THE DIGEST OR PANDECTS.

BOOK XL.

TITLE I.

CONCERNING MANUMISSIONS.

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

It has been decided that anyone who is born on the *Kalends* of January can manumit his slave after the sixth hour of the night preceding the *Kalends,* as having, at that time, completed his twentieth year. For anyone more than twenty years old is permitted to manumit a slave, but a minor under that age is forbidden to do so. Hence, he is not considered under the age of twenty, who is in the last day of his twentieth year.

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

If an heir should manumit a slave who has been bequeathed, while the legatee is deliberating whether he will accept him or not, it is settled that the slave will be free if the legatee should finally conclude to reject the bequest.

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

Where a slave is given by way of pledge, he cannot be manumitted, even if the debtor is wealthy.

4. *Ulpianus, Disputations, Book VI.*

An Epistle of the Divine Brothers, addressed to Urbius Maximus, sets forth that a slave purchased with his own money is in a position to demand his freedom.

(1) In the first place, such a slave cannot properly be considered to have been purchased with his own money, as a slave cannot have money of his own. But if we close our eyes, he must be held to have been bought with his own money, since he was not purchased with that of him who redeemed him from slavery. Hence, whether the money came from the *peculium* which belongs to the vendor, or from some fortunate acquisition by the slave; or was provided by the kindness or liberality of a friend; or whether someone advanced it, or promised it, or caused himself to be delegated; or whether the slave was ransomed by his undertaking to pay the debt, he must be considered to have been purchased with his own money. For it is sufficient if he who has lent his name to the purchase did not spend any of his own money.

(2) If a slave, purchased by someone who is unknown to him, should afterwards tender him the price for which he was sold, it must be said that he should not be heard, for this ought to be done in the beginning in order that a fictitious sale may be made, and a confidential agreement entered into between the purchaser and the slave.

(3) Therefore, if this was not done in the first place to enable the slave to be ransomed with his own money, or if the slave did not give the money with this intention, he will not be entitled to his freedom.

(4) Hence, it may be asked, when this was the intention in the beginning, and the purchaser hastened to pay the money, and he should afterwards be reimbursed, can the slave avail himself of the benefit of the Imperial Constitution ? I think that he can do so.

(5) Therefore, if the purchaser should advance the money to the slave, and the latter repays it to him, he can acquire his freedom.

(6) Whether it was or was not mentioned in the contract (for instance, in the case of a sale), that the slave would be manumitted, the better opinion is that he will be entitled to his freedom.

(7) Hence, if anyone should purchase a slave with the money of the latter, but without agreeing to manumit him, the humane opinion of those who have treated the question in that the slave should obtain his freedom, as the purchaser was merely fictitious and lent the use of his name, and besides, he has lost nothing.

(8) It, however, makes no difference by whom a slave purchased with his own money is acquired, whether by the Treasury, by a municipality, or by a private individual, nor what may be the sex of the purchaser. If the vendor is under twenty years of age, the constitution will apply. Nor is the age of the purchaser taken into consideration, for, even if he is a minor, it is only just that he should keep his word, as, by doing so, he will not sustain any injury.

The same rule is applicable to the purchaser who is a slave.

(9) The constitution does not apply to slaves who are absolutely incapable of being granted their freedom; as, for example, where a slave is to be sent out of the country, or has been sold or bequeathed by will under the condition that he.shall never be manumitted.

(10) When a slave is ransomed with his own money, even though he did not pay the entire price, it must be said that he is entitled to his freedom if he contributed his labor to make up what was due, or if he afterwards obtained property by his industry.

(11) If he should purchase a part of himself with his own money, and the other part belonged to him already, the constitution will not apply, any more than if, having the ownership of himself, he only purchased the usufruct of the same.

(12) But what if he owned the usufruct of himself, and he purchased the ownership? In this case, he is in such a position that the Imperial Constitution will apply.

(13) Where two persons purchase a slave, one of them with his own money, and the other with the money of the slave, it must be held that the constitution will not be applicable, unless he who purchased him with his own money is prepared to manumit him.

(14) Where, however, anyone buys half of a slave, and acquires the other half by some profitable transaction, it must be said that there is ground for the application of the constitution.

5. Marcianus, Institutes, Book II.

If a slave should allege that he was purchased with his own money, he can appear in court against his master, whose good faith he impugns, and complain that he has not been manumitted by him; but he must do this at Rome, before the Urban Prefect, or in the provinces before the Governor, in accordance with the Sacred Constitutions of the Divine Brothers; under the penalty, however, of being condemned to the mines, if he should attempt this and not prove his case; unless his master prefers that he be restored to him, and then it should be decided that he will not be liable to a more severe penalty.

(1) Where, however, a slave is ordered to be free after having rendered his accounts, an arbiter between the slave and his master, that is to say, the heir, shall be appointed for the purpose of having the accounts rendered in his presence.

6. *Alfenus Varus, Digest, Book IV.*

A slave, having agreed to give a certain sum in order to obtain his freedom, paid it to his master, but the latter died before manumitting him, and ordered him to be free by his will, and also bequeathed him his *peculium.* The slave asked whether the money, which he had paid to his master in consideration of obtaining his freedom, should be refunded to him by the heirs of his patron, or not? The answer was that if, after the master had received the money, he kept an account of it as his own, it immediately ceased to form part of the *peculium*- of the slave; but if, in the meantime, before he manumitted him, he set the money aside, as having been paid by the slave, it should be considered to belong to his *peculium,* and the heirs must return

it to the manumitted slave.

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

Two sons under paternal control had, as part of the *'peculium* of each, separate slaves. One of them, during the lifetime of his father, manumitted a young slave who belonged to his *peculium.* The father, by his will, bequeathed to each son his own *peculium,* as a preferred legacy. The question arose whether the above-mentioned slave became the freedman of both of the sons, or only of the one by whom he had been manumitted? The answer was that if the father made his will before the son manumitted the slave, he would only become the freedman of that one, for the reason that he would be considered to have been bequeathed with the remainder of the *peculium.* If, however, the father had made his will afterwards, he would not be held to have intended to bequeath the slave who had been manumitted; and as he did not bequeath the said slave as a preferred legacy, after the death of the father he would be the slave of the two brothers.

8. *Marcianus, Institutes, Book XIII.*

Those who are reduced to slavery by way of penalty undoubtedly cannot manumit anyone, because they themselves are slaves.

(1) Nor can those who are accused of a capital crime manumit their slaves, as this has been decreed by the Senate.

(2) The Divine Pius stated in a Rescript addressed to Calpurnius, that freedom given to slaves by a person who has been convicted under the Cornelian Law, or who was aware that he would be convicted, will be of no force or effect.

(3) The Divine Hadrian stated in a Rescript that where slaves have been manumitted in order that their master might be released from liability for crime, they were not legally entitled to their freedom.

9. *Paulus, Rules.*

When a slave is sold under the condition that he shall not be manumitted, or is forbidden by will to be manumitted, or is forbidden to be manumitted by a prefect of the Governor on account of some offence which he has committed, he cannot obtain his freedom.

10. *Book II of the Six Books of the Imperial Decrees having Reference to Judicial Investigations.*

^lianus, a debtor of the Treasury, having many years before purchased a female slave named Evemeria under the condition that he should manumit her, did so. As the Agent of the Treasury did not find the property of the debtor sufficient to satisfy his creditors, he raised a question with reference to the status of Evemeria. It was decided that there was no ground for the exercise of the right of the Treasury, under which all the property of debtors is liable by the law of pledge, because the slave had been purchased under the condition of being manumitted, and if this had not been done, she would have 'been entitled to her freedom under the Constitution of the Divine Marcus.

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

An heir, by manumitting a slave who has been bequeathed under a condition, and does this while the condition is pending, does not render the slave free.

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

A slave who has been guilty of kidnapping, and for whom his master has paid the penalty, is forbidden by the Favian Law to be manumitted within ten years; and in this case we do not consider the time when the will was made, but the date of the death of the testator.

13. *Pomponius, On Plautius, Book I.*

The slave of an insane person cannot be manumitted by a relative of the latter who has been appointed his curator, because the manumission of a slave is not included in the administration of the property. If, however, the insane person should owe the slave his freedom on account of a trust, Octavenus says that, in order to remove all doubt, the slave should be delivered by the curator to the person to whom he is to be transferred in order to be manumitted by him.

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

We cannot manumit a slave in the presence of one whose authority is equal to ours. A Pra?tor, however, can manumit a slave in the presence of a Consul.

(1) When the Emperor manumits a slave he does not touch him with a wand, but the slave who is manumitted becomes free by the mere expression of the Imperial will, in accordance with the law of Augustus.

15. *Marcellus, Digest, Book XXIII.*

There is no doubt that a slave can be manumitted *mortis causa.* You must not, however, understand if a slave is ordered to be free in this manner that he will not become so if his master should recover his health; for just as if he had been absolutely manumitted before the Praetor, when anyone thinks that he is about to die, and his death is expected, so, in this instance, freedom is granted during the last moments of the person who bestows the manumission, as his will is considered to continue to exist on account of the tacit condition of the death of the person manumitting the slave. The case is the same as if someone should deliver property under the condition that, if he dies, it shall belong to the person who receives it; since the property will not be alienated if the donor retains the same intention during his lifetime.

16. *Modestinus, Rules, Book I.*

If a son under twenty years of age manumits his slave with the consent of his father, he makes him the freedman of the latter; and proof of the manumission is unnecessary, on account of the consent of the father.

17. *The Same, Rules, Book VI.*

Slaves whom a son under paternal control acquires while in the army are not included in the property of the father, and the latter cannot manumit slaves of this kind.

18. *Gaius, On the Lex Julia et Papia, Book XII.* The vendor can manumit a slave whom he has agreed to sell, and the promisor one whom he has contracted to deliver.

19. *Papinianus, Questions, Book XIII.*

Where anyone has received a sum of money from another in consideration of manumitting his slave, the freedom of the latter can be extorted from him without his consent, although it is frequently the case that his own money is paid, and, above all, if his brother or his natural father furnished it; for the case is similar to one where a slave is redeemed with his own money.

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

It is superfluous for a minor of twenty years of age to prove the manumission of a slave, if he receives him for the purpose of manumitting him, after the promulgation of the Rescript of the Divine Marcus addressed to Aufidius Victorinus; for if he had not manumitted him, the slave would, nevertheless, obtain his freedom.

(1) The same rule of law does not apply where the grant of freedom is charged by a trust; for,

in this case, the donor must prove the fact, as the manumitted slave will not otherwise obtain his freedom.

(2) A certain man sold a female slave under the condition that she should be manumitted by the purchaser after the expiration of a year; and, if this was not done, it was agreed that the vendor should lay his hand upon her, or that the purchaser should pay *ten aurei.* The contract not having been observed, it was decided that the slave, nevertheless, became free in accordance with the terms of the aforesaid constitution; as, very frequently, laying on of the hand takes place for the purpose of giving assistance. Therefore the money cannot be recovered, as the benefit of the law was secured in accordance with the wishes of the vendor.

(3) At the time of the alienation of a slave, it was agreed that, having been transferred with the intention of granting him his freedom, he should be manumitted after the expiration of five years; and also that in the meantime he must pay a certain sum every month.

I gave it as my opinion that the said monthly payments did not form part of the condition under which he was liberated from bondage, but in order to show that his servitude was only temporary; for a slave who has been transferred in order to be free cannot, in every respect, be compared to one who is to be manumitted under a certain condition.

21. *The Same, Opinions, Book XIII,*

A husband who is solvent can manumit a dotal slave during the continuance of the marriage. If, however, he is not solvent, even though he may have no other liabilities, the slave will be prevented from obtaining his liberty, as the dowry is understood to be due as long as the marriage continues to exist.

22. *The Same, Definitions, Book II.*

A grandson can manumit a slave with the consent of a grandfather, as a son can do with the consent of his father; but the manumitted slave will become the freedman of the father, or the grandfather.

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

Gaius Seius purchased Pamphila under the condition that she would be manumitted within a year; and, before that time had elapsed, Seius himself was judicially decided to be a slave.

I ask whether Pamphila was entitled to her freedom after a year had elapsed, in accordance with the condition of the sale. Paulus answered that the slave who had been purchased was acquired by the master of Seius, under the same condition subject to which she had been sold.

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

It is provided by the *Lex Junia Patronia* that where the decisions of Courts are conflicting, judgment must be rendered in favor of freedom.

(1) It has frequently been established by Imperial Decrees that, where witnesses for and against freedom appear in equal numbers, judgment must be rendered in favor of freedom.

25. *Gaius, On Manumissions, Book I.*

The law provides that even infants are entitled to freedom.

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

Labeo holds that a slave who is insane can be manumitted and obtain his freedom by every proceeding known to the law.

TITLE II.

CONCERNING MANUMISSIONS BEFORE A MAGISTRATE.

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

It is settled that a ward can, with the authority of his guardian in the presence of the Prsetor, manumit his slave as well as before the said guardian acting as Praetor.

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

Where a minor of twenty years of age is the usufructuary of a slave, can he consent to his obtaining his freedom? I think that the slave can obtain it, if he gives his consent.

3. *The Same, Disputations, Book IV*.

If the heir manumits a slave who has been bequeathed, and the legatee afterwards rejects the legacy, the grant of freedom has a retroactive effect. The same rule applies where a slave is absolutely bequeathed to two persons, and one of them afterwards repudiates the manumission made by the other; for, in this instance also, the grant of freedom has a retroactive effect.

4. *Julianus, Digest, Book XLII.*

If a father should permit his son to manumit his slave, and, in the meantime, should die intestate, and his son, not being aware that his father was dead, should grant the slave his freedom, the slave will become free through the favor conceded to liberty, as it does not appear that the master changed his mind.

If, however, the father had, by means of a messenger, forbidden his son to liberate the slave, and the son did not know this, and, before ascertaining it, he should manumit the slave, the latter will not become free; for in order that a slave may obtain his freedom through the manumission of a son, the intention of the father must continue to exist; since, if he should change his mind, it would not be true that the son had manumitted the slave with his father's consent.

(1) Whenever a master manumits his slave, even though he may think he belongs to another, it is, nevertheless, true that the slave is manumitted with the consent of his master, and therefore he will become free.

And, on the other hand, if Stichus does not think that he belongs to the person who manumits him, he will, nevertheless, obtain his freedom, for there is more in the fact itself than in opinion; and, in both cases, it is true that Stichus was manumitted with the consent of his master.

The same rule of law will apply where both the master and the slave are mistaken, and one of them thinks that he is not the master, and the other believes that he is not his slave.

(2) A minor of twenty years of age, who is a master, cannot legally manumit without appearing before the proper authority.

Paulus says that if a minor of twenty years of age permits a slave over whom he has the right of pledge to be manumitted, the manumission is legal; because he is not understood to have actually liberated him, but only not to have interfered with his manumission.

5. *Julianus, In the Same Book.*

The question has often been asked whether a magistrate appointed for the purpose of examining manumissions can, himself, manumit a slave. I remember that Javolenus, my preceptor, manumitted his slaves in Africa and in Syria, when he was a member of the board of magistrates ; and I followed his example, and liberated some of my slaves in my tribunal, both while I was Praetor and Consul; and I advised certain other Praetors and Consuls to do the same.

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

There is no doubt that a slave held in common by minors of twenty years of age can be

manumitted before the proper tribunal; even though one of the owners may not assent to the proceedings.

7. *Gaius, Diurnal or Golden Matters, Book I.*

It is not absolutely necessary for the manumission to take place in the tribunal, and therefore slaves are frequently manumitted while in transit, when the Praetor, the Proconsul, the Deputy, or the Emperor confers this benefit upon them while on the way to the bath, to the tribunal, or to the public games.

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

When I was in the country with a Praetor, I permitted a slave to be manumitted before him, although no lictor was present.

9. *Marcianus, Institutes, Book XIII.*

Just cause for manumission exists, where a slave has saved his master from the danger of losing his life, or from disgrace.

(1) It should be remembered that freedom must be granted after it has once been received, no matter what reason may be alleged against it afterwards. For the Divine Pius stated in a Rescript that where a case has once been proved it cannot be revived, provided the person is not permitted to manumit a slave belonging to another; for anything that is alleged can be contradicted by evidence, but where it has once been proved, it cannot be reconsidered.

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

The son of a deaf or dumb father can manumit a slave by his order. The son of an insane person, however, cannot do so.

11. *Ulpianus, On the Duties of Proconsul, Book VI.*

When a minor under the age of twenty years manumits a slave, the manumission is ordinarily accepted, where the person who manumits is the natural son or daughter, brother or sister of the slave;

12. *The Same, On the Lex JElia Sentia, Book II.*

Or if they are related to him by blood (for such relationship is taken into consideration).

13. *The Same, On the Duties of Proconsul.*

Or if he or she is the foster-brother, instructor, teacher, or nurse of the minor, or the son or daughter of the person above mentioned, or his pupil, or the attendant who carries his books, or if a slave is manumitted in order to become an agent; provided, in this instance, that he is at least eighteen years of age; and it is also required that the minor who manumits him shall have more than one slave.

Likewise, if a virgin or a woman is manumitted for the purpose of marriage, if an oath is exacted from the master in the first place that she will be married within six months, as this was decreed by the Senate.

14. *Marcianus, Rules, Book IV.*

It is more usual for women to manumit their foster-children, but this is also permitted in the case of men; and it is sufficient for one to be allowed to manumit a slave in whose support he has a more than ordinary interest.

(1) There are some authorities who think that women can manumit a slave for the purpose of marrying him, but this should be limited to a case where he was bequeathed to the woman who has been his fellow-slave.

(2) If a man, who is impotent, wishes to manumit a female slave for the purpose of marrying

her, he can do so. This rule, howevery does not apply to one who has been castrated.

15. *Paulus, On the Lex Mlia Sentia, Book I. }*

A minor of twenty years of age should also be permitted to manumit a slave for the purpose of complying with a condition; for instance, where anyone lias been appointed an heir under the condition of liberating a slave.

(1) Many just causes for manumission may exist with reference to time past; for example, where the slave has assisted his master in battle, has protected him against robbers, has cured him when he was ill, or has revealed treachery with which he was threatened, and in other instances which it would take too long to enumerate; as there are a great many other reasons for which it would be honorable for freedom to be granted by a decree, and which should be taken into a consideration by the magistrate before whom the matter is brought.

(2) Several slaves can be manumitted at the same time in the presence of a magistrate, and the presence of the slaves is sufficient to enable several to be manumitted.

