but (as often happens), merely attempts to appease the anger of his wife by marital remonstrances; I gave as my opinion that he was not guilty of any offence, and should not be deprived of what had been given him by the will.

TITLE VII.

CONCERNING THE LAW OF CODICILS.

1. *Ulpianus, Disputations, Book IV.*

It has very frequently been set forth in Rescripts and Imperial Constitutions, that where a testator was under the impression that he had made a will (but which was void as such), and did not intend it to be valid as a codicil, he is held not to have executed a codicil. Therefore, whatever is included in a will of this kind will not be due, although it would have been if included in a codicil.

2. *Julianus, Digest, Book XXXVII.*

Where a child is born after a will has been executed, and before a codicil is written, and anything is left to it in trust by the codicil, it will be valid.

(1) If, however, he to whom anything was given should die after the execution of the will, and before the codicil in which the bequest is made is executed, it will be considered as not having been written.

(2) A rule peculiar to a codicil is that whatever is included in it shall be considered to have the same effect as if it had been included in the will. Hence freedom is not legally granted to a slave who, at the time of the execution of the will, was the property of the testator, but, when the codicil was executed, belonged to another.

And, on the other hand, if the slave belonged to another at the time that the will was made, and at the time of the execution of the codicil had become the property of the testator, freedom is then understood to have been granted to a slave belonging to another; and therefore, although it cannot be directly bestowed, still recourse can be had to a trust.

(3) An insane person is not understood to have the power to make a codicil, for the reason that he is not considered to be competent to perform any other act; since, in the transaction of every kind of business, he is held to be in the position of one who is absent, or who takes no part in the transaction.

(4) Where an estate is fruitlessly bequeathed by a will, it cannot be confirmed by a codicil, but it can be claimed under a trust, with a reservation of the amount granted by the *Lex Falcidia.*

3. *The Same, Digest, Book XXXIX.*

Where anyone who has not made a will establishes a trust, by means of a codicil, as follows: "Whoever shall be my heir, or the prætorian possessor of my estate, I leave to him as trustee," the sums left under the trust must be paid, because the head of the household who had the power to make a will, and made a codicil, is in the same position as if all those were his heirs into whose hands the estate will come either through descent or through possession under praetorian law.

(1) Where a child is born after the execution of a codicil, and it is the next of kin, or the direct heir, it will not be obliged to pay any sums left in trust, for it is also understood to be the appointed heir, and therefore it should not be considered as having broken the codicil.

(2) Where a will has been made, even if a codicil should not be confirmed by it, the codicil will, nevertheless, obtain all its force and effect from the will. Again, if the estate is not entered upon by virtue of the will, a trust created by a codicil of this kind will be of no

validity whatever.

4. *The Same, Digest, Book LXIII.*

It has been decided that a testator who was solvent at the time of making a codicil can legally grant freedom to his slaves, although he may not have been solvent at the time when the will was executed.

5. *Papinianus, Opinions, Book VII.*

A codicil which precedes a will is not valid unless confirmed by the will or by a second codicil subsequently executed, or where its provisions are established by some other expression of the intention of the testator; but any different dispositions that the deceased may subsequently make shall not stand.

6. *Marcianus, Institutes, Book VII.*

The Divine Severus and Antoninus stated in a Rescript, where a mother appointed her children her heirs absolutely, but, in a codicil, added a condition of emancipation, that her act was void; because she could not impose a condition upon an heir who had been appointed, or directly make a substitution under a codicil.

(1) Anyone can make several codicils, and it is not necessary for him to write or seal them with his own hand.

(2) Although, in the confirmation of a codicil, the head of a household may have added that it was not his intention that it should be valid, unless it was sealed and signed with his own hand; still, the codicil made by him will be valid, even if it had neither been signed nor sealed with his own hand, for subsequent dispositions annul those which precede them.

(3) He only can make a codicil who is competent to make a will.

(4) If anyone, by a codicil, should bequeath a legacy to a person who died after he had made his will, the bequest will be considered as not having been made, even though the codicil may have been confirmed by the will.

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

There are certain dispositions which do not relate to the confirmation of codicils; as, for instance, where anyone confirms a codicil before being taken prisoner, and writes a codicil while in captivity, for such a codicil will not be valid.