(3) A master who is absent can state the reason for manumissions by his attorney.

(4) If two masters manumit the same female slave for the purpose of marrying her, the reason should not be accepted.

(5) Those persons who have their domicile in Italy, or in some other province, can manumit their slaves before the Governor of another province, after having made application to the proper tribunal.

16. *Ulpianus, On the Lex ^Elia Sentia, Book II.*

The judges, when hearing the reasons for manumissions, must remember that these must be based, not on dissoluteness, but on affection; for the *Lex &lia Sentia* is understood to grant lawful freedom, not for the purpose of pleasure, but on account of sincere attachment.

(1) If anyone should transfer a slave to a minor of twenty-one years of age, either in consideration of a price paid, or as a donation, under the condition that he shall liberate him, he can offer this as a just reason for manumission, stating the condition which had been imposed, and can then grant the slave his freedom. He, however, will be required to show that this was the agreement between the parties, so that the matter may be decided in accordance with the condition of the donation, or with the affection of the person who gave the slave to be manumitted.

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

We can manumit a slave in the presence of the Proconsul after he has left the City.

(1) We can also manumit a slave in the presence of his deputy.

18. *The Same, On Plautius, Book XVI.*

A slave can be manumitted before a son under paternal control, who is acting as a magistrate, although he himself, being subject to paternal authority, has, as a private individual, no right to manumit a slave.

(1) A Praetor cannot manumit a slave in the presence of his colleague.

(2) A son can also manumit a slave in the presence of his father, with the consent of the latter.

19. *Celsus, Digest, Book XXIX.*

If a minor of twenty years of age manumits a female slave who is pregnant, before the proper tribunal, for the purpose of marrying her, and, in the meantime, she should have a child, the condition of the child whom she brought forth, that is to say, whether it is a slave or a freeman, shall remain undetermined.

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

If a minor of twenty-five years of age is charged by the terms of a trust to manumit a slave, he should be permitted to do so immediately, unless he was charged to manumit his own slave. For, in this instance, the amount of the benefit, which he will obtain from the will of the person who made the request, must be compared with the value of the slave whom he was requested to manumit.

(1) Where, however, a slave was donated to the minor under the condition that he should be manumitted, he ought to be allowed to manumit him, in order to prevent the Constitution of the Divine Marcus from becoming applicable during the delay granted by the Consul.

(2) Where anyone wishes to manumit a female slave in order to marry her, and he can, without dishonor to his rank, marry a woman of this kind, he should be permitted to do so.

(3) Marcellus also says that if a woman desires to emancipate her natural son, or any of the other persons previously mentioned, she should be allowed to do so.

(4) A Consul can manumit a slave before himself, if he should happen to be a minor of twenty years of age.

21. *Modestinus, Pandects, Book I.*

I can, in accordance with the Constitution of the Divine Augustus, manumit a slave in the presence of the Prefect of Egypt.

22. *Paulus, Questions, Book XII.*

A father sent a letter from a province to his son, whom he knew to be at Rome, by which he permitted him to liberate before a magistrate any slave whom he might select out of those whom he had with him for his personal service, and the son subsequently manumitted Stichus in the presence of the Praetor. I ask whether he rendered him free? The answer was, why should we not believe that the father could authorize his son to manumit any slaves which he had for his personal service? For he only granted his son the privilege of making a choice, and, as for the rest, he himself manumitted the slave.

23. *Hermogenianus, Epitomes of Laiv, Book I.*

At the present time, it is usual for manumission to be made by means of the lictors, the master remaining silent, and although solemn words are not spoken, they are considered to be spoken.

24. *Paulus, On Neratius, Book II.*

A minor who is no longer an infant can legally manumit a slave before the proper tribunal.

Paulus: Provided his guardian authorizes him to do so, and he liberates him in such a way that the *peculium* does not follow the slave.

25. *Gaius, On Manumissions, Book I.*

If a minor manumits a slave for the purpose of making him his guardian: Fufidius says that this should be approved. Nerva, the son,

holds the contrary opinion, which is correct. For it would be the height of absurdity for the judgment of a minor to be held to be sufficiently good to enable him to select a guardian, when in every other transaction he is controlled by the authority of his guardian, because his judgment is weak.

TITLE III.

CONCERNING THE MANUMISSION OF SLAVES BELONGING TO A COMMUNITY.

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

The Divine Marcus granted the power of manumission to all corporate bodies that have the right to assemble.

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

For this reason, such bodies can claim the estates of their freedmen to which they are legally entitled.

3. *Papinianus, Opinions, Book XIV.*

A slave belonging to a municipality, who has been lawfully emancipated, will retain his *peculium,* if he has not been previously deprived of it; and therefore his debtor is released from liability by paying him.

TITLE IV.

CONCERNING TESTAMENTARY MANUMISSIONS.

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

Where freedom is granted to a slave several times in a will, that disposition will prevail by which he can best obtain his freedom.

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

If anyone should appoint an heir as follows, "Let Titius be my heir, and if Titius should not be my heir, let Stichus be my heir; let Stichus be free," Aristo says that Stichus will not be free, if Titius becomes the heir.

It seems to me that he can be held to be free, as he does not receive his liberty in two different degrees, but it is granted to him twice; which is our practice.

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

A minor of twenty years of age, who is in the army, is not permitted to manumit his slave by will.

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

If anyone should make the following provision in his will, namely, "Let Stichus be free, and let my heir pay him ten *aurei,"* there is no doubt that the money will be due him, even if the head of the household should manumit him during his lifetime.

(1) The same rule will apply if the testator should say: "Let Stichus be free, either immediately or after a certain time; and when he becomes free, let my heir pay him ten *aurei."*

(2) It has been decided that if a legacy of freedom is bequeathed as follows, "Let my heir pay ten *aurei* to such-and-such a slave, if I grant him his freedom in the presence of the magistrate," although, strictly speaking, this is different from a testamentary manumission, still, according to the dictates of humanity, the legacy will be valid if the master, during his lifetime, should emancipate the slave.

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

Those provisions which are the least burdensome should be considered where freedom is granted by a will, and where there are several provisions of this kind, that which is the least burdensome is understood to be the one the most advantageous to the person manumitted. Where, however, freedom is granted by a trust, the last clause written must be taken into account.

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

If the master of a slave appoints as his heir the usufructuary of said slave, and freedom is

granted to the latter conditionally, as the slave in the meantime belongs to the heir, the usufruct will become extinguished on account of the merger which results, and if the condition should be fulfilled, the slave .will obtain his freedom absolutely.

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

Neratius says, that when freedom is granted to a slave as follows, "If I should have no child at the time of my death, let Stichus be free," he will be prevented from obtaining his freedom in case a posthumous child is born. But, while the birth is in anticipation, shall we say that the slave remains in servitude; or shall we hold that he will become a freedman by retroactive effect, if no child should be born? I think that the latter opinion should be adopted.

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

Where the following provision was inserted into a will, "Let Stichus be free if he has transacted my business properly," the degree of diligence displayed by Stichus must be considered with reference to its benefit to the master, and not to the slave; and he must also manifest his good faith by paying over any balance which may remain in his hands. ,

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

Where a slave was bequeathed in order to be manumitted and, if he should not be manumitted, he was directed to be free, and a legacy was bequeathed to him, it has been frequently decided that he is entitled to his freedom, and that the legacy is due to him.

(1) Where it is stated in a constitution that a slave cannot be manumitted who is forbidden by will to be set free, I think that this only refers to slaves belonging to the testator or to his heirs, for it cannot apply to a slave belonging to another.

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

Where the *peculium* of a slave is bequeathed as a preferred legacy, and a sub-slave, who forms part of the *peculium,* is directed to be free, it is established that he will become free, for there is a great deal of difference between genus and species. For it is settled that the species can be removed from the genus, as it consists of the *peculium* which was bequeathed, and the sub-slave who was manumitted.

(1) If a slave who is bequeathed is ordered to be liberated from servitude he will become free; but where, in the first place, he is considered to be free, and he is afterwards bequeathed, if it is evident that the intention of the testator was that he should be deprived of his liberty, and as it is at present held that he will be deprived of it, I think that he will form part of the legacy. If, however, the matter is in doubt, then the more favorable opinion should prevail, and he will become free.

11. *Pomponius, On Sabinus, Book VII.*

If, after a slave has been bequeathed, his freedom has been left him under a trust, the heir or the legatee will be compelled to manumit him.

(1) "If Stichus and Pamphilus, pay ten *aurei,* let them be free;" one of them can become free by paying five *aurei,* even though the other may not pay anything.

(2) Where a slave is ordered to be free by a will, he immediately becomes free just as soon as one of several appointed heirs enters upon the estate.

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

Where anyone leaves a slave his freedom under the condition of his taking an oath, there will be no ground for the application of the Praetorian Edict for the purpose of remitting the oath; and this is reasonable, for if anyone should remit the condition upon which the freedom of the slave depends, he will prevent the freedom itself from taking effect, as the slave cannot obtain

it except by complying with the condition.

(1) Hence, if anyone should bequeath a slave a legacy with his freedom, the latter will not be entitled to the legacy, unless he complies with the condition of taking the oath.

(2) If, however, he should receive his freedom absolutely, and the legacy was granted under the condition of his taking the oath, Julianus, in the Thirty-first Book of the Digest, thinks that the condition of taking the oath should be remitted.

(3) Moreover, I hold that the same rule will apply where the condition was imposed upon the grant of freedom, and the testator, during his lifetime, manumitted the slave; for, in this instance, the condition on which the legacy depended is remitted.

13. *The Same, Disputations, Book V.*

Where freedom was granted to two slaves under the condition that they should build a house, or erect a statue, the condition cannot be divided between them. Doubt can only arise where one of them, having complied with the condition, appears to have carried out the wishes of the testator, and therefore will be entitled to his freedom, which is the better opinion; unless the testator had expressed himself otherwise.

One of the slaves, by doing what he was directed to do, complied with the condition so far as he himself was concerned, and while he did not do so with respect to the other, still the condition will no longer bind the latter, for he cannot comply with it any further after it has once been fulfilled.

(1) The same question can also arise where a legacy is bequeathed to two artisans or painters, under the condition that they shall paint a picture, or build a ship; for the intention of the testator must be considered, and if he imposed the condition of the performance of one upon the other, the result will be that when one of them does not do anything, the condition will not be fulfilled, although the other may be ready to do his share.

If, however, it can be shown that the testator would have been content, if whatever he had written or stated was only done by one of them, the matter will be readily disposed of; for one of them will, by his act, benefit either himself and his associate, or himself alone, according as it appears to have been the intention of the testator.

(2) This question can also be discussed in the case where a testator grants freedom to two slaves, if they render their accounts. For Julianus asks, if one of them is ready to render his account, and the other is not, whether the former will be prevented from doing so by the latter. And he very properly says that if their accounts were kept separately, it will be sufficient for the one who renders his to obtain his freedom; but if both of them kept their accounts together, one of them shall not be considered to have complied with the condition, unless he pays the balance remaining in the hands of the other.

We must understand this to mean that the books containing the accounts shall also be given up.

(3) If, however, a female slave, together with her children, is directed to be liberated, even if she has no children, she will, nevertheless, become free; or if she should have any, and they are not capable of obtaining their freedom, the result will be the same.

This rule will also apply even though the slave herself cannot become free, as her children will still obtain their liberty; for the clause, "together with her children," does not impose a condition, unless you suggest that the intention of the testator was otherwise; since, under such circumstances, these words must be understood to establish a condition. But that they do not impose a condition is proved by the Edict of the Prsetor by which it is provided *as* follows: "I will order the mother of the unborn child and her children to be placed in possession of the estate." For it is settled that even if there are no children, the mother of the

unborn child should still be placed in possession of the estate.

14. *The Same, Disputations, Book Vill.*

When a slave is granted his freedom absolutely, and is appointed an heir under a condition, it has been decided that even if the condition is not complied with, he will be entitled to his freedom.

15. *Julianus, Digest, Book XXXIII.*

"I give and bequeath Stichus to Sempronius; if Sempronius should not manumit Stichus within a year, let the said Stichus be free." The question arose, what is the rule in this case? The answer was that where freedom is granted as follows, namely, "If Sempronius should not manumit Stichus, let Stichus be free," and Sempronius does not manumit him, he will have no right to Stichus, but he will be free.

16. *The Same, Digest, Book XXXVI.*

Where the following provision is inserted into a will, "When Titius reaches the age of thirty years, let Stichus become free, and let my heir give him such-and-such a tract of land," and Titius dies before reaching his thirtieth year, Stichus will obtain his freedom, but he will not be entitled to the legacy. For it is only in favor of freedom that it is admitted, after the death of Titius, that a time is held to exist during which freedom may be granted; but the condition on which the legacy depended is considered to have failed.

17. *The Same, Digest, Book XLII.*

Freedom which is granted to take effect at the last moment of life, as for example, "Let Stichus be free when he dies," is held to be of no force or effect.

(1) The following testamentary disposition, "Let Stichus be free, if he does not ascend to the Capitol," must be understood to mean if he does not ascend to the Capitol as soon as he possibly can. Hence, Stichus would obtain his freedom in this way, if having the power to ascend to the Capitol he abstained from doing so.

(2) The question arose whether freedom should be considered to have been conditionally granted by the following provision in a will: "Let Pamphilus be free, in order that he may render an account to my children." The answer was that freedom should be granted absolutely, and that the addition, "In order that he may render an account," does not impose any condition upon the grant of freedom; still, because the manifest wish of the testator was expressed, the slave should be compelled to render his account.

(3) Where a slave is indefinitely ordered to be free after several years, he will become free after the expiration of two years. The favor-conceded to liberty requires this, and the words themselves are susceptible of such a construction; unless the person who is charged with the grant of freedom can prove by the clearest evidence that the intention of the testator was otherwise.

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

Where a testator appointed two heirs, and directed that his slave should be free after the death of one of them, and the heir upon whose death the freedom of the slave depended died during the lifetime of the testator, Sabinus gave it as his opinion that the slave would become free.

(1) The following condition, "Let him be free when I die," includes the entire duration of life, and therefore is held to be void. It is better, however, that the words should be interpreted in a more favorable manner, and in such a way that the testator may be considered to have granted freedom to his slave after his death.

(2) The following gives rise to greater doubt, "Let him be free in a year," as this can be understood to mean, "Let him be free after the year of my death," and it can also be

understood as follows, "Let him be free after the year when I made this will," and if the testator should happen to die within a year, the grant of freedom will be of no force or effect.

19. *The Same, On Urseius Ferox, Book III.*

A certain man charged his heir to manumit his slave, and if his heir did not do so he directed that he should be free, and he left him a legacy. The heir manumitted the slave. Several authorities hold that he obtained his freedom by the will, ana", as this was the case, that he was also entitled to the legacy.

20. *Africanus, Questions, Book I.*

A testator bequeathed his slaves, and made the following provision in his will: "I ask that you regard my slaves as worthy of their freedom, if they have acted meritoriously towards you." It is the duty of the Praetor to compel freedom to be given the slaves, unless they have done something which renders them unworthy of obtaining their freedom, without such services being required of them as may be considered necessary for them to deserve it.

The person who was asked to liberate them will still have the right to fix the time when he will do so; as, if he does not manumit them during his lifetime, his heir can be compelled to grant them their freedom immediately after his death.

21. *The Same, Questions, Book IV.*

"Let Stichus, or rather Pamphilus, be free." It was decided that Pamphilus should be free, for the testator appeared to have, as it were, corrected a mistake.

The same rule will apply where it was stated in a will, "Let Stichus be free, or rather let Pamphilus be free."

22. *The Same, Questions, Book IX.*

A testator appointed his son, who had not reached the age of puberty, his heir, and ordered that Stichus should be emancipated after he had rendered an account of the silver plate, which was in his care. This slave had stolen a portion of the silver plate, which he had divided with the guardian, and he gave the other part of it to the guardian who took an account of it. Advice having been asked as to whether Stichus was free, the reply was given that he was not.

But, on the other hand, as it has been decided if a slave who is to be free under a certain condition is directed to pay a certain sum of money, and pays it to the guardian, or it is the guardian's fault that the condition was not complied with, he will obtain his freedom; this must be understood to mean that all is done in good faith, and without any fraud on the part of the slave or the guardian, just as is observed in the alienation of the property of a ward. Therefore, if the slave should tender the money and the guardian should not be willing to accept it because his ward will be defrauded, the slave cannot obtain his freedom, unless he was not guilty of fraud. The same rule applies with reference to a curator.

(1) The question also arose, where the slave was ordered to render an account of the silver plate, in what way he should be understood to have complied with the condition; that is to say, if any vessels had been lost without his fault, and he delivered the remaining ones to the heir, in good faith, whether he would be entitled to his freedom. The answer was that he would be entitled to it, for it is sufficient if he rendered an honest and just account.

In short, he is considered to have complied with the condition by rendering to the heir such an account as the careful head of a household would accept.

23. *Marcianus, Institutes, Book I.*

A slave, who has been manumitted by a will, only becomes free when the will is valid, and the estate is entered upon on account of it; or where anyone obtains possession of the estate on the ground of intestacy because of the rejection of the will.

(1) Where freedom is granted by a will, it is obtained as soon as the estate is accepted by one of the heirs. If it is granted after a certain period, or under a condition, it will be obtained when the time arrives, or the condition is fulfilled.

24. *Gaius, Diurnal or Golden Matters, Book I.*

Slaves ordered to be free are considered to be expressly mentioned where they are clearly designated, either by their trades or offices, or in any other manner whatsoever, as, for instance, "My steward; my butler; my cook; the son of my slave Pamphilus."

25. *Ulpianus, Rules, Book IV.*

Where a slave is ordered to be free by the terms of a will, he will obtain his freedom as soon as any portion of the estate whatsoever is accepted; provided it is accepted by one belonging to the degree in which the slave is ordered to be free, and that he has been unconditionally manumitted.

26. *Marcianus, Rules, Book IV.*

The Divine Pius and the Divine Brothers stated beneficently in a Rescript that where a slave, who was appointed a substitute, had been bequeathed a legacy, together with his freedom, in case he should not be an heir, but the bequest of his freedom was not repeated, the result would be the same as if this had been done.

27. *Paulus, On the Lex JElia Sentia, Book I.*

Those who can grant freedom by applying to a tribunal can also appoint slaves their necessary heirs; and this necessity itself renders the manumission proper.

28. *The Same, On the Law of Codicils.*

"Let Stichus be free, if I do not by a codicil forbid him to be manumitted," is the same as if a testator said, "Let Stichus be free, if I do not ascend to the Capitol," for an heir can be appointed in this way.

29. *Scsevola, Digest, Book XXIII.*

A man repudiated his wife, who was pregnant, and married another. The first one, having had a son, exposed it, and it was taken away and brought up by another, and bore the name of its father; but both the father and mother during their lives remained ignorant that it was living. The father died, and his will having been read, it was held that the son was neither disinherited nor appointed an heir by the will, and he, having been recognized by his mother and his paternal grandmother, obtained the estate of his father on the ground of intestacy, as the heir at law.

The question arose whether the slaves who obtained their freedom under the will were free, or not. The answer was that the son should not suffer any wrong, if his father did not know that he was living, and therefore, as he was under the control of his father, who was not aware of the fact, the will was not valid.

But if manumitted slaves remain for five years in a state of freedom, the favor with which liberty is regarded does not permit that when it has once been granted them it shall be revoked.

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

Where slaves who are in the hands of the enemy are ordered to be free, they will obtain their freedom, even though at the time that the will was executed, or when the testator died, they did not belong to the latter, but were in captivity.

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

Where one of several slaves who have the same name is ordered to be free, and it is not apparent which one was meant, none of them will obtain freedom.

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

It must be remembered that grants of freedom made by a will take effect whenever there is a necessary heir, even though he should reject the estate; provided they were not made contrary to the *Lex JElia Sentia.*

33. *Paulus, Questions, Book XII.*

Freedom cannot be granted for a certain time.

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

Therefore, where the following is inserted into a will, "Let Stichus be free for ten years," the addition of the term is superfluous.

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

Servius was of the opinion that freedom could be granted directly to slaves who had belonged to the testator, both at the time when the will was made, and when he died. This opinion is correct.

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

I manumitted a slave by will as follows, "Let him be free if he will swear to pay to my son, Cornelius, ten *aurei* in lieu of his services." The question arises, what is the law in this case? It must be acknowledged that the slave will comply with the condition by taking the oath, but he will not be bound to pay the money in lieu of his services, because he will not be bound unless he takes the oath after his manumission.

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

A slave is considered to have been manumitted specifically by a codicil, when his name is mentioned in the will.

38. *The Same, On Plautius, Book XII.*

Freedom can be granted to a slave by will as follows, "Let him be free when he has a right to be so by law."

39. *The Same, On Plautius, Book XVI.*

"Let my slave, Stichus, be free, if my heir should alienate him." This grant of freedom is void, because it has reference to the time when the slave will belong to another. Nor can the objection that a slave, who is to be free under a certain condition, will obtain his freedom by virtue of the will, even if he should be sold, be raised; for where freedom is legally granted, it cannot be annulled by the act of the heir. But what if a legacy is bequeathed in this manner? There is no reason to hold a different opinion under such circumstances, for no difference exists between a grant of freedom and a legacy, so far as this question is concerned. Therefore, freedom is not directly granted by the following clause, "Let my slave be free, if he ceases to belong to my heir," because there is no instance where a concession of this kind will be available.

40. *Pomponius, On Plautius, Book V.*

Julianus says that where the same slave is granted a sum under the terms of a trust, and is also ordered to be free, the heir must grant him his freedom; for he says that he is not, by virtue of the trust, compelled to pay the value of the slave, as he gives him his freedom to which he is entitled.

(1) But where freedom is granted to a slave conditionally, under the terms of a trust, and the

slave himself is given at the time, the heir will not be obliged to deliver him, unless security is furnished by the beneficiary of the trust that, if the condition is fulfilled, he will liberate the slave; for in almost all cases freedom granted by virtue of a trust is considered as having been directly granted. Ofilius, however, says that if a testator bestowed freedom by means of a trust, with the intention of depriving the slave of a legacy, this opinion is correct. But if the legatee can prove that the heir was charged by the testator, he will still be obliged to pay the value of the slave to the legatee.

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

Where freedom is granted as follows, "Let Stichus be free the twelfth year after my death," it is probable that he will become free at the beginning of the twelfth year, for this was the intention of the deceased. There is, however, a great deal of difference between the two expressions, "the twelfth year," and "after twelve years," and we are accustomed to say "the twelfth year" when ever so little of the twelfth year has arrived, or elapsed. He who is ordered to be free the twelfth year is ordered to be free for every day during that year.

(1) Where the following provision is inserted in a will, "Let my slave, Stichus, be free, if he pays my heir a thousand *sesterces* at the end of one, two, and three years, after my death, or if he gives security to do so," the slave cannot become free before the expiration of the third year, unless he pays the entire sum immediately, or gives security; as the advantage which the heir derives from immediate payment should be compensated by the rapidity with which the grant of freedom is made.

(2) Labeo says that where a testamentary grant of freedom is made as follows, "Let Stichus be free within a year after my death," he will become free immediately. And if his freedom had been bequeathed as follows, "Let him be free, if he pays such-and-such a sum to my heir within ten years," and he pays it at once, he will become free without delay.

42. *Marcellus, Digest, Book XVI.*

If anyone should insert the following clause into his will, "I desire my slave to be the freedman of such-and-such a person," the slave can demand his liberty, and the other party can claim him as his freedman.

43. *Modestinus, On Manumissions.*

Direct grants of freedom can be legally made by will, and by a codicil confirmed by a will. Grants of freedom under a trust can be made *ab intestato,* and by codicils not confirmed by a will.

44. *The So/me, Opinions, Book X.*

Msevia, at the time of her death, bequeathed freedom to her slaves named Saccus, Eutychia, and Hirena, conditionally, in the following terms: "Let my male slave, Saccus, and my female slaves, Eutychia and Hirena, be free, under the following condition, namely, that they burn a lamp on my tomb every other month, and celebrate funeral rites there,"

As the said slaves did not regularly visit the tomb of Maevia, I ask whether they would be free. Modestinus answered that neither the wording of the entire clause nor the intention of the testatrix indicated that the freedom of the slaves should be suspended under a condition, as she desired them to visit her tomb as persons who were free; but that it was, nevertheless, the duty of the judge to compel them to obey the order of the testatrix.

45. *The Same, Pandects, Book II.*

It is commonly stated that where freedom is granted under several conditions, the one which is the least onerous should be observed; and this is true where the conditions are imposed separately. Where, however, they are imposed together, the slave will not be free unless he complies with all of them.

46. *Pomponius, Various Passages, Book VII.*

Aristo replied to Neratius Appianus as follows: If a slave is directed to be free by will when he reaches the age of thirty years, and, before doing so, he is sentenced to the mines, and afterwards is released, there is no doubt that he will be entitled to the legacy left with his freedom, nor will his right be affected by his sentence to the mines. The rule is the same when the slave is appointed an heir under a condition, for he will become the necessary heir.

47. *Papinians, Questions, Book VI.*

Where freedom is granted through mistake, under a forged codicil, although it is not due, still it must be granted by the heir, and the Emperor has decided that twenty *solidi* must be paid to the heir by each slave who is liberated.

(1) When an appointed heir manumits a slave for the purpose of complying with a condition, and the son, by subsequently bringing an action to declare the will inofficious gains his point, or the will is pronounced forged, the result will be that in this case the same course must be pursued as is prescribed in the one involving a forged codicil.

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

Where a partner granted freedom to a slave by will, as follows, "Let Pamphilus be free, if my partner should manumit him," Servius gave it as his opinion that if the partner should manumit the slave, he will become the common freedman of the heirs of the deceased and of the partner who manumitted him; for it is neither new nor unreasonable for a slave held in common to obtain his freedom by the exercise of different rights.

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

Where a female slave was manumitted by the will of a soldier, as follows, "I direct that Samia shall obtain her freedom," it was held that she obtained her freedom directly in accordance with military law.

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

It was decided by the Divine Marcus, with a view to the preservation of freedom, that his decree on that subject should apply to cases where a will was held to be void, and that the property of the estate should be sold; and, on the other hand, it was especially provided where the estate is claimed by the Treasury as being without an owner, that this decree shall not be applicable.

(1) In order that slaves manumitted by a will might obtain the property of the deceased, it was decided that they must give a suitable bond in court, just as the other freedmen of the deceased, or foreign heirs. Minors, who are appointed heirs, and, as is customary, claim assistance with reference to the estate of the deceased, are not deprived of this advantage.

51. *The Same, Opinions, Book XIV.*

A centurion, by his will, forbade his slaves to be sold, and asked that they be manumitted, so far as they were deserving of it. The answer was that freedom was lawfully granted, since, if none of the servants had given cause for offence, all of them would be entitled to be free; but if some of them were excluded on account of having committed a crime, still the others ought to obtain their freedom.

(1) Where the following provision was inserted into a will, "Let those slaves who have not given cause for offence be free," it was held that the grant of freedom was conditional, and that it should be interpreted in such a way that the testator, when liberating his slaves, did not intend to include those whom he had subjected to punishment, or had excluded from the honor of serving him or from transacting his business.

52. *Paulus, Questions, Book XII.*

The Emperors to Missenius Fronto. Freedom having been granted by the will of a soldier in the following terms, "I wish or I order my slave Stephen to be free," the slave can obtain his freedom whenever the estate is entered upon. Therefore, when the following words were added, "Provided, nevertheless, that he remains with my heir as long as he is a young man, but if he refuses to do so, or treats my proposal with contempt, let him continue to be held as a slave," they do not have the effect of revoking the freedom to which the slave was entitled.

The same rule is observed with reference to the wills of civilians.

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

Lucius Titius granted freedom to his slave under the condition that he should render a faithful account of his administration to his son, Gaius Seius. When Gaius Seius had reached the age of puberty, the slave, having been sued by the curators of the former, paid in court everything that was due. A bond having been required of the curators, the slave was declared to be free. Now Gaius Seius, the son of the testator, denies that the money was legally paid to his curators, and I ask whether this was the case. Paulus answered that the balance of the account of the slave did not seem to have been paid to the curators of the youth in such a way as to comply with the condition prescribed by the will in accordance with law; but if the money had been paid in the presence of the minor, or had been entered in his accounts, the condition should be considered to have been fulfilled, just as if it had been paid to him himself.

54. *Scsevola, Opinions, Book IV.*

A man who had a slave named Cratistus made the following provision in his will, "Let my slave, Cratinus, be free." I ask whether the slave Cratistus can obtain his freedom, as the testator had no slave called Cratinus, but only the said slave, Cratistus. The answer was that no impediment existed because a mistake had been made in a syllable.

(1) Certain testamentary heirs, before entering upon the estate, agreed with the creditors that the latter should be content with half of their claims; and a decree having been issued by the Praetor to this effect, they accepted the estate. I ask whether the grants of freedom made by the will would take effect. The answer was that they would take effect, if the testator had no intention of committing fraud.

55. *Msecianus, Trusts, Book II.*

A grant of freedom having been made under a condition, the decision was rendered that if neither the slave nor the heir was responsible for the condition not having been complied with, the slave would be entitled to his freedom. I think that the same opinion should be given where freedom is granted under the terms of a trust to slaves belonging to an estate.

(1) It is not absurd to hold that this rule also applies to the slaves of the heir.

(2) We cannot reasonably doubt that this is also applicable to slaves whom the heir was charged to purchase; for in this instance, it would be unjust for him to be compelled to purchase them as if the condition had been fulfilled, because it might happen that the owner would refuse to comply with the condition, in order to obtain the price of a slave, and not demand him as the condition.

56. *Paulus, Trusts, Book I.*

If anyone grants freedom to a slave by will, both directly and under a trust, it is in the power of the slave to choose whether he will obtain his freedom directly, or by virtue of the trust. This the Emperor Marcus also stated in a Rescript.

57. *Gaius, On Manumissions, Book III.*

When a wealthy man becomes the heir of a person who is poor, let us see whether this will be of any advantage to the slaves who are granted their freedom by will, without the creditors of

the estate being defrauded. And, indeed, there are certain authorities who hold that when a rich man appears as the heir, it is the same as if the testator had died after having increased his estate. But I have been informed (and this is our practice), that it makes no difference whether the heir is rich or poor, but the amount of the estate of which the testator died possessed must alone be taken into consideration. Julianus adopts this opinion to the extent that he holds that grants of freedom will not take effect where the testator was insolvent, and ordered the slave to be free, as follows, "Let Stichus be free when my debts are paid."

This opinion, however, does not coincide with that of Sabinus and Cassius, which Julianus himself appears to accept, as he thinks that the intention of the testator who manumitted the slave should be considered. For a person who orders his slave to be free under such a condition does so without any intention of committing a fraud, since he is held clearly to desire that his creditors shall not be cheated.

58. *Msecianus, Trusts, Book III.*

It is true that, where a slave is directed to be free under the terms of a will, and is afterwards alienated by the testator, and again becomes a part of the estate before it is entered upon, he will obtain his liberty as soon as the estate is accepted.

59. *Scasvola, Digest, Book XXIII.*

Titia bequeathed freedom directly to certain of her male and female slaves, and then inserted the following provision in her will, "And I wish all the slaves attached to my personal service, whose names are inscribed in my registers, to be free."

The question arose whether Eutychia who, along with the other personal slaves, was emancipated at the time when the will was executed, and who, when the testatrix died, was married to a steward who was a slave, would obtain her freedom under the general head of "Slaves attached to my personal service." The answer was that there was nothing to prevent her obtaining her freedom, even though at the time of the death of the testatrix she had ceased to be one of her attendants.

(1) Stichus received his freedom directly by the will of his master, and was accused of having fraudulently secreted much of the property of the estate.

The question arose if, before he could demand his freedom, he should not restore to the heirs the property which he was proved to have taken. The answer was that, according to the facts stated, the slave in question should be free.

Claudius: The point raised seems to have been finally disposed of, for the interest of the heirs will be sufficiently consulted by having recourse to the Edict concerning thefts.

(2) Lucius Titius provided by his will, "Onesiphorus shall not be free unless he renders an exact account of his administration." I ask whether Onesiphorus can demand his freedom by virtue of these words? The answer was that, in accordance with what is stated, he is rather deprived of freedom than granted it.

60. *The Same, Digest, Book XXIV.*

The following provision was inserted in a will, "I wish that a thousand *solidi* be given to Eudo, for the reason that he is the first child born after his mother obtained her freedom." If Eudo cannot prove that he was born after the manumission of his mother, I ask whether he can obtain his freedom by virtue of these words of the will. The answer was that this inquiry should not prejudice him.

61. *Pomponius, Epistles, Book XL*

I know that many persons, desiring that their slaves may never become free, are accustomed to insert the following clause in their wills, "Let Stichus be free when he dies." Julianus,

however, says that where freedom is granted at the last moment of life, it has no effect; as the testator is understood to have made a disposition of this kind for the purpose of preventing rather than of bestowing freedom. Hence, if the following should be inserted in a will, namely, "Let Stichus be free, if he should not ascend to the Capitol," it will be of no force or effect, if it is evident that the testator intended to grant the slave his freedom at the last moment of his life, nor will there be ground for a Mucian Bond.

(1) If the following provision should be inserted in a will, "Let Stichus be free if he should go to Capua," the slave will not be free unless he goes to Capua.

(2) Octavenus goes still further, for he holds that if a testator, having granted freedom to his slave under any condition whatsoever, should add, "I am unwilling that he be manumitted by my heir before the condition is fulfilled," this, addition will be void.

TITLE V.

CONCERNING FREEDOM GRANTED UNDER THE TERMS OF A TRUST.

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

Where any persons among those who have been charged with a grant of freedom under a trust are present, and others are absent for some good reason, and others still have concealed themselves, the slave to whom freedom was bequeathed under the trust will become free, just as if those who were present, and those who were absent for good reasons had been charged with the execution of the trust; and therefore the share of the right of patronage to which those who concealed themselves are entitled will accrue to the others.

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

If anyone, when dying intestate, should bequeath freedom to a slave by a codicil, and the estate should not be entered upon, the benefit conceded by the Constitution of the Divine Marcus will be available. In a case of this kind, it directs that the slave shall be entitled to his freedom, and that the estate shall be awarded to him if he gives sufficient security to the creditors of the same to pay the full amount which is due to each one of them.

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

Creditors generally have the right to bring praetorian actions against freedmen under these circumstances.

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

Hence, as long as it remains doubtful whether there is a successor or not, the Constitution will not apply, but as soon as it is certain, it will become operative.

(1) Where he who can obtain complete restitution rejects the estate, shall we hold that the Constitution will not become operative as long as his right to complete restitution continues to exist, because it is uncertain whether anyone will appear as an heir at law? The better opinion is that the Constitution will apply.

(2) But what if, after judgment has been rendered for the purpose of procuring freedom, the heir should obtain complete restitution? It can by no means be said that freedom which has once been granted can be revoked.

(3) Let us see whether those who receive their freedom must be present or not. And, as property awarded on account of freedom can be granted to them, even without their consent, this can also be done in their absence.

(4) But what if some of them were present, and others were absent? Let us see whether those who are absent will be entitled to their freedom. It can be said, just as in the case where an estate is entered upon, that those who are absent will also become free.

(5) If freedom is granted on a certain day, must we wait until the day arrives? I think that we should do so; therefore, the property will not be awarded before that time. But what should be done if freedom was granted under a condition? If some grants of freedom were made absolutely, and others conditionally, the property can be awarded immediately. When, however, all the grants of freedom were conditional, what then must be said? Must we wait until the condition is fulfilled, or shall we immediately award the property so that freedom will only be granted when the condition has been complied with? The latter opinion is preferable. Hence, when the property has been awarded, and freedom directly granted, it is immediately acquired; when it is granted at a certain time, it will be acquired when the time arrives; when it is conditional, it will be acquired when the condition is fulfilled. Nor is it unreasonable to hold that, while the condition upon which the grants of freedom are dependent is in abeyance, even though all the grants of freedom were conditional, the Constitution will apply. For it must be said where there is a prospect of freedom, the property must be awarded, when there is the slightest occasion for it, if this can be done without any loss to the creditors.

(6) If the slave who receives the grant of freedom, under the condition of the payment of ten *aurei* either to the heir, to someone who is not mentioned, or to the person entitled to the estate, the question arises, can the slave obtain his freedom? The better opinion is that the money should be paid to the person to whom the estate is awarded, as the condition appears to have been transferred to him. It is, however, certain if he was directed to pay it to some other person than the heir, that it must be paid to the individual designated.

(7) Where slaves have received their freedom under the terms of a trust, they do not become freedmen immediately, as soon as the estate is awarded, but they can obtain their freedom left" them by the trust; that is to say, they should be manumitted by the person to whom the estate is adjudged.