The same rule applies where a person in some way or other ceases to possess testamentary capacity.

(1) Moreover, in questions which are rather those of fact than of law, what is included in a codicil is not to be considered as if it had been written at the time when the codicil was confirmed; for example, if it should be stated in the codicil, "That such-and-such a garment which belongs to me is bequeathed", the time that the codicil was written, and not that when it was confirmed, should be considered. Again, if a bequest is made to Seius by a codicil as follows, "If Titius is living", or "If he is so many years old", the date of the codicil, and not that of the will, should be considered.

8. *Paulus, On the Law of Codicils.*

Codicils are drawn up in four ways: for they are either to be confirmed in the future; or have been confirmed in the past; or they are made by means of a trust, where a will has been executed; or where there is no will.

(1) Those who succeed to an estate *ab intestato* can be charged with a trust, as it is considered that the deceased has voluntarily left them the estate to which they were entitled by law.

(2) A codicil is valid whenever the party who executed it was competent to make a will. But it must not be understood that we require him to have been competent to make a will at the time when he wrote the codicil. (For what if he was unable to obtain a sufficient number of witnesses?) It is indispensable, however, for him to have had the legal right to make a will.

(3) If anyone, by his will, should confirm a codicil to be made hereafter, and then offer himself to be arrogated, and afterwards make a will, and die emancipated; the question arises whether the legacies bequeathed by the codicil should be paid, as the will is valid ? He, however, executed the codicil at a time when he did not have testamentary capacity; and this case is not similar to that of a dumb person, who can legally confirm a codicil; for, although he is not competent to make a will, still one which he made before he became dumb remains in the same condition; but the will of this party is void, and, he is in a certain way disposing of the property of others by means of it.

We hold, however, that the codicil is valid, for even if the birth of a posthumous child should break the will, and it should afterwards die, the codicil will still be valid.

(4) Where a soldier executes a will before entering the army, and executes a codicil after his enlistment, the question arises whether the codicil will be valid under military law, since a will made under such circumstances is valid by the Common Law only where the soldier did not seal it, or make some addition to it during the term of his military service. It is certain that the codicil made during military service should not be referred back to the will in order to establish its validity, but is valid by military law.

(5) Where freedom is granted by a codicil to a slave who had also received a legacy by will, we say that the legacy is valid, just as if it had been so from the beginning.

(6) Where anyone confirms a codicil of a certain kind, for instance, "the one which I shall execute last", the provisions contained in any codicil will not be considered to be valid immediately, so long as others can be made; and therefore if others should be made subsequently, all grants of legacies by former ones will be void.

9. *Marcellus, Digest, Book IX.*

Aristo denies that a codicil is valid where it is made by a person who was ignorant as to whether or not he was the head of the family. Ulpianus states in a note, "Unless he had served in the army, for then his will will be valid".

10. *Papinianus, Questions, Book XV.*

The opinion that an estate cannot be bequeathed by a codicil has been handed down from former times, and the reason for this is to prevent the will, which obtains all its force from the appointment of the heirs, from appearing to be confirmed by means of a codicil, which itself is dependent upon the will for its validity.

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

A certain man who was not aware that his wife was pregnant, in a codicil directed to his son, liberated some of his slaves. After the death of the father, a daughter was born to him, and as it was established that her father had not had her in his mind at any time, it was held that the grant of freedom should be made by the son alone:

12. *The Same, Questions, Book XXII.*

After the sister had been reimbursed for her share of the slaves.

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

For it can undoubtedly be maintained that the daughter could not be compelled to manumit the slaves, since her father requested nothing of her, and she becomes an heir in her own right.

(1) The point is often discussed as to what conclusion should be reached, where a man did not make a will, but stated in a codicil: "I wish Titius to be my heir". It makes a great deal of difference whether he left the estate in trust in charge of his lawful heir, by means of this instrument, which he intended for a codicil, or whether he thought that he was making a will, for, in this case, Titius could claim nothing from the lawful heir.

The intention of the party in question is generally ascertained by the examination of the instrument itself. For if he left a legacy to be discharged by Titius, and appointed a substitute for him, if he should not be the heir, there is no doubt that he should be understood to have intended to make a will, and not a codicil.