(8) The Emperor intended that an estate should be awarded only where sufficient security is given to the creditors for the payment of the entire amount due to each of them. Proper security must, therefore, be furnished. What is meant by the term "proper"? It signifies that sureties or pledges should be given. If, however, the creditor has faith in the promisor, without his furnishing a surety, the security will be considered sufficient.

(9) In what way should security be furnished to creditors ? Should it be given to them individually, or to one appointed by the entire number in the name of all ? It is necessary and is part of the duty of the judge to call the creditors together, and appoint one of their number to whom security shall be furnished in the name of all.

(10) Let us see whether security should be given to the creditors before the estate is awarded, or whether this should be done under the condition that security shall be furnished? I think that it will be sufficient if everything provided by the Constitution of the Divine Marcus is included in the decree.

(11) We should understand the entire amount to mean both principal and interest.

(12) The Constitution shows whose freedmen they who are manumitted become, so that those who receive their freedom directly will be the freedmen of the deceased; unless he who claims that the estate should be awarded to him alone wishes this to be done in such a way that those who have been emancipated directly may become his own freedmen.

(13) Should those who wish to become his freedmen be manumitted by him, or in awarding the estate ought we to mention that it is awarded upon the condition that the slaves who have been granted their liberty directly shall become his freedmen?

I think that this opinion should be adopted and stated in the decision, and the terms of the constitution also permit this to be done.

(14) When a slave, under the age of puberty, obtains his freedom, the party to whom the estate is awarded shall be entitled to his guardianship.

(15) If the deceased charged his heir to manumit certain slaves belonging to another, shall we say that the Constitution is applicable, or, indeed, will it not take effect? The better opinion is that there is ground for its application, because the person to whom the estate is awarded will be compelled to purchase the slaves, and have their freedom granted them by the PraBtor.

(16) If the legatee, and not the heir, is charged to manumit the slave, will the constitution fail to apply, because, the legacies not being due, the grants of freedom cannot be due either? The better opinion is that the same advantage will be available, as the intention of the constitution, generally speaking, is to grant freedom to all who are entitled to it, if the estate has been entered upon.

(17) The same constitution provides that if the Treasury acquires the estate, the grants of freedom must still be made. Therefore, if the property is without an owner, on account of the Treasury having either rejected or accepted it, the constitution will still apply. If, however, the Treasury obtains it in some other way, it is evident that the constitution will cease to be applicable. Hence, if the property of a legion, which is without an owner, escheats to the Treasury, the same opinion must be adopted.

(18) Likewise, where a minor of twenty years of age bequeaths a grant of freedom, we say that the slave will not be entitled to it, unless the minor left it under a trust. The slave will, however, be entitled to it if the minor should manumit him during his lifetime, provided he can give a good reason for doing so.

(19) Where freedom is granted and creditors defrauded by a testator who was not solvent at the time of his death, will the grant be valid? If the Treasury does not obtain the estate, the grant of freedom perhaps will be valid, because all that is due to the creditors is offered to them. If, however, the estate has been entered upon, it will not be valid. It is clear that if the Treasury should obtain the estate, there will be better ground for holding that the grant of freedom will not be valid. For anyone, strictly adhering to the terms of the constitution, might say that he can only blame himself, who desired that the estate should be awarded to him under the condition that the grants of freedom should be considered valid. *If* anyone, however, should follow the rule applicable where an estate is accepted, a direct grant of freedom will be void if the intention of the testator was fraudulent, and the result was that the creditors were cheated; nor will grants of freedom under a trust be executed if, by doing so, the creditors of the estate will be defrauded.

(20) When an estate has not escheated to the Treasury, and it has been adjudged for the purpose of preserving freedom, can the Treasury afterwards acquire it? The better opinion is that it cannot do so. It is evident that, if notice had not previously been given to the officials of the Treasury, and the estate is awarded for the preservation of freedom, it should be considered whether there is ground for the application of the constitution. If the estate is in such a condition that the Treasury must accept it, the award will be of no effect; but if it is not, there will be ground for it.

(21) Moreover, he to whom property had been adjudged should be compared to a possessor under the Praetorian Edict; and, according to this, he will be entitled to the rights of burial enjoyed by the deceased.

(22) Again, let us see whether the person to whom an estate is awarded can be sued by the creditors as an heir, or only on the bond which he has furnished. The better opinion is that he can only be sued on the bond.

(23) Where an estate is awarded to two or more persons, they will hold the property and the freedmen in common, and will have the right to bring an action in partition against one

another.

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

With reference to freedom granted by the terms of a trust, if the Praetor should, in the absence of the heir, decide that the slave was entitled to be free, he will become so, and will be the freedman of the deceased, if he was his slave, or of the heir if he belongs to the latter. Moreover, if the heir should die without a successor, the Senate, in the time of Hadrian, decreed that the freedom of the slave should be preserved.

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

Ten *aurei* were bequeathed by a testator, and the legatee was charged to purchase Stichus and manumit him. The Falcidian Law will apply, and the slave cannot be purchased for less than ten *aurei.* Some authorities hold that the legatee is entitled to three-fourths of the legacy, and should not be compelled to purchase the slave. They also think that even if an heir was requested to manumit his own slave, and only receives three-fourths of his legacy, he will not be compelled to manumit him.

Let us see whether, in this instance, another opinion should not be adopted. There are certain authorities who hold that, in the first place, the legatee should be compelled to assume the charge and purchase the slave, if he only receives three-fourths of his legacy. If, however, he is prepared to return what he has received, let us see whether he should be heard. The heir should be forced to pay the entire ten *aurei,* just as if the testator had expressly stated that the legacy should be paid in full.

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

Where a hundred *aurei* are bequeathed to anyone, under the condition that the legatee shall purchase and manumit a slave belonging to another, and when the property of the heir is sold, the legatee shall only demand a portion and not all of his legacy, he cannot obtain it unless he gives security to manumit the slave; provided that the value of the portion which he will obtain will be as much as the price of the slave, and the master of the latter is ready to sell him for this price; otherwise, the legatee will be barred by an exception on the ground of bad faith.

8. *Pomponius, On Plautius, Book VII.*

Where a person to whom the sum of a thousand *sesterces* has been bequeathed is charged to manumit a slave worth twenty, he cannot be compelled to execute the grant of freedom under the trust, if he does not accept the legacy.

9. *Marcellus, Digest, Book XV.*

When an heir has been charged not to permit a certain slave to become the property of another, the slave can, immediately after having been alienated, institute proceedings to demand his freedom. Where, however, the alienation is not voluntary, but a necessity exists for it on account of some act of the testator, it is probable that the trust should not be executed, because the deceased is not supposed to have had an alienation of this kind in view.

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

A certain man inserted the following provision in his will, "I do not wish my slaves, So-and-So and So-and-So, to be sold." Therefore, if he did not wish them to be sold and intended, if they were sold, that they should become free, their freedom should be granted them; for freedom is considered to have been bequeathed to a slave by the following clause, "I do not wish So-and-So to belong to anyone but you." Hence, in accordance with this, if the heir should attempt in any way to sell the slave, the latter can immediately claim his freedom, and if the heir should purchase him to prevent him from obtaining it, it will be of no advantage to him, because the condition has been fulfilled.

(1) A slave who was entitled to his freedom was sold. If he is willing to be manumitted by the heir, there will be no necessity to bring the purchaser, who has concealed himself, into court along with the present heir, as the slave can avail himself of the decree of the Senate to obtain his freedom under the will.

(2) A slave who was entitled to his freedom under a trust permitted himself to be transferred to a *bona fide* purchaser by the heir, who was not solvent. Do you think that an action can be granted against this manumitted slave, just as where a freeman deceived his purchaser by pretending that he was a slave? I, however, am inclined to believe that an action will properly lie against the vendor, as the case seems to be similar to that of a slave entitled to be free under a certain condition, and who suffered this to be done the day before he was to obtain his freedom by will.

11. *Modestinus, Differences, Book I.*

A ward cannot grant freedom to a slave by virtue of a trust without the authority of his guardian.

12. *The Same, On Manumissions.*

When Firmus Titianus bequeathed three slaves, who were tragedians, and added, "I charge you not to permit them to become the slaves of anyone else," the Emperor Antoninus stated in a Rescript that, as the property of Titianus had been confiscated, the slaves should be publicly manumitted.

(1) A legatee as well as an heir can be charged to manumit a slave, and if he should die before manumitting him, his heirs must do so.

(2) The Divine Antoninus and Pertinax stated in a Rescript, where an estate was claimed by the Treasury because there was a secret provision to deliver it to a person who is not capable of receiving it, that all grants of freedom made directly, or under the terms of a trust, should be executed.

13. *The Same, Rules, Book IX.*

If a female slave, who is pregnant, should suffer delay in being manumitted, not through the intention of the person charged with this duty, but accidentally, her child will not be free; but the person who should have manumitted the said slave will be compelled to deliver the child to its mother, in order that through her it may obtain its freedom.

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

Lucius Titius, having made a will, appointed Seia, his wife, and Titia, their common daughter, heirs to equal shares of his estate. In another place he said, "I desire my slave, Eros, who is also called Psyllus, to be free, if my wife consents." Therefore, as Seia, the wife of Lucius Titius, refused to accept her share of the estate, which went to her daughter Titia, under the substitution, I ask whether Eros, who was also called Psyllus, will be entitled to his freedom by virtue of the above-mentioned clause. Modestinus answered that the rights of Eros were not prejudiced, because the wife of the testator declined to accept the estate. I also ask whether his wife, Seia, who did not enter upon the estate, could legally oppose Eros when he demanded his freedom ? Modestinus answered that Seia's refusal of consent would be of no force or effect.

15. *The Same, Pandects, Book V.*

A person charged with the manumission of a slave under the terms of a trust can, in no way whatever, render the condition of the said slave worse; and therefore he cannot in the meantime sell him to anyone else, in order that he to whom he was sold may emancipate him; and if he should deliver the slave, he will be compelled to purchase and manumit him; for it is sometimes to the interest of a slave to be manumitted by an old man rather than by a young

one.

16. *Licinius Rufinus, Rules, Book V.*

Freedom can also be bestowed under the terms of a trust, and, in fact, to even a greater extent than where it is directly bestowed, for by means of a trust it can be granted not only to one's own slaves, but also to those of another; provided' words in common use and by which the intention of the testator is plainly expressed are employed.

17. *Claudius, On the Digest of Scsevola, Book XXI.*

Freedom is legally granted by a trust as follows, "When you think proper to manumit him."

18. *Scxvola, Digest, Book XXIII.*

The following provision was inserted in a will, "Let Pamphilus be free, if he transacts my business properly." As the testator died some years after making this will, and there was no ground for complaint of the conduct of Pamphilus, so far as his patron was concerned, the question arose whether he was entitled to his freedom under the will. The answer was that there was nothing in the case stated to prevent him from obtaining it.

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

A woman, having appointed her husband her heir, liberated her slaves by a trust, among whom was Stichus, the steward of her husband. The slaves having appeared before the Governor of the province for the purpose of obtaining their freedom, during the absence of their master who had a good reason for being away, and the Governor of the province having decided that the slaves were entitled to their freedom, the question arose whether proceedings could be instituted against Stichus to compel him to render an account of his administration as steward. The answer was that this could not be done.

(1) A man bequeathed a dowry and considerable other property to his wife, and charged her to manumit Aquilinus, her own slave, before the tribunal. The woman refused to do so, because the slave was her individual property. I ask whether he was entitled to his freedom. The answer was that if the wife had accepted not only her dowry, but also the other property left to her by the will, she could be compelled to manumit Aquilinus by virtue of the trust, and that, when he became free, he could demand anything that had been bequeathed to him.

20. *Pomponius, Epistles, Book VII.*

It is stated by Julianus that, when an heir who is charged to manumit a slave transfers the estate under the Trebellian Decree of the Senate, he can be compelled to manumit the slave; and if he should conceal himself, or be absent for some good reason, the Praetor, after proper cause is shown, must render a decision in accordance with the decrees of the Senate which relate to cases of this kind.

If, however, the beneficiary to whom the estate was transferred should have the custody of said slave, he himself can manumit him; and it is proper that the same formalities should be observed with reference to him, as is usually done with reference to purchasers in general.

Do you think that this is true? I, myself, actuated by the desire to acquire knowledge, have for seventy-eight years considered the following saying, which I have always in mind, as the best rule of life, "When I have one foot in the grave I shall still be glad to learn something." Aristo and Octavenus very properly hold that the slave in question does not form part of the estate subject to the trust, because the testator, by asking the heir to manumit him, does not seem to have had in view that he should be delivered to the beneficiary of the same. If, however, he should be delivered through a mistake of the heir, the opinion of Julianus should be adopted.

21. *Papinianus, Questions, Book XIX.*

"I request that Stichus shall not become the slave of another." It was decided by the Emperor

that freedom was granted by a trust under this clause: for what is more opposed to slavery than freedom ? Freedom, however, is not considered as granted after the death of the heir. The result is that if the heir, during his lifetime, should alienate the slave, he can immediately demand his freedom, and if the heir purchases him, it will be no impediment to his becoming free, as the condition has already been fulfilled.

This rule should also be adopted where the alienation by the heir was not voluntary, nor can it be stated, in opposition, that the alienation was not made by the heir himself; for the case resembles that of a slave who was to be free conditionally, where, to a certain extent, the condition has been complied with.

22. *The Same, Questions, Book XXII.*

When a tract of land and the sum of ten *aurei* are left to a legatee, instead of the price of one of his slaves, under the condition that he shall manumit the said slave, and he accepts the devise of the land, but rejects the bequest of the money to avoid the operation of the Falcidian Law, he can be compelled to accept it, together with the diminution resulting from the Falcidian Law, and to grant freedom to the slave under the terms of the trust, when he has once accepted the devise of the land.

(1) A testator, who had three slaves, charged his two heirs to manumit two of the said slaves whom they might select. One of the heirs failing to appear, the other mentioned the two slaves whom he desired to manumit. It can be said that they are liberated and obtain their freedom, just as if the heir who was present alone had the right to emancipate them. If, however, one of the slaves should die, and the heir should be absent for some good reason, or he of whom the request was made did not have the power of speech, it is established that the two surviving slaves will become free by the Decree of the Praetor.

(2) When a trustee who is charged with the grant of freedom is absent for a good and sufficient reason, or conceals himself; or where there are several heirs, some of whom are present and others absent for good cause; and still others do not appear in order to avoid the execution of the trust; or the heir charged with the grant of freedom is not living; or a proper heir rejects the estate; the Praetor must decree that the slave is entitled to his freedom under the trust provided by the will of Lucius Titius.

It has been expressly stated by a decree of the Senate that, although it may not be doubtful or obscure whose freedman the slave will become, the Praetor must decide which one of the heirs was absent for a good reason, and which one failed to appear for the purpose of preventing the execution of the trust.

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

Freedom granted under the terms of a trust cannot be deferred under the pretext that the slave has stolen something belonging to the estate, or has administered its affairs improperly.

(1) The heir of an heir, who has transferred the estate under the Trebellian Decree of the Senate, can be compelled to grant freedom to a slave, where the trust has not been executed by the former heir, if the slave who is to be manumitted selects him as his patron.

(2) I gave it as my opinion that a son, who is a soldier, or who has served in the army, and who has accepted a trust created by his father requiring him to liberate a slave forming a part of his *peculium castrense* (the charge being that this should be done by his legitimate sons) ; if he should become the heir of his father he can be forced to emancipate the slave, because the deceased thought that he was manumitting his own slave after having given him to his son. The latter cannot be compelled by his brother, who is the co-heir of the owner of the slave, to pay him a portion of the price of the slave, as this would be contrary to the will of the father; nor, on account of this mistake, should the other property which his father gave to his son when he was about to depart for the army be brought into contribution for the benefit of the

brother, who remained under paternal control; as the said son, who is included among the other lawful heirs, can retain his *peculium castrense* as a preferred legacy.

(3) Where freedom is granted under the terms of a trust, and a son is charged with the execution of the same, after he arrives at a certain age, and he dies before reaching that age, freedom must be granted to the slave by his heir at the prescribed time; but it has been settled that this decision, which only applies to a particular case, does not extend to other kinds of trusts.

(4) A testator wished a slave to be manumitted by his son after the expiration of five years, if, during that time, the slave paid him a certain sum every day. The slave ran away after two years had elapsed, and did not pay the money. It was held that the condition had not been complied with.

If, however, the son, who was the heir, or his guardians, had chosen to accept the services of the slave during the two years, in lieu of payment, it was held that this would be no impediment to the freedom of the slave, as it was the fault of the heir that the remainder of the condition had not been fulfilled.

24. *Ulpianus, Trusts, Book V.*

Generally speaking, we say that persons who can leave money under a trust can also bequeath a grant of freedom in the same manner.

(1) A grant of freedom under a trust, which is bequeathed to a slave of the Emperor, or of a municipality, or of anyone else, is valid.

(2) Where freedom is bequeathed by the terms of a trust to a slave of the enemy, can it be maintained that it is not without force or effect? Perhaps someone may say that a slave of the enemy is unworthy to become a Roman citizen. If, however, it is bequeathed to him in case he becomes one of our allies, what is there to prevent anyone from holding that the grant of freedom is valid?

(3) Where freedom is bequeathed under the terms of a trust to a man who is already free, and he is subsequently reduced to slavery, he can demand his freedom, provided he was a slave at the time of the death of the testator, or when a condition was fulfilled.

(4) Freedom can legally be left under a trust to a slave who is yet unborn.

(5) A slave cannot expect his freedom if he has been sentenced to the mines. But what if freedom was left to him under the terms of a trust, and he was released from the penalty of the mines by the indulgence of the Emperor? It was stated in a Rescript by our Emperor that he will not be restored to the ownership of his former master; but in this case, it is not stated to whom he will belong. It is certain that when he becomes the property of the Treasury that he can expect to obtain his freedom by virtue of the trust.

(6) Freedom under the terms of a trust can be granted to a slave conceived and born of a woman who was condemned to the mines. What is there surprising in this, as the Divine Pius stated in a Rescript that he could be sold as a slave?

(7) Where it is requested by the testator that Stichus should not afterwards serve as a slave, it was held that freedom should be considered to have been granted to him under a trust; for he who asks that he shall not afterwards serve as a slave is considered to ask that he be granted his freedom.

(8) Where, however, the testator states, "You shall not alienate or sell him," the same rule will apply, provided that this was done by the testator with the intention that he should obtain his freedom. But if he inserted the clause with a different intention (for example, because he advised the heir to retain the slave; or because he desired to punish and torture the latter in order to prevent him from obtaining a better master, or did so with some other motive than

that of liberating him), it must be said that he should not be granted his freedom. This was mentioned by Celsus in the Twenty-third Book of the Digest.

It is not so much the terms of the trust as the intention of the testator, which usually confers freedom in such cases. As, however, freedom is always considered to be granted, it devolves upon the heir to prove the contrary intention of the testator.

(9) When anyone appoints a slave a guardian, because he thinks that he is free, it is absolutely certain that he cannot demand his freedom, nor can the right to the guardianship be maintained by him on account of the grant of freedom. This is held by Marcellus in the Fifteenth Book of the Digest, and Our Emperor, with his Father, also stated it in a Rescript.

(10) Where anyone grants liberty directly to a slave who has been pledged, although, by the strict construction of the law, the grant is held to be void; still, if freedom had been left to him by the terms of a trust, the slave can demand his liberation by virtue of it. For the favor conceded to freedom requires that we should interpret the bequest in this manner, and that the words of the will mean that freedom should be demanded, just as if the slave had been directed to be free under the terms of a trust. For it is well known that many things contrary to the strict construction of the law have been decided in favor of liberty.

(11) It is established that grants of freedom which are either direct, or dependent upon the terms of a trust, cannot be carried out under a will which has been broken by the birth of a posthumous child, where the testator has not charged his lawful heirs with their execution.

(12) Where anyone is requested to manumit his own slave, or the slave of another, and he receives less by the will of the testator than the value of the slave, whether he can be compelled either to purchase the slave belonging to another, or to manumit his own, is a question for consideration. Marcellus says that, as soon as he accepts the legacy, he will, by all means, be compelled to manumit his slave. And, indeed, this is our practice, as it makes a great deal of difference whether anyone is requested to manumit his own slave, or a slave belonging to someone else. If it is his own slave, he will be compelled to manumit him, even if the amount he receives is very small; but if it is the slave of another, he should not be forced to manumit him unless he can purchase the said slave for a sum equal to what he receives by the will of the testator.

(13) Hence Marcellus says that he also, who is appointed the heir, can be compelled to manumit his own slave, if he obtains anything from the estate after payment of its indebtedness, but if he obtains nothing, he cannot be forced to do so.

(14) It is clear that, if less has been bequeathed to anyone than the slave is worth, but the legacy has been increased for some reason or other, it will be perfectly just for him to be compelled to purchase the slave with the amount which he obtains from the estate; but it should not be said that he has been left less than the slave was worth, as his legacy has been increased by reason of the will. For if, through delay, the crops or the interest should be added to the amount bequeathed under the trust, it must be held that freedom ought to be granted.

(15) On the same principle, if the price of the slave has been reduced, it must be held that he should be forced to purchase him.

(16) Where, however, the legacy has been diminished, it must be considered whether he who expected to obtain a larger legacy can be compelled to manumit the slave. I think that if he is ready to refund the legacy, he cannot be forced to do so, for the reason that he accepted the legacy with a different prospect, and it has been unexpectedly diminished. Therefore, if he is ready to surrender the legacy, he shall be permitted to do so, unless what remains of it is sufficient to pay the price of the slave.

(17) But what if a person is charged to manumit several slaves, and the sum bequeathed is equal to the value of some of them, but not to that of all; can he be compelled to manumit

some of them ? I think that he can be compelled to manumit as many as the legacy will permit him to do. But who shall decide which ones shall be manumitted; must the legatee select them, or must the heir do so? Perhaps someone may very properly say that the order given in the will should be followed. If the order is not indicated therein, the slaves ought to be selected by lot, to prevent the Praetor from being suspected of favoring any through interest, or kindness; for he must render his decision by taking into account the alleged merits of each slave.

(18) In like manner, it must be held that, where a legatee is ordered to purchase certain slaves, and give them their freedom, and the money which was bequeathed for this purpose is not sufficient for the purchase of all of said slaves, the rule in this case will be the same as we have adopted in the preceding one.

(19) Where a legacy is bequeathed to anyone, and he is requested to manumit his own slave, and transfer the legacy to him, must freedom be granted under the terms of the trust? Some authorities are in doubt on this point, because if the legatee is compelled to give the slave his liberty, he will necessarily be obliged to execute the trust and transfer the legacy; and there are some authorities who hold that he should not be forced to do so. For if a legacy should be left to me, and I should be charged to immediately transfer it to Titius, and also to grant freedom under the trust to my slave, we should undoubtedly hold that I cannot be compelled to grant him his freedom, because I am not considered to have received anything to take the place of his value. It is clear that if I should be charged to pay the legacy after a certain time has elapsed, it may be held that I can be compelled to manumit the slave if, in the meantime, I have obtained any benefit from the legacy.

(20) Where anyone is asked to give to one person a tract of land, and to another a hundred *aurei,* at the time of his death, he will be compelled to pay whatever he has collected out of the profits of the land, if the amount is equal to that provided by the trust; so that, in this instance, it is not certain whether the money left under the trust, or the grant of freedom, will be due.

(21) Whenever freedom is legally bequeathed by the terms of a trust, the condition is such* that the right can neither be extinguished by a donation, nor by usucaption; for no matter into whose hands the slave whose freedom has been left under the trust may come, his owner will be compelled to manumit him. This has been frequently set forth in the Imperial Constitutions. Therefore, he into whose hands the slave may come will be compelled to grant him his freedom by virtue of the trust, if he who was requested to do so prefers it; for it has been settled by a broader interpretation that, even if freedom were left to a slave conditionally, and he should be alienated while the condition is pending, he is, nevertheless, alienated with the understanding that he is to be free if the condition is complied with. If, however, the slave is unwilling to be manumitted by him, but prefers to obtain his freedom from the person who was charged to emancipate him, the Divine Hadrian and the Divine Pius stated in a Rescript that he must be heard.

The Divine Pius also stated in a Rescript that even if he had been already manumitted and preferred to become the freedman of the person who had liberated him, he should be heard. But if the freedman can show that his rights may be, or have been prejudiced by his manumission, on account of some act of the person who manumitted him or for some other reason, relief must be granted him by one of these constitutions, in order that his condition may not become less endurable, which would be contrary to the wishes of the deceased. It is. clear that if the intention of the deceased was that the slave should be manumitted by anyone whomsoever, it must be said that the constitutions above referred to will not apply.

25. *Paulus, Trusts, Book HI.*

If the heir who sold the slave should die without leaving an heir, and the purchaser should be

living, and the slave should desire to become the freedman of the deceased, and not that of the purchaser, Valens decided that he ought not to be heard, for fear that the purchaser might lose both the price which he had paid and his rights over the freedman as well.

26. *Ulpianus, Trusts, Book V.*

Where anyone who was requested to manumit the slave of another transfers the slave to a third party on account of his death or the confiscation of his property, I think that it should be held that there is ground for the application of the constitutions, in order that the condition of the freedom bequeathed by the trust may not be rendered worse. For when anyone is charged to manumit a slave at the time of his death, and he dies before giving the slave his freedom, it has been decided that it is the same as if the slave had been bequeathed his freedom by him; for he could have granted him his freedom directly by his will.

The result of this is, that whenever anyone who obtains his freedom by virtue of a trust is manumitted by someone, other than the person charged with manumitting him, he w^Jl be entitled to the benefit of the constitutions, and will be regarded just as if he had been manumitted by him who was asked to do so; for the reason that favor is always shown to grants of freedom under a trust, and when they are bequeathed they should not be interfered with, as he to whom they are granted is in the meantime held to be in the enjoyment of his liberty.

(1) Therefore, it is apparent that relief should be granted where freedom is left under a trust, and that any delay which results should be considered as proceeding from the matter itself, and in reckoning the day from which freedom can be demanded, children should be given to their mother to be manumitted, where she is a liberated slave, and the children are born free from the day when freedom was demanded. For, generally, freedom which is left under a trust is demanded too late, or is not demanded at all, on account of the neglect or timidity of those who are entitled to it; or because of their ignorance of their rights; or on account of the authority and rank of those who are charged with the execution of the trust; which things should not stand in the way of the acquisition of freedom.

Hence we maintain, and it should so be decided, that children are born free from the very time when any delay is made in liberating their mother from servitude; and, moreover, the child of a female slave should be considered as manumitted from the very time when the mother had the right to demand her freedom, even though she may not have done so.

It is clear that relief should be granted to minors of twenty-five years of age in a case of this kind, and that any delay should be held to have proceeded from the matter itself; for, as it has been decreed and set forth in the Constitution of the Divine Severus that wherever delay takes place in the payment of money left to minors under a trust, it should be considered as having proceeded from the matter itself, there is still greater reason that this rule should be adopted where grants of freedom are involved.

(2) A certain Caecilius, who had given a female slave in pledge, provided by his will that, after the claim of his creditor had been satisfied, the slave should be manumitted by virtue of a trust. The heirs not having paid the creditor, the children afterwards born to the said slave were sold by him. Our Emperor and his Father stated in a Rescript that, in accordance with what had been decided by the Divine Pius, the children should not be defrauded of the freedom to which they are entitled, and that the price having been refunded to the purchaser, they should become free; just as if their mother had been manumitted at the time when they were born.

(3) Our Emperor and his Father also stated in a Rescript that if a will or a codicil had not been opened within five years after the death of the testator, and the female slave had had a child in the meantime, it should be delivered to its mother, in order that it might be granted its freedom; and that it should not remain in slavery on account of accidental delay.

(4) It is, therefore, apparent from this Rescript, as well as from the one which we have mentioned as promulgated by the Divine Pius, that these Emperors were unwilling that any accidental delay in granting freedom should prejudice the rights of a child born of a slave to whom freedom was granted under the terms of a trust.

(5) This, however, will not be the case where freedom is to be granted under a trust to a female slave by the substitute of a son under the age of puberty, if she had the child during the lifetime of the minor; or if she was to receive her freedom after the lapse of a certain time, or conditionally, and she brought forth the child before the time had arrived, or before the condition had been complied with; for the said child will not be entitled to freedom because the condition in this case is different, as the delay was not accidental, but was caused by the will of the testator.

(6) If a slave should be bequeathed to anyone in such a way that the legacy is held to be void, and freedom is bequeathed to the same slave under the terms of a trust, the question arises whether the grant of freedom must also be held to be void. And if the slave demands his freedom under the terms of the trust of the person under whose control he remains, where the legacy left to him who was charged to manumit him has been declared to be void, or if the slave himself was bequeathed as was stated above, whether the bequest of his freedom should not be considered to be without force or effect. I think it should be said that the grant of freedom under the trust remains unimpaired, even though nothing may come into the hands of him who was asked to manumit the slave. Hence, he who obtains the legacy must liberate the slave, for the reason that freedom granted under the terms of a trust permits no obstacle to be interposed.

(7) In the case of bequests of freedom, relief is granted by a decree of the Senate enacted in the time of the Divine Trajan, during the Consulate of Rubrius Gallus and Gselius Hispo, as follows: "If those charged with a grant of freedom, having been summoned by the Prse-tor, refuse to appear, and, after investigation, the Praetor finds that the slaves are entitled to be free, they will be in the same position under the law as if they had been directly manumitted."

(8) This Decree of the Senate has reference to those who are entitled to freedom by virtue of a trust. Hence, if they are not entitled to it, and it has been fraudulently obtained by a decision of the Praetor, freedom will not be granted under this Decree of the Senate. This Our Emperor and his Father stated in a Rescript.

(9) Those must be summoned before the Praetor who are obliged to grant freedom under a trust, but the Rubrian Decree of the Senate will not apply unless they are summoned. Hence, they should be summoned by notices, by edicts, or by letters.

(10) This Decree of the Senate applies to all those who conceal themselves, and who are required to grant freedom under the terms of a trust. Hence, no matter who is charged, whether it is the heir or anyone else, there will be ground for the application of the Decree of the Senate; for all of those who are obliged to grant freedom by virtue of a trust are in such a position that the Decree of the Senate will be applicable to them.

(11) Wherefore, if the heir should conceal himself, and the legatee or the trustee who was asked to grant freedom to a slave is present, the Decree of the Senate will not take effect, and the grant of freedom will be prevented; for, in this instance, we suppose that the legatee has not yet obtained ownership of the slave.

27. *Paulus, Trusts, Book III.*

Therefore, in this case recourse must be had to the Emperor, in order that the interests of freedom may be consulted.

28. *Ulpianus, Trusts, Book V.*

Will there be ground for the application of the Rubrian Decree of the Senate, if a slave, to

whom freedom was bequeathed by a trust, should be sold by the person charged with his liberation, and the purchaser should conceal himself, but the trustee should appear? Marcellus says that the Decree will apply, because the party who was charged to manumit the slave is not present.

(1) The following words, "Refuse to appear," do not absolutely require that he whose duty it is to grant freedom should conceal himself, for if he does not do so, but merely fails to appear, the Decree of the Senate will be applicable.

(2) The same rule should also be observed where several heirs are charged with the granting of freedom under the trust, and a decision rendered that no good cause exists for their absence.

(3) The slave will become the freedman of those who are absent for a good reason, as well as of those who, being present, do not cause delay in the execution of the trust, just as if they alone had granted him his freedom.

(4) Where anyone, having been charged to manumit a slave that does not belong to the estate, conceals himself, a Decree of the Senate to provide for such an emergency was enacted during the Consulate of Emilius Juncus and Julius Severus as follows: "It is decided that where any one of those who are charged to grant freedom to a slave under a trust, for any reason whatsoever, and the slave did not belong to the person who made the request at the time of his death, and the trustee refuses to appear, the Prastor shall take cognizance of the case, and if it is established that the slave has a right to be manumitted, and the person charged with his manumission is present, he must decide accordingly. And, after he has rendered his decision, the condition of the slave will be the same in law as it would have been if he had been manumitted by the person who was charged to do so under the trust." (5) It must be held that persons are not present for a good reason, when no improper cause exists for their absence; as it is sufficient if they have not absented themselves for the purpose of defrauding the slave of his freedom, in order that they may appear to be absent for a good reason. It is, however, not necessary that anyone should be absent on public business. Hence, if he has his domicile in one place, and he applies for freedom under the trust in another, it must be said that it is not essential for him who is alleged to be the one from whom the grant of freedom is due to be summoned, because if while he is absent, it should be established that freedom ought to be granted, a decree can be rendered that he is absent for a good reason, and he will not lose his rights over his freedman; for no one can entertain any doubt that he is absent for a just cause who is at his own residence.

29. *Paulus, Trusts, Book HI.*

Where a slave is alienated after he has been placed in such a position that he ought to be liberated under the terms of a trust, the person to whom he belongs in the meantime will be compelled to manumit him. In this case, however, no distinction is made as to whether there is a good cause for his absence or not, for, in any event, he will be entitled to his freedom.

30. *Ulpianus, Trusts, Book V.*

When a decree is rendered by the Praetor that he who is absent has good reason for it, and he is already dead, Our Emperor stated in a Rescript that the decree must be transferred to his heir, and that the law would apply to him just as if the Praetor had decided that he himself was absent for a good reason.

(1) Where an infant was among the slaves entitled to manumission, the Senate decided that the age of one of them would prevent the others who were entitled to be free under the terms of the trust from obtaining their liberty.

(2) This rule will also apply where only one heir is appointed, and he is unable to speak for himself.

(3) When, however, the minor has a guardian, and he is unwilling to authorize the grant of freedom, the Divine Brothers stated in a Rescript that the slave should become free under the terms of the trust, just as if he had been manumitted by the minor himself, by the authority of his guardian; and that it should not be productive of any disadvantage to the minor, nor would it, in any way, prejudice the grant of freedom, if he did not have the slave as his freedman.

(4) Therefore, when any case occurs in which a child is not able to speak for himself, and yet is charged with a grant of freedom under a trust, we must take into consideration the spirit of the Decree of the Senate, which even extends to the infant heir of the person charged with the execution of the trust.

(5) Recourse should also be had to the Praetor under these circumstances, especially as it is provided by a Rescript of the Divine Pius that where some of those charged with the execution of the trust are present, and others have concealed themselves, and others again are absent for some good reason, and there is also an infant, the slave will not become the freedman of all of them, but only of the infant and of those who are absent for a good reason, or of those who are present.

(6) Where several heirs are appointed, and among them there is one who cannot speak for himself, but who has not been charged to manumit the slave, the grant of freedom will not lose its effect because the infant cannot sell his share of the slave to his co-heirs. The Vitrasian Decree of the Senate is applicable in this instance.

The Divine Pius, however, stated in a Rescript addressed to Cassius Dexter, that the matter could be disposed of as follows, namely, by appraising the shares of the slaves to whom freedom was granted under the terms of the trust, at their true value, and then directing the slaves to be manumitted by the persons charged with that duty. Those who manumitted them will, however, be liable to their brothers and coheirs, just as if judgment had been rendered against them on this account in court.

(7) The Divine Pius stated in a Rescript, with reference to an insane person, that freedom granted under a trust was not prevented on account of the condition of the appointed heir, where it was alleged that he was not of sound mind; and, therefore, if it should be established that freedom had been legally provided for by the trust, a decree must be rendered in which this is stated.

(8) Relief should be granted to a deaf and dumb person just as in the case of an infant.

(9) Where anyone dies without leaving an heir or other successor who can execute the trust conferring freedom, the Senate decreed that relief should be granted upon application being made to the Prsetor.

(10) If, however, a proper heir should reject the estate, relief should be granted by the Decree of the Senate to the person entitled to freedom under the trust; even though he cannot be said to die without an heir, who leaves a proper heir, even if he rejects the estate.

(11) The same rule will also apply where a minor of twenty-five years of age enters upon the estate of the person charged with granting him freedom, and obtains complete restitution because of his rejection of the estate.

(12) It may also be asked whose freedman the slave becomes; for, in accordance with the constitution, he obtains his freedom just as if he had acquired it by virtue of the will. He will, therefore, become the freedman of the deceased, and not of him who was charged with the execution of the trust.

(13) A Rescript of the Divine Marcus and Verus is extant which says that where one of those charged with the execution of the trust dies without leaving a successor, and the other is absent for some good reason, the slave shall be entitled to his freedom, just as if it had been granted to him regularly by the person who died without a successor, or by him who was

absent for a good reason.

(14) A very nice point may arise; that is, where an heir dies without a successor, whether the slave can obtain his freedom before it is certain that an heir or a possessor of the estate under the Praetorian Edict will not appear, or while it is still doubtful (for instance, while the appointed heir is deliberating), whether he will accept the estate. The better opinion is that it is necessary to wait until it is certain that no successor will appear.

(15) Our Emperor, Antoninus, stated in a Rescript that a slave who is entitled to freedom by virtue of a trust cannot receive anything under the will of the heir without his freedom being mentioned.

(16) The Divine Marcus also stated in a Rescript that grants of freedom under a trust could not be annulled or unfavorably affected by the age, the condition, the default, or the tardy action of those who were required to see that they were executed.

(17) Although a bequest of freedom made by a codicil which is void is not due, still, if the heir considered the codicil to be valid, and paid out anything under it, and desired that the slaves should remain free for the sake of carrying out the provisions of the trust, it has been declared by a Rescript of Our Emperor and his Divine Father that they will justly be entitled to their freedom.

31. *Paulus, Trusts, Book III.*

Freedom can be granted under a trust to a slave belonging to another, provided he has testamentary capacity with reference to his master.

(1) Where a person about to die intestate charged his son to manumit a certain slave, and a posthumous child was afterwards born to him, the Divine Fathers stated in a Rescript that, because the slave could not be divided, he should be manumitted by both the heir at law and the posthumous child.

(2) A person who is charged with a grant of freedom under a trust can manumit a slave, even at the time when he is forbidden to alienate him.

(3) If a patron acquires praetorian possession contrary to the provisions of the will, because his freedman has passed him over, he cannot be compelled to sell his own slave whom he was requested by his freedmen to manumit.

(4) Where the person to whom a slave belongs is unwilling to sell him in order that he may be manumitted, the Prsetor has no cause to interfere. The same rule applies when he wishes to sell him for more than *a* just price. If, however, the master is ready to sell his slave for a certain sum which, at the first glance, does not appear to be unjust, and he who was asked to manumit him contends that the price is unreasonable, the Praetor should interpose his authority, so that a just price having been paid with the consent of the master freedom may be granted to the slave by the purchaser.

If, however, the master is willing to sell the slave, and the latter desires to be manumitted, the heir should be compelled to purchase and manumit him; unless the master wished to manumit the slave in order that an action might be granted him against the heir to recover the price. The same should be done if the heir conceals himself. The Emperor Antoninus, also, stated this in a Rescript.

32. *Msecianus, Trusts, Book XV.*

If the master is ready to alienate the slave, but is not willing to do so before he is satisfied with the price, he ought not to be compelled to liberate him, lest, if he did it, he might obtain little or nothing, if he who is asked to manumit him should prove to be insolvent.

(1) If the slave does not consent, neither the master nor anyone else should be permitted to

proceed with the matter, because a trust of this kind is not one by which anything is acquired by the master; otherwise, the benefit of the trust would appear to accrue only to himself.

This might happen if the testator wished the slave to be purchased for more than he was worth, and be manumitted, for then the master could proceed with the execution of the trust; because it would be to his interest to obtain, in addition to the true value of the slave, any excess which the testator ordered to be given him; and it is to the interest of the slave to secure his freedom.

(2) This will occur where the heir or the legatee is directed to purchase certain property for a special sum of money, and deliver it to another; for then both the owner of the property and the person to whom it is to be delivered can proceed to compel the execution of the trust, as both of them are interested in doing so; the owner, in order that he may obtain any excess over and above the price which the testator has ordered to be given him, and the person to whom the property was left, in order that he may acquire it.

33. *Paulus, Trusts, Book III.*

Where the son of the deceased is asked to manumit a slave belonging to his father, it must be said that he can have him as his freedman under the Praetorian Edict, and impose services upon him; for he can do this as the son of the patron, even if the slave should obtain his freedom directly.

(1) There will be ground for the application of the Rubrian Decree of the Senate even when freedom is granted under a condition, provided compliance with the condition is not imposed upon the slave himself. Nor does it make any difference whether the condition consists of giving or doing something, or is dependent upon the occurrence of any other event, for the heir will lose his freedom as the son of the deceased if he places any obstacle in the way of the fulfillment of the condition, even though he can acquire his right over the freedman in another way.

Sometimes he suffers a penalty, for if he demands that the slave shall remain in servitude, or accuses him of a capital crime, he will lose praetorian possession contrary to the provisions of the will.

(2) Where a slave is bequeathed to anyone who is charged to manumit him, but refuses to accept him, he can be compelled to do so, or to assign his rights of action to whomever the slave may select, in order that the grant of freedom may not be annulled.

34. *Pomponius, Trusts, Book III.*

When the person to whom a slave is left to be liberated under a trust is unwilling, the slave should not be delivered to him in order to be manumitted; but he can become the freedman of another than the one who was requested to emancipate him.

(1) Campanus says that if a minor of twenty years of age should ask his heir to manumit a slave who belongs to him, his freedom must' be granted; because, in this instance, the *Lex ^lia Sentia* does not apply.

(2) A slave was bequeathed to Calpurnius Flaccus, who was charged to manumit him, and if he refused, the same slave was bequeathed to Titius, who was also charged to manumit him; and if he should fail to do so, the slave was ordered to be free. Sabinus says that the legacy is void, and that the slave will become free immediately by the terms of the will.

35. *Msecianus, Trusts, Book XV.*

The opinion of Gaius Cassius is not adopted, for he held that the obligation of manumitting his own slave should not be imposed upon the heir or the legatee, if the services of the slave were so necessary that he could not dispense with them; as, for instance, where he was his steward, or the teacher of children, or where he had committed an unpardonable crime. For

the testator is considered to have had these slaves in his power, and the owners have the right to reject the will, but if this is not done, the wishes of the deceased should be carried out.

36. *The Same, Trusts, Book XVI.*

Neither infants, insane persons, captives taken by the enemy, nor those whom religion or any honorable cause, or some calamity, or important business, or the danger of forfeiting life or reputation, or anything of this kind detains, come within the scope of the Rubrian Decree of the Senate; nor, indeed, minors who have no guardians, and even if they have any, are they or their guardians subject to its provisions, where any of the above-mentioned matters are involved. For, even if the latter designedly refrain from exerting their authority, I do not think that their wards should be deprived of the rights over their freedmen, because it is unjust that a ward should suffer wrong by the act of his guardian who, perhaps, may not be solvent, and only those are included in the Decree of the Senate who are obliged to grant freedom in accordance with the provisions of the trust. What course must then be pursued ? Relief is granted to such persons by the Dasumian Decree of the Senate, under which provision is made with reference to those who are absent for some good reason, in order that no impediment may be placed in the way of freedom, and that the rights over a freedman may not be taken from those who are not guilty of fraud.

(1) If an absent party is defended by an attorney, he is always held to be absent for some good reason, and he will not be deprived of his rights over his freedman.

(2) No objection can be urged against the jurisdiction of a magistrate who has cognizance of a grant of freedom under a trust, by alleging a personal privilege, or one attaching to a municipality or a corporation, or any office held by anyone, or the civil condition of any of the parties interested.

37. *Ulpianus, Trusts, Book VI.*

When an absolute grant of freedom is made under the terms of a trust to a slave who is said to have administered the affairs of his master, the Divine Marcus stated in a Rescript that it should not be delayed; but that an arbiter must immediately be appointed for the purpose of compelling the slave to render an account. The words of the Rescript are as follows: "It seems to be the more equitable course to grant freedom to Trophinus at once under the trust, because it is established that it was bestowed without the condition of his rendering an account. Nor would it be humane for the enjoyment of his liberty to be delayed on account of any pecuniary question which may arise. However, as soon as he obtains his freedom, an arbiter should be appointed by the Praetor before whom he who transacted the business must appear and render an account." Therefore, he is only obliged to render an account, but nothing is said as to his paying over any balance which may remain in his hands. I do not think that he can be forced to do so, for he cannot be sued after having obtained his freedom on account of any business which he transacted while in servitude.

It is clear that he can be forced by the Praetor to surrender any property mentioned in his accounts, and all the articles or money of which he has possession, as well as to give information with reference to special matters.

38. *Paulus, Decrees, Book III.*

A testator, whose will was not perfect, bequeathed freedom and a trust to a female slave whom he had reared. As all these bequests took effect under an intestate succession, it was asked whether the slave was manumitted by virtue of the trust. An interlocutory decree was rendered to the effect that even if the father had demanded that nothing be done *ab intestato,* his children, through respect for his memory, ought to have manumitted the slave to whom their father was attached. It was therefore decided that she was legally manumitted, and for this reason entitled to the benefit of the trust.

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

Paulus gave it as his opinion that, even though the slave of another whom a testator desired to be manumitted by one of his heirs, under the impression that he belonged to himself, was concerned, he who was asked to manumit him should be compelled to purchase the slave, and liberate him; as he did not think a case involving freedom, and one relating to the disposition of money under a trust, were similar.

(1) Paulus gave an opinion as follows, "Believe me, Zoilus, that my son Martial is grateful to you, and not to you alone, but also to your children" (meaning that the intention of the deceased, with reference to a benefit to be conferred upon the children of Zoilus, was included in this clause, they being slaves), "no greater service can be rendered them than to give them their freedom." Therefore the Governor should execute the will of the deceased.

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

Lucius Titius gave his female slave, Concordia, to his natural daughter, Septicia. Afterwards, by his will, he bequeathed the abovementioned slave along with others to his daughter, for the purpose of manumitting her. I ask whether his daughter, Septicia, can be compelled to manumit the slave. Paulus answered that, if the donation of the slave was made during the lifetime of the natural father, and the daughter did not accept other legacies left by the will of her father, she could not be compelled by the terms of the trust to manumit the said female slave, who was her own property.

(1) Lucius Titius bequeathed his slave Stichus to Msevius, and asked that he should never be manumitted either by him or by his heir. Paulus gave it as his opinion that the testator had the power afterwards to liberate this slave, because he did not impose any condition upon himself but upon his legatee.

41. *Scssvola, Opinions, Book IV.*

"I wish Thais, my female slave, to become my freedwoman, after she has served my heir as a slave for ten years." The question arises, as the testator desired the slave to be his freedwoman, and the heir could not make her such, and freedom was not absolutely and directly granted her, whether she would remain in slavery even after the ten years had elapsed. The answer was that there was nothing in the case stated to show why Thais should not be entitled to freedom.

(1) Lucius Titius provided in his will as follows, "My dear son, Msevius, if Stichus, Damas, and Pamphilus have deserved it at your hands, I request you not to permit them to serve as slaves to another after my debts have been paid." If it was the fault of the heir that the debts of the estate were not paid, I ask whether the slaves can obtain their freedom under the terms of the trust. The answer was that the heir ought not to be blamed if he delayed payment of the debts on account of the convenience resulting to himself in managing his property; but if it should clearly be proved that he designedly did not pay the debts, in order to prejudice the grants of freedom, the latter will become operative.

(2) A testator charged the testamentary guardian of his children to manumit his slaves, but the person appointed was excused. I ask whether the other guardians appointed in the place of the one who was excused should be required to liberate the slaves. The answer was that, according to the facts stated, the appointed heir appeared to have been charged with the grants of freedom.

(3) "I give to Seius three pounds of gold and my notary Stichus, whom I charge him to manumit." Seius was appointed guardian by the same will, but excused himself from accepting the guardianship. The question arises whether the grant of freedom under the trust should, nevertheless, be executed. The answer was that there was nothing in the case stated which would prevent this from being done.

(4) A testator, having appointed his sister his heir, made the following provision with reference to his slaves, "I wish, and I charge you, my dear sister, to entertain the highest consideration for my stewards, Stichus and Damas, whom I have not manumitted, as they have not rendered their accounts. If you are also satisfied with those slaves, you know the feelings which I entertain towards them." Where the stewards were ready to render their accounts, and the heir did not grant them their freedom, I ask whether she should be heard if she alleged that she was not satisfied with them. The answer was that the displeasure of the heir should not be considered, but only what would satisfy a reliable citizen to enable them to obtain their freedom.

(5) Lucia Titia charged her heirs to purchase Pamphila, the female slave of Seia, and her children, and manumit them. An estimate of the amount which ought to be given for them was made by a judge, and, in the meantime, before the money was paid, Pamphila brought forth a child. I ask whether the child of Pamphila would belong to the heirs of Seia, or to the heir of Titia? The answer was that the child would be the property of the person to whom the mother belonged at the time of its birth; but if the heir was in default in executing the trust, he should be compelled also to grant freedom to the child.

(6) Lucius Titius made the following provision in his will: "I recommend So-and-So and So-and-So, slaves who are physicians, to you, and it depends upon you whether you have them as your good freedmen and medical attendants. I myself would grant them freedom, but I fear to do so, because the physicians of my sister, who were slaves, having been manumitted by her, and having served their time, abandoned her." I ask whether the above-mentioned slaves are entitled to their freedom under the trust. The answer was that, in accordance with the facts stated, the necessity of liberating them is not imposed upon the heirs, but that this depends upon their judgment.

(7) Titius granted freedom to his slave "in case he rendered his accounts." I ask whether the accounts rendered by him should include, as part of the sum remaining in his hands, any losses which may have accidentally been incurred. I gave it as my opinion that in any business which was transacted with the consent of the master, those losses which were the result of accident could not be charged to the slave, and must not be included, in the balance remaining in his hands.

(8) I also ask, where a slave is directed to surrender all of his *peculium,* whether the *peculium* should be calculated in such a way that only that will be included in it which would belong to the master for any reason whatsoever. The answer was that, in the case in question, what the master was entitled to should not be deducted from the *peculium.*

(9) I also ask, if the slave has placed in his *peculium* any of the balance remaining in his hands, whether this should be deducted from the *peculium* which he is required to surrender. The answer was that if what is mentioned has been placed in his *peculium,* it must be paid over as a part of the balance, for the condition is sufficiently complied with where the remainder of the *peculium* is delivered.

(10) A testator made a grant of freedom by his will as follows: "I desire my slave, Cupitus, to be free, after rendering his accounts, when my son Marcianus reaches the age of sixteen years." After the death of the testator, the guardians of his son required Cupitus to pay a debt due to the estate, and the latter paid to the said guardians the amount which he had collected. The son afterwards died under the age of puberty, his mother became his heir, and caused judgment to be rendered against the guardians on account of their administration of the guardianship. Cupitus demanded his freedom at the time when Marcianus would have been sixteen years of age, if he had lived; and offered to render his accounts for a year after the death of the testator, as the other accounts had been approved.

The question arose whether Cupitus could also be compelled to render the accounts for which

the guardians were responsible. The answer was that the slave in question seems to have complied with the condition of rendering his accounts, if he had rendered one of all the business which he had conducted, and which could properly be required.

With regard to the other proviso, the more indulgent interpretation should be adopted, that is, the child having died, the slave had waited long enough, as he did not demand his freedom until the time when the minor would have attained his sixteenth year if he had lived.

(11) "Stichus and Damas, my slaves, you will become my freedmen, if you render your accounts." The question arose whether, in order to obtain their freedom, they must not only render their accounts, but also give up any property which had been designedly and fraudulently appropriated by them. The answer was that, in the condition of rendering their accounts, everything which related to the administration and fidelity of the slave was included.

(12) Certain slaves did not comply with the condition of rendering their accounts within a specified time, and afterwards announced that they were ready to do so. The question arose whether they could obtain their freedom. The answer was that if they were to blame for not complying with the condition within the prescribed time, they would not become free, even if they were subsequently willing to render their accounts.

(13) "I request my heirs, and I charge them to manumit Stichus, after he renders his accounts, when my son reaches the age of sixteen years." I ask whether the testator intended that the slave should act as steward until the time when the son reached the age of puberty. The answer was that it was clear that the testator intended that Stichus should also render an account of this part of his administration.

(14) "I direct that my slave, Stichus, give and pay to my daughter and my wife, my heirs, so many *aurei,* without any controversy, and I charge them to manumit him." As the wife rejected the estate, the question arose whether the slave was obliged to pay both of them, or only the daughter. The answer was that the entire sum should be paid to the daughter, as she was the sole heir to the estate.

(15) A testator having appointed his son heir to his entire estate, granted him his freedom in the following words: "Let December, my accountant, Severus, my steward, and Victorina, the wife of Severus, become free in eight years, and I wish them to remain in the service of my son for that time. Moreover, I charge you, my dear son Severus, to treat December and Severus, to whom I have not immediately granted freedom, with due consideration, in order that suitable services may be rendered by them to you, and I hope that you will have them as good freedmen."

As the son of Titius was nine years of age at the time that the latter made his will, and Titius died two years and six months afterwards, I ask whether the eight years during which the grant of freedom was deferred should be reckoned from the date of the will, or from the time of the death of the testator. The answer was, that the testator appeared to have counted the eight years, during which the grant of freedom was in abeyance, from the day when the will was made, unless it can be proved that his intention was otherwise.

(16) "Let Spendophorus be free when my daughter marries in my family, if he renders a satisfactory account of his administration to her." The daughter, having died before reaching the age of puberty, and during the lifetime of her father, Seius became the heir by substitution. If Spendophorus did not transact the business of the minor, and ceased to administer the affairs of her father, I ask whether he would become free by the terms of the will, at the time when, if Titia had lived, she would be twelve years old. The answer was that according to the facts stated, if the slave had not transacted any business of which he would be compelled to render an account to the heir, he would become free.

(17) "I wish Stichus to be manumitted after he has rendered his accounts." Stichus, who was a banker, executed certain promissory notes with the approval of his master, and produced accounts signed by the latter, but he did not afterwards contract any other liabilities. The question arose whether the condition could be held to have been complied with, if there were some insolvent debtors whose claims others had attempted to collect. The answer was, that the fact that some of the debtors were not solvent had nothing to do with the obligation of rendering the account.

42. *Marcianus, Trusts, Book VII.*

Our Emperor, Antoninus Pius, in order that the last wills of his soldiers might in every respect be considered valid, where an appointed heir and his substitute died suddenly before entering upon the estate, ordered that those to whom freedom and the estate had been left under a trust, by soldiers, should become free and be heirs, just as if they had received both of these bequests directly.

Moreover, where slaves, by means of a trust, had acquired their freedom and an estate from a civilian, and the appointed heir and his substitute had also died suddenly, he held that this was sufficient for the confirmation of their freedom.

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

Freedom granted under the terms of a trust is not due to a slave whom his master afterwards placed in chains.

44. *Pomponius, On Sabinus, Book VII.*

A slave can legally bring suit against his master where the freedom has been bequeathed to him by a trust.

45. *Ulpianus, Disputations, Book HI.*

When a debtor is asked by his creditor to manumit a female slave who has been pledged to him, it can be maintained that freedom has been legally bequeathed by the debtor under the terms of the trust. For what difference does it make whether a certain amount is left by him, or freedom is granted under a trust?

Whether the value of the slave is more or less, he can be forced to grant her freedom; provided he has once acknowledged the validity of his creditor's will. We must understand that he has done so when, for instance, if he is sued by the heir, he avails himself of an exception; or proves the wishes of the creditor in some other way. For if the debtor should be sued by the heir of the creditor he can plead an exception on the ground of bad faith, because of the interest of the debtor in obtaining his slave.

(1) In granting freedom under the terms of a trust, even though the legatee may only have obtained a small bequest, it will, nevertheless, be necessary for him to manumit his slave. For, if a pecuniary trust should be divided, great injury will be done to the cause of freedom as well as to the beneficiary; therefore, it is better for him who accepts the legacy to be burdened than that the bequest of freedom should be annulled.

(2) Whenever freedom is bequeathed to a male or female slave under the terms of a trust, the slave is in such a position that he or she will remain in servitude until they are manumitted. If the person charged with this duty causes no delay in liberating the slave, no change will take place in his or her condition, and therefore it is established that the slave can, in the meantime, be bequeathed, subject to his manumission afterwards.

46. *The Same, Disputations, Book VI.*

Freedom can be granted under a trust as follows, "I charge my heir to manumit Stichus, if he should choose to do so," even though nothing else in the will dependent upon the consent of

the heir should be valid.

(1) It is clear that if freedom is bequeathed as follows, "If Stichus should be willing," it can be granted him.

(2) Where the following clause is inserted in a will, "I desire Stichus to be free if he is willing," it seems to me that the grant of freedom can be held to be valid, because the words rather imply a condition, just as if a bequest should be made to me, "If Titius should ascend to the Capitol."

(3) Where it was stated in a will, "If the heir should consent," the trust will not be valid, but this will only be the case where the testator left everything to the discretion of his heir, "If he chooses." Where, however, he left it to his judgment as a good citizen, we have no doubt that freedom should be granted; for it has been decided that a slave was entitled to be free where the testator made the following provision, "If you think proper, I ask you to manumit him," for this must be understood to mean if you, as a good citizen, approve it. For where freedom is bequeathed as follows, "If you approve my will," I think it should be granted, just as in the following case, "If he deserves it of you as a good citizen," or "If he should not offend you as a good citizen," or "If you approve of it," or "If you do not disapprove it," or "If you think that he is worthy." For where a testator left a bequest of freedom under a trust, in the Greek words meaning, "I desire you to grant freedom to So-and-So, if you think best," it was stated by the Divine Severus in a Rescript that the execution of the trust could be demanded.

(4) But, although a testator cannot leave it to the judgment of his heir whether or not he will grant freedom to a slave, he can let him decide when it shall be granted.

(5) A certain man, who bequeathed three slaves, charged his heir to manumit any two of them that he might select. A trust of this kind will be valid, and the heir can manumit whichever of the three slaves he chooses. And therefore if a legatee should claim those whom the heir wishes to manumit, he will be barred by an exception on the ground of bad faith.

47. *Julianus, Digest, Book XLII.*

If a father should appoint his two sons his heirs, and his will is annulled by the birth of a posthumous child, although the estate will belong to them equally, still, the grants of freedom under the trust ought not to be executed, as they are not compelled to pay any other legacies, or execute any other trusts.

(1) Where an heir who is charged to manumit a slave belonging to a third party, or one who is owned in common, or one in whom the usufruct belongs to another, conceals himself, relief will not improperly be granted under the Decree of the Senate.

(2) If freedom is bequeathed to Stichus by a trust under the condition that he shall render his account, and he is ready to pay over the balance in his hands, during the absence of the heir, it is the duty of the Praetor to select some reliable person under whose supervision the account may be rendered, so that the slave can deposit the money which is due according to the calculation; and then the Prsetor shall decree that the slave is entitled to his freedom under the terms of the trust.

It is proper for this to be done when the heir is absent for some good reason; for if he conceals himself, it will be sufficient to satisfy the Prsetor that it is not the fault of the slave that the condition is not complied with, and hence he must decree that he is entitled to his freedom.

(3) Where freedom is bequeathed conditionally to a slave who forms part of the legacy, he should not be delivered to the beneficiary of the trust, unless the latter gives security that he will surrender him if the condition should be complied with.

(4) A certain woman, at the time of her death, made the following statement in the presence of several respectable men, and of her mother, who was entitled to the estate as her heir at law,

"I wish my female slaves, Msevia and Seia, to be free," and then died intestate. I ask, if her mother does not claim the estate as heir at law under the Decree of the Senate, and it should pass to the next of kin, whether the slaves will be entitled to freedom under the terms of the trust. I answered that they would be, for when the woman being at the point of death said, "I wish my female slaves, So-and-So and So-and-So, to be free," she is considered to have asked this to be done by all those who would be her heirs at law, or the possessors of her estate under the Praetorian Edict.

48. *The Same, Digest, Book LXII.*

Where the following was inserted in a will: "I bequeath Stichus to Titius," or "Let my heir give him to Titius, in order that he may manumit him," I held that if the legatee should claim Stichus, he can be opposed by an exception on the ground of bad faith; unless he gives security to grant him his freedom in accordance with the will of the deceased.

49. *Africanus, Questions, Book IX.*

Where a person to whom a slave is bequeathed and who is charged to manumit him conceals himself, the slave is held to become the freedman of the deceased.

The same rule will apply where not the legatee but the heir is charged with the execution of the trust. Where not all of them, but only some, are charged with its execution, it must also be said that the slave will become the freedman of the deceased.

Moreover, an equitable action should be granted against those who have concealed themselves, and in favor of their co-heirs, by whom the value of their shares must be paid, or they can properly bring suit in partition against them.

50. *"Marcianus, Institutes, Book VII.*

Where a slave has been bequeathed and manumitted under a trust, Cervidius Scaevola, having been consulted, held that the last disposition was valid, whether it had reference to freedom or to a legacy; for the reason that it is established that when freedom is bequeathed it may afterwards be taken away, and it is clear that this can be done at the request of the slave.

If, however, it is doubtful with what intention the testator bequeathed the same slave, after having left him his freedom, the bequest of freedom should have the preference. This opinion also seems to me to be the more correct one.

51. *The Same, Institutes, Book IX.*

Not only he who was requested to manumit a slave can give him his freedom, but his successors, whether they are such by purchase or by any other title, can do so. If, however, he should have no successor, the slave will escheat to the Treasury in order to obtain his freedom.

(1) Moreover, he who is requested to manumit a slave, can do so at a time when he is forbidden to alienate him.

(2) Where anyone is requested to manumit the slave of another, and a certain sum of money has been bequeathed to him to purchase and manumit the slave, and his master is unwilling to sell him, the legatee shall retain the legacy in accordance with the will of the deceased.

(3) Where freedom is bequeathed by a trust to a slave, the latter is, to some extent, in the position of a freedman, and occupies the place of a slave to be free under a condition, and all the more, because he must not be transferred to another in such a way that his freedom will be prevented, or he will be exposed to more severe rights of patronage.

(4) It is provided by the Dasumian Decree of the Senate that if the person who is charged with the grant of freedom should be absent for some good reason, and such a decision is rendered by the Praetor, the slave will be entitled to his freedom; just as if he had been regularly

manumitted according to the terms of the trust.

(5) A person is understood to be absent who does not appear in court.

(6) And for the reason that provision had only been made for the absence of heirs, it was added in the same Decree of the Senate that when anyone is charged with the grant of freedom, and has been pronounced to be absent for any good cause whatsoever, the result will be the same as if the slave had been regularly manumitted in accordance with the terms of the trust.

(7) It is, however, provided by the Articuleian Decree of the Senate that the governors of provinces shall have jurisdiction in cases of this kind, although the heir may not reside in the province.

(8) Where anyone is asked to manumit a slave who does not form part of the estate, but is his own property, the slave will obtain his freedom under the Juncian Decree of the Senate, after the decision has been rendered.

(9) The Divine Pius stated in a .Rescript that where anyone is absent for some good reason, or conceals himself, or, if present, is unwilling to manumit the slave, he shall be considered as being absent.

(10) It is stated by the same Decree of the Senate that a purchaser shall also manumit the slave.

(11) A co-heir, who is present, can manumit the slave just as if he had acquired from his co-heir the share of the latter in the slave. It is said that the same Emperor stated in a Rescript that this rule will apply to a co-heir who is a minor under the age of puberty and was not asked to manumit the slave.

(12) When anyone is requested to manumit a slave, in order to marry her, he should not be compelled to contract marriage with her, but it will be sufficient if he grants her her freedom.

52. *Ulpianus, Opinions, Book I.*

Where slaves, to whom freedom has been bequeathed under the terms of a trust, are afterwards sold by a creditor, they cannot be granted relief against the heir, except for good cause.

53. *Marcianus, Rules, Book IV.*

Where anyone is asked to manumit a female slave, and delays doing so, and, in the meantime, she has a child; it has been established by an Imperial Constitution that under such circumstances the child will be born free, and will even be considered freeborn. There are, however, certain constitutions by which it is provided that the child is freeborn from the very time that the grant of freedom takes effect, and this rule should undoubtedly be observed; for freedom is not a private but a public matter, so that he who is under obligation to grant it should tender it voluntarily.

(1) Where, however, the female slave had a child before she was entitled to her freedom under the trust, and this had been purposely brought about by the heir, in order that she might not yet be entitled to her freedom, as where he delayed entering upon the estate in order that any children born to the said female slave would belong to him, it is settled that they should be manumitted, but they must be delivered to their mother to be set free by.her, and become rather her freedmen than those of the heir, for where the latter is unworthy to have slaves, he is not worthy of having freedmen.

54. *Msecianus, Trusts, Book XVI.*

If the mother, after having received her child, or he who has succeeded to her place, refuses to grant it its freedom, he or she should be compelled to do so. Again, if the mother is unwilling

that the child should be delivered to her, or if she should die before this is done, it may not incorrectly be said that freedom should be granted to the child by the heir.

55. *Marcianus, Rules, Book IV.*

The same rule will apply where the heir did not designedly delay entering upon the estate, but deliberated as to whether or not he would accept it; and if he learned that he had been appointed heir after the slave had brought forth her child, it is decided that relief should be granted in this case; for, under such circumstances, the heir himself ought to manumit the child, and not deliver it to its mother to be emancipated.

(1) If, however, freedom has been directly bequeathed to the slave, and any of the above events should take place, in what way can relief be granted to the child? For, in these instances, freedom left under a trust is demanded, and the Prsetor comes to the relief of the children, but where freedom is left directly, no such a demand is made.

I think, however, that, in a case of this kind, the child is entitled to relief, and that the Prsetor, having been applied to, may grant the mother an action *in rem,* just as where freedom is left by a trust. Hence, Marcellus, in the Sixteenth Book of the Digest, states that where children who have been manumitted by will before the estate is entered upon are acquired by usucaption, relief must be granted them, in order that their freedom may be preserved by the Prsetor; and although they may have been to blame for suffering themselves to be acquired by usucaption, still, no responsibility can attach to children on this account.

56. *Marcelli, Opinions.*

Lucius Titius provided by his will as follows, "I desire 'that any codicils which I may hereafter execute shall be valid. If a child should be born to me by my wife, Paula, within ten months after my death, let it be the heir to half of my estate. Let Gaius Seius be the heir to half of my estate. I request my heirs, and I charge them to manumit my slaves Stichus, Pamphilus, Eros, and Diphilus, when my children arrive at the age of puberty." Then he inserted the following provision in the last part of his will: "If no children should be born to me, or if they should die before reaching the age of puberty, then let Mucius and Msevius be heirs to equal shares of my estate. I desire that the legacies bequeathed by my former will, under which I appointed my sons and Seius my heirs, to be paid by the heirs who may succeed them."

He afterwards executed a codicil as follows: "Lucius Titius to his heirs in the first degree and to their substitutes; Greeting. I ask you to pay those legacies which I have bequeathed by my will, as well as those which I shall bequeath by my codicil." As no children were born to Lucius Titius, I ask whether the freedom granted by the trust should be immediately given to the slaves Stichus, Pamphilus, Eros and Diphilus. Marcellus answered that there was a condition attached to the bestowal of freedom upon the slaves in question, which was that the children of the testator should become his heirs; but the condition did not appear to be repeated, and therefore that freedom should be immediately granted to the slaves by the heirs in the first degree and the substitutes. For, as was stated above, the testator requested that everything which he mentioned in his will shall be carried out. Moreover, he provided for the freedom of the said slaves, but he did so under a condition, and if the condition had been of any other kind it

would have been necessary to await its fulfillment. It is not, however, probable that he had this condition in his mind when he charged the substitutes, since if it should be fulfilled, the substitutes could not be admitted to the succession.

TITLE VI.

CONCERNING THE DEPRIVATION OF FREEDOM.

1. *Terentius Clemens, On the Lex Julia et Papia, Book XVIII.*

When freedom is taken away by law, it should either be considered as not having been granted, or as having afterwards been taken away by the testator himself.

TITLE VII.

CONCERNING SLAVES WHO ARE TO BE FREE UNDER A CERTAIN CONDITION.

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

A slave who is to be conditionally free is one who will be entitled to his freedom at the expiration of a prescribed time, or upon the fulfillment of a certain condition.

(1) Slaves become free either under an express condition, or by the operation of the,law itself. It is clear in what way this takes place under an express condition. They are manumitted by operation of law where they are liberated for the purpose of defrauding creditors. For as long as it is uncertain whether a creditor will avail himself of his rights, the slaves are conditionally free, because, by the *Lex ^Elia Sentia,* the commission of a fraud under such circumstances must take effect.

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

We understand the position of the slave who is to be free under a condition to be such that, whether he is delivered after having been sold, while still retaining the hope of his freedom, or whether he has been acquired for his own benefit by usucaption, or whether when he is manumitted, he does not abandon the expectation of becoming the freedman of the deceased. The slave is not placed in such a position unless the estate has been entered upon by one of the heirs. But if he should be alienated, or acquired by usucaption, or manumitted before the estate is entered upon, his hope of the freedom bequeathed to him will be lost.

(1) Where, however, freedom has been left to a slave under a pupillary substitution, will he become conditionally free during the lifetime of the minor, after the estate of his father has been accepted? Cassius denies that he will; but Julianus holds the opposite opinion, which is considered the more correct one.

(2) Julianus further says that if a slave is bequeathed to the heir of the father, and, in the pupillary substitution he is ordered to be free, the grant of freedom will take precedence.

(3) If a slave is appointed heir to half of the estate, with the grant of his freedom conditionally, by the first will, will he occupy the position of a slave, who is to be conditionally free, so that, if his co-heir enters upon the estate, he cannot under the circumstances be acquired by usucaption? He cannot occupy the position of a slave to be conditionally free, as he received freedom from himself.

It is clear that it must be held that he will occupy the position of a slave to be conditionally free, if the condition under which he was appointed heir should not be complied with; in which case, according to Julianus, he will obtain his liberty because he is not held to have obtained it from himself but from his co-heir.

(4) In whatever degree a slave may have been substituted for a minor, with the bequest of his freedom, he occupies the position of a necessary heir. This opinion has been adopted on account of its convenience, and we approve it. Celsus, also, in the Fifteenth Book, thinks that a slave who is substituted with a bequest of his freedom occupies the position of one who is to be conditionally free.

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

Slaves of this description must comply with the condition prescribed, if no one prevents them from doing so, and the condition is possible.

(1) Where, however, the slave is ordered to comply with the condition with respect to the heir, what must be said?" If he complies with it he will immediately become free, although the heir

may not consent. If the heir prevents him from complying with the condition, as, for instance, where he refuses ten *aurei* which the slave was ordered to pay him, there is no doubt that the slave will be free, because it is the fault of the heir that the condition was not fulfilled. And it makes little difference whether he tenders the amount out of his *peculium,* or whether he has obtained it from some other source, for it is established that a slave who pays money out of his *peculium* will be entitled to his freedom, whether he is ordered to pay it to the heir or to anyone else.

(2) Hence, the question arises, if a sum of money should be due to the said slave, either from the heir, because the slave had advanced it in transacting the business of his master, or from a stranger, and the heir does not wish to sue the debtor, or to pay the money to the slave, will the latter be entitled to his freedom on account of the delay he suffers through the fault of the heir? Either the *peculium* was bequeathed to the slave, or it was not; if it was bequeathed to him, Ser-vius says that it is the heir who is responsible for the delay of the slave obtaining his freedom, because something is due to him from the estate of his master which is not paid by the heir. Labeo adopts this opinion. Servius also approves it, and says that if the heir causes delay for the reason that he is unwilling to collect money from the debtors of the slave, the latter will be entitled to his freedom.

The opinion of Servius seems to me to be correct. Hence, as we think this opinion to be true, let us see whether the same rule should not apply, even where the *peculium* was not bequeathed as a preferred legacy to the slave. For it is settled that a slave, in order to be conditionally free, can make a payment out of his *peculium* whether he is ordered to do so to the heir, to himself, or to someone else; and if the heir should prevent him from doing so, the slave will be entitled to his freedom.

Finally, this is given to the master of the slave as a remedy, that is, he is forbidden to pay to a stranger what he was ordered to pay, lest he may run the risk of losing both the money and the slave; hence it can be maintained that, if the heir does not wish to collect the claim from the debtors of the slave, or to pay him himself, so that he may have the means with which to comply with the condition, the slave will be entitled to his freedom. Cassius also adopted this opinion.

(3) Again, the slave will not only obtain his freedom when he is prevented from paying what he was ordered by the testator to pay, but also if he is forbidden to ascend to the Capitol, or if he is prevented from going to Capua; for anyone who hinders a slave from taking a journey is understood rather to desire that he shall lose his freedom than to wish to avail himself of his services.

(4) Where the slave is ordered to pay a co-heir, and another of the heirs prevents him from doing so, he will also become free; but he to whom he was ordered to make payment and become free will be entitled to an action in partition against the one who prevented him, in order to obtain the amount of his interest in not having the slave prevented from paying him.

(5) If a slave who is ordered to pay ten *sesterces* and become free pays five, he will not be entitled to his freedom unless he pays the entire sum. Therefore, in the meantime, the owner of the five *sesterces* can claim them, but if the balance should be paid, then the first five, the ownership of which had not previously passed to him to whom they were given will be acquired by him; hence, the transfer of the first sum paid will remain in suspense, so that the *sesterces* will not, by retroactive effect, become the property of him who received them, but only where the remainder of the amount has been paid.

(6) If the slave should pay more than he had been ordered to do (for instance, if he had been ordered to pay ten *sesterces,* and he pays twenty), whether he counted the coins, or gave them in a bag, he will obtain his freedom, and can recover the surplus.

(7) If anyone should sell, without his *peculium,* a slave who had been ordered to pay ten

sesterces and become free, will the slave immediately obtain his liberty, because he has been prevented from making payment out of his *peculium,* for the reason that he was sold without it, or will he become free from the time that he was forbidden to touch his *peculium?*

I think that he will only become free from the time when he wished to make payment, and was prevented from doing so, and not from the very day when he was sold.

(8) Where anyone prevents a slave, who was ordered to pay ten *aurei* and become free from working, or where the heir deprives him of what he has earned by his labor, or if he should give the heir whatever he has obtained in this way, will he be entitled to his freedom? I think that if he should pay him what he has earned by his labor, or anything that he has obtained from any source whatsoever, he will be entitled to his freedom. If, however, he was prevented from working, he will not become free, because he is obliged to work for his master. I think that it is clear that he will become free if he should be deprived by his master of money earned by his labor, because he has been deprived of the power to pay it out of his *peculium;* but if the testator ordered him to pay the said sum of money earned by his labor, and he is prevented from working, I have no doubt that he will be entitled to his freedom.

(9) If, however, the slave should have abstracted any silver plate, or sold other property and made payment out of the proceeds, he will obtain his freedom, although if he has paid money which he stole he will not do so; for he is not considered to have given the said money but rather to have returned it. But if he stole money belonging to other persons, and paid it to the heir, he will not obtain his freedom, for the reason that the money which was stolen can be recovered from him who received it; still, if it was used in such a way that it can, under no circumstances, be recovered, the slave will be entitled to his freedom.

(10) Moreover, not only where the heir delays in making a grant of freedom, but where a guardian, curator, agent, or anyone else by whom the condition should be complied with does so, we say that the slave will be entitled to his freedom. And, indeed, this is our practice, in the case of a slave who is to be conditionally free, and it is sufficient that it is not his fault that he does not comply with the condition.

(11) If anyone should be ordered to pay the heir within thirty days after the death of the testator, and the heir enters upon the estate after that time has elapsed, Trebatius and Labeo say that if he did so without acting fraudulently, the slave will obtain his freedom within thirty days after the acceptance of the estate. This opinion is correct.

But what course must be pursued if the heir purposely delayed; will the slave be entitled to his freedom on this account from the time when the estate was entered upon? What if he had the money then, but did not have it after the estate was accepted? In this case, however, the condition is held to have been fulfilled, as the slave was not responsible for it not having been complied with in the first place.

(12) Where a slave receives his freedom under the following clause, "Let him be free when he can pay him ten *aurei,"* Trebatius says that, although he may have the ten *aurei,* or be in a position to obtain and keep his *peculium,* still he will not be entitled to his freedom unless he pays the money, or is not to blame for failing to pay it. This opinion is correct.

(13) Stichus was ordered to be free if he paid ten *aurei* to the heir annually for three years. If the heir was responsible for the nonpayment of the first instalment, it is established that the slave must wait until the date of the third payment, because the time is prescribed, and there are two payments remaining. If, however, the slave has only the ten *aurei* which he offered when the first payment was due, would it be of any advantage to him if he tendered them at the time of the second payment, or even at the time of the third, provided the second had not been accepted ? I think that it would be sufficient for him to do so, and that the heir has no right to change his mind. Pomponius also adopts this opinion.

(14) What must be done if the slave who was ordered to make the three annual payments should tender the entire amount to the heir without waiting for it to become due? Or if, having paid ten *aurei* at the end of the first year, he should offer twenty at the end of the second? The more indulgent interpretation is that he will be entitled to his freedom, as benefit will accrue to both parties; for the slave will obtain his freedom sooner, and the heir will receive without delay what he would have obtained after a certain time.

(15) Where freedom is granted to a slave, if he serves the heir for five years, and the heir should manumit him, he immediately becomes free, as it is the fault of the heir that he did not serve him; although, if the heir did not wish him to do so, he would not become free until after the term of five years had elapsed. The reason for this is evident, as a manumitted slave can no longer remain in servitude. But the master who does not desire the slave to serve him can still permit this to be done within five years. The slave, however, cannot serve him for the entire term of five years but he can do so for a shorter period.

(16) Julianus, also, in the Sixteenth Book of the Digest, says that if Arethusa was granted her freedom under the condition that she should bring forth three slaves, and the heir was responsible for her not doing so (for instance, because he gave her some drug to prevent her from conceiving), she will immediately become free. For why should we wait? It is just the same as if the heir should cause her to have an abortion, because she could have three children at a birth.

(17) Likewise, if the heir should sell and deliver a slave who is to be liberated conditionally, and who has been ordered to serve him, I think that the slave will immediately be entitled to his freedom.

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

When the heir is absent on business for the state, and the slave has the money ready for payment,'he must wait until he to whom he is to pay it returns, or he must deposit it, sealed up, in a temple; and this having been done, he will immediately be entitled to his freedom.

(1) A slave is not considered to become conditionally free whose liberty is deferred for so long a time that he who is to be manumitted cannot live until it has elapsed; or, if his owner has prescribed such a difficult, or even an impossible, condition that his freedom cannot be acquired by complying with it; as, for instance, if it was that he should pay a thousand times a certain sum to the heir, or if he should order him to be free from the time of his death. A grant of freedom made in this manner is void, as Julianus says, because there is, in fact, no intention of granting the slave his freedom.

(2) If a slave is ordered to be free on condition of serving Titius for a year, and Titius should die, the slave will not immediately become free, but he will after the expiration of a year, because freedom is considered to have been given him not only under a condition, but also from a certain date. For it would be absurd for him to become free sooner when he did not comply with the condition than he would if he did comply with it.

(3) Where a slave is ordered to be free on the payment of ten *aurei* to two persons, and one of them refuses to accept five, it is better to hold that the slave can obtain his freedom by tendering the said five *aurei* to the other party.

(4) "Let Stichus be free, if he serves Titius for three years, or renders him services worth a hundred *solidi."* It is settled that freedom can be legally granted in this manner; for the slave of another can serve us as a freeman, and can, with greater propriety, render us his services; unless the testator, by the term services, meant ownership, rather than labor. Hence, if the heir prevents the slave from serving Titius, he will be entitled to his freedom.

(5) "Let Stichus be free if he serves my heir for a year." The question might arise how ought the word "year" be understood in this case; should it be a term which contains three hundred

and sixty-five consecutive days, or merely that many days? Pomponius says that the word should be understood in the former sense. If, however, illness, or some other just cause prevents the slave from serving during certain days, these ought to be included in the year. For those whom we take care of when ill are understood to serve us, if they are willing to do so but are precluded by bad health.

(6) If a slave is ordered to pay ten *aurei* to the heir, the latter will, through the indulgence conceded to freedom, be compelled to receive the money in separate payments.

(7) Where a slave was ordered to be free, "if Titius should ascend to the Capitol," and Titius refuses to do so, the grant of freedom is annulled.

This rule also applies to similar cases under the same conditions.

(8) Cassius, likewise, says that where a slave is ordered to serve for a year, the time when he was in flight or in litigation will not be included in favor of his freedom.

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

Where a slave who was to become free conditionally was ordered to render an account, and paid what appeared to be the balance remaining in his hands, and offered to give security with reference to what remained in doubt, Neratius and Aristo very properly hold that he will become free; as otherwise, many slaves might not obtain their liberty because of the uncertainties of accounts and the nature of business of this kind.

(1) A slave who is to become free conditionally, and is ordered to pay a sum of money but not to render an account, should pay it, and not furnish a surety that he will do so.

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

If a female slave who is to become free conditionally is sentenced to servitude as punishment for crime, and after her conviction the condition upon which her freedom is dependent is fulfilled, although it will be of no advantage to her, it will, nevertheless, benefit any child which she may have, for it will be born free, just as if its mother had not been convicted.

(1) What, however, would be the result if such a female slave should conceive while in servitude, and, having been captured by the enemy, should have a child after the condition upon which her freedom was dependent had been complied with; would her child be free at its birth? There is no doubt whatever that it would, in the meantime, be the slave of the enemy; but it is also true that it would become free by the right of *postliminium,* because if the mother had been in her own country the child would have been born free.

(2) It is clear that the more equitable opinion is that, if she should conceive while in the hands of the enemy, and bring forth the child after the condition had been fulfilled, it could profit by the right of *postliminium* and become free.

(3) A slave to be free conditionally will obtain his liberty from his purchaser if the condition is complied with. It must be remembered that this rule is applicable to slaves of both sexes. If the condition is fulfilled, it not only binds the person who purchased the slave, but also all those who have obtained ownership of him by any title whatsoever. Therefore, whether the slave has been bequeathed to you by the heir, or awarded to you in court, or acquired by you through usucaption, or transferred to you, or has become your property by any other right, we say that, beyond any doubt, the condition can be complied with so far as you are personally concerned. The same can be said with reference to the heir of the purchaser.

(4) Where a son under paternal control is appointed an heir, and a slave to be free conditionally is directed to pay to the son a certain sum of money, and be free, he will obtain his freedom by paying the said sum either to the son, or to his father; because the father is entitled to the benefit of the estate. If, however, he should pay the father after the death of the son, he will become free, as having made payment to the heir of the heir. For if a slave is

ordered to pay a sum of money to a stranger, and become free, and the latter becomes the heir of the heir, he will comply with the condition not with reference to the stranger, but as it were, with reference to the heir.

(5) Where a slave is directed to pay ten *aurei* and become free, and he is sold after having paid five, he must pay the remaining five to the purchaser.

(6) If your slave should purchase another slave, who is to be free conditionally, he must pay you what he was ordered to pay to the heirs. If, however, he has paid your slave, I think that he will be free, provided your slave bought him with money belonging to his *peculium,* and you have not deprived him of it; so that, in this way, he will be understood to have paid you, just as if payment had been made to any one of your slaves with your consent.

(7) When a slave is ordered to be free, not upon the payment of a sum of money but if he renders his accounts, let us see whether this condition will pass to the purchaser. And it must be remembered that usually only those conditions which refer to the payment of money pass to a purchaser, and that such as refer to acts to be performed do not pass to him; for instance, if he gives his son instruction, for these conditions attach to the person of those upon whom they are imposed.

The condition of rendering an account, however, which implies the existence of a balance, has reference to the payment of money; but the production of the books containing the amounts, and the calculation and examination of the accounts themselves, as well as their revision and investigation, have reference to acts to be performed. Therefore, can the slave obtain his freedom by paying the balance remaining in his hands to the purchaser, and by complying with the rest of the condition which concerns the heir? I think that the payment of the balance passes to the heir. Hence it happens that the condition may be divided. Pomponius, also, stated this opinion in the Eighth Book on Sabinus.

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

The alienation of the usufruct does not carry with it the condition upon which the slave is to become free.

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

Where a slave is ordered to be free if he pays ten *aurei,* he must pay them to the heir; for when there is no one designated to whom payment shall be made, the slave will be entitled to his freedom by paying the heir.

(1) If each one of the heirs sells his share in a slave to different purchasers, the slave must pay to every purchaser the same proportion of the sum which was due to each heir. Labeo, however, says that if the names of the heirs are only mentioned in the will, equal portions should be paid them; but if the testator said "If he pays my heirs," the amounts will correspond to the shares of the estate to which the heirs are respectively entitled.

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

No one should be ignorant of the fact that, in the meantime, the slave remains the property of the heir. Hence, he can be surrendered by way of reparation for damage caused by him, but even if this is done, he can still hope to obtain his freedom, for his surrender does not deprive him of it.

(1) If an heir sells a slave under a different condition than the one upon which his freedom is dependent, his status is not changed; and he can release himself from the control of the purchaser, just as he can do from that of the heir.

If, however, the heir should conceal the condition upon which the slave is to be liberated, he will be liable to an action on purchase; and good authorities hold that anyone who knowingly conceals the condition under which a slave is to become free, and sells him absolutely, is

guilty of swindling.

(2) The question has been discussed whether he is released, who has delivered up a slave, that was to be conditionally free, by way of reparation for injury committed. Octavenus thinks that he is released, and says that the same rule will apply if someone owed Stichus on account of a stipulation, and delivered him to be free under a certain condition. For if he should obtain his freedom before payment had been made, the entire obligation would be extinguished; because only that is included in it which can be settled by the payment of money; freedom, however, cannot be discharged or replaced by money. This opinion seems to me to be correct.

(3) The position of a slave who is to be conditionally free is only unchangeable, if the estate is entered upon; for, before this is done, he can be acquired as a slave by usucaption, and the expectation of his freedom disappears. If, however, the estate is entered upon subsequently, his hope of freedom is restored through the favor with which it is regarded.

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

If an heir sells a slave who had been ordered to pay ten *aurei,* and delivers him to the purchaser, and says that he was entitled to his freedom if he pays twenty *aurei,* an action on purchase will lie against the vendor. If double the amount had been promised, an action for double damages will lie on the ground of eviction, and an action on purchase on account of the false statement.

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

If the heir should make a donation of a sum of money to a slave, who is to be conditionally free, in order that he may pay it to him and be liberated, Aristo says that he will not become free, but if the heir should give him the money absolutely he will obtain his freedom.

12. *Julianus, Digest, Book VII.*

Where a slave receives his freedom by a will, under the condition of rendering an account, he must pay the balance remaining in his hands to the heirs, in proportion to their respective shares of the estate; even if the names of some of them are mentioned in the condition.

13. *The Same, Digest, Book XLIII.*

Where a testator bequeaths a grant of freedom as follows, "Let Stichus be free, if my heir does not manumit him by his will," the intention of the testator is held to be that the slave will be free if the heir does not grant him freedom by his will. Hence, if the heir should emancipate the slave by his will, the condition is considered to have failed; if he does not emancipate him, the condition will be fulfilled at the time of the death of the heir, and the slave will obtain his freedom.

(1) If a slave held in common is ordered to be free under the condition of his paying ten *aurei,* he can pay the said sum out of his *peculium,* no matter in what way he may have obtained it; nor does it make any difference whether the *peculium* was in the hands of the heir, or in those of a joint-owner; or whether the slave was ordered to pay the money to the heir, or to a stranger. For it is a rule of general application that slaves who are to be free conditionally can alienate property belonging to their *peculium* for the purpose of complying with a condition upon which their freedom is dependent.

(2) Where two slaves are ordered to be free on condition of rendering their accounts, and they have transacted business separately, there is no doubt that they can also comply with the condition separately. If, however, their administration has been conducted in common, and is so confused that it cannot be divided, it necessarily happens that if one of them fails to render an account, he will prevent the other from obtaining his freedom; nor will the condition be held to have been complied with with reference to one of them, unless both or either should pay all which may be found to be due as a balance after examination of the accounts.

(3) Where a slave is ordered to be free under the condition that he will swear that he will ascend to the Capitol, and immediately takes such an oath, he will become free even if he does not ascend to the Capitol.

(4) The slave of the heir, who is ordered to deliver property belonging to the heir himself, and be free, will be entitled to his freedom, because the testator can order the slave of the heir to be manumitted without imposing the condition of giving anything.

(5) The following clause, "Let Stichus be free when he is thirty years old; Stichus shall not be free unless he pays ten *aurei,"* has the same effect as if it had been said that they should let Stichus be free if he pays ten *aurei* and reaches the age of thirty years. For the deprivation of freedom, or of the legacy which is bequeathed under a certain condition, is considered to impose the contrary condition upon the legacy or the grant of freedom previously made.

14. *Alfenus Varus, Digest, Book IV.*

A slave, who was ordered to be free by the will of his master under the condition of paying ten *aurei* to the heir, paid to the latter the wages of his labor, and as the heir received from the same a larger sum than ten *aurei,* the slave alleged that he was free. Advice was taken on this point. The answer was that the slave did not appear to be free, as the money which he had paid was not in consideration of his freedom, but on account of the labor which he had performed; and that he was no more free on this account than if he had leased a tract of land from his master and paid him the money instead of giving him the crops.

(1) A slave was ordered to be free after he had given his services to the heir for the term of seven years. He took to flight and remained absent for a year. When the seven years had expired, the opinion was given that he was not free, for he had not rendered his services to his master while he was a fugitive, and he would not become free until he had served his master for the number of days that he was absent.

If, however, it had been stated in the will that he should be free after he had served seven years, he could become free if he served his master for the time of his flight, after his return.

15. *Africanus, Questions, Book IX.*

If a slave who was ordered to pay a certain sum of money at the death of the heir should have enriched the estate by an amount equal to that which he was ordered to pay, for instance, if he had paid the creditors, or had furnished the slaves with food, it was held that he would immediately be entitled to his liberty.

(1) An heir, who sold a slave who was to become free on the payment of ten *aurei,* stated at the time when he sold him that the condition was that the said ten *aurei* should be paid to him and not to the purchaser. The question arose, to which of the two must the slave pay the money in order to obtain his freedom? The answer was that he must pay it to the heir. If, however, he had stated the condition to be that the slave should make payment to a stranger, the opinion was given that the agreement would be valid, because the slave is considered to pay the heir, if he pays someone else with the former's consent.

16. *Ulpianus, Rules, Book IV.*

If a female slave who is to be free conditionally has a child, it will be the slave of the heir.

17. *Neratius, Parchments, Book III.*

A slave is ordered to be free if he pays ten *aurei* to the heir. He has the amount, but he owes an equal sum to his master. He will not be free by payment of these ten *aurei,* because where a slave is permitted to pay money out of his *peculium* for the purpose of complying with a condition, we must understand this to mean that he must not pay what does not belong to his *peculium.* I am perfectly aware that this money can be said to form part of his *peculium;* although if the slave had nothing else, he would have no *peculium.* But it cannot be doubted

that the intention of those who established the rule was that the slave should have the power of making payment out of his *peculium,* just as out of his patrimony, because this could be conceded as being done without any injury to his master. If, however, anyone should go farther, the case would not differ much from one where a person might hold that the slave complied with the condition by the payment of money which he had stolen from his master.

18. *Paulus, On the Granting of Freedom.*

If a slave is ordered to pay ten *aurei* annually for three years, and offers ten