14. *Scævola, Questions, Book VIII.*

Certain authorities hold (as I recollect) that in Vivianus a controversy is explained which arose between Sabinus, Cassius, and Proculus with reference to the question whether legacies given, or taken away by a codicil from persons who died after they were appointed heirs, were due to the substitutes; that is to say, whether the giving or the taking away of the legacies was as valid where they were provided for by a codicil, as they were when provided for by a will. It is said that Sabinus and Cassius answered that this was the case, and that Proculus dissented. The conclusion of Sabinus and Cassius, (as they themselves assert) is that the codicil is considered as part of the will, and that it sustains the observance of the law with reference to the delivery of the property. Still, I venture to say that the opinion of Proculus is the more correct; for a legacy is of no force or effect which is bequeathed to one who, at the time the codicil was made, was not in existence, even though he was living at the time when the will was drawn up; as it should belong to him to whom it is given.

Then the question should be asked whether the legacy was properly bequeathed, so that the rule of law shall not be inquired into before the existence of the person is ascertained. In the case stated, therefore, the bequest is of no force or effect, if it was made or taken away by a codicil, after the death of the heir; for the reason that the heir referred to was not in existence, and the deprivation or the grant of the legacy becomes void in consequence.

This would not apply where a substitute is given for an heir appointed to the entire estate, as the codicil would be confirmed by the appointment.

(1) Where two heirs have been appointed, and substitutes assigned, and one of them should die, the legacies will still be considered valid; but some discussion arose with reference to the co-heir, and whether he owed the entire legacy, where the bequest was as follows: "Whoever shall be my heir." Or must it be held that all is not due, for the reason that the heir who was substituted should pay a portion of the same, even though he himself does not owe it?

The same discussion may arise with reference to specified obligations ; but I think that there is much more ground for the co-heir being liable for the entire legacy, because the party who was joined with him is no longer in existence.

15. *Africanus, Questions, Book II.*

But as it was the will of the testator that the legacy should be paid out of the entire estate, it must be said that an exception on the ground of bad faith will lie for the benefit of the heirs appointed by the will, where a sum greater than they are entitled to is claimed.

16. *Paulus, Questions, Book XXI.*

Where a codicil is made without a will having been drawn up, the successor of the deceased, even though he was born after the codicil was executed, will owe whatever legacies were bequeathed by the same; for the codicil is valid, no matter who the heir may be who is entitled to the intestate succession; for only one case was taken into consideration, and it does not make any difference who obtains the estate, provided he succeeds *ab intestato.* The codicil depends upon the will, if one was made, no matter at what time this was done. And (in order

that I may express myself more clearly) where the head of a household dies intestate, the codicil requires no confirmation, but takes the place of a will. Where, however, a will has been made, the codicil is governed by the same law.

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

Letters by which an estate is promised, or affection is expressed, have not the force of a codicil.

18. *Celsus, Digest, Book XX.*

Plotiana to her friend, Celsus, Greeting. Lucius Titius made the following provision in his will: "If I leave anything by will in any document, which in any way relates to this will, I desire it to be valid." I ask whether a codicil made before this will should be confirmed. Juventius Celsus to Plotiana, Greeting. These words: "If I leave anything which relates to this will, I desire it to be valid," also include everything which was bequeathed before the will was made.

19. *Marcellus, Digest, Book XIV.*

A father, who had an only son, made a codicil directed to him, and died intestate, leaving as his heir a son whom he had begotten after he had made the codicil. No one can say that the codicil was annulled, and therefore if the deceased did not expect to have a posthumous heir, the codicil will not become void through his death; and the son to whom it was directed will be compelled to pay the legacy in proportion to his share of the estate, but the posthumous son will not be compelled to pay anything.

But if he, at the time of his death, should have left two surviving sons, but thought that one of them was dead, in like manner, it can be held that the son to whom the codicil was directed may be compelled to pay the entire legacy, just as if he had been the sole heir of his father; but he will only owe a sum in proportion to his share of the estate. Still, no part of a legacy which cannot be divided shall be paid, as the father would not have deprived his son of his share, unless he had thought that he would be his sole heir.

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

Where an heir has been orally appointed, and the bequests of the legacies have been reduced to writing; Julianus says that this instrument should not be understood to be a will in which the heir is not mentioned, but it should rather be considered a codicil, and I think this to be the more correct opinion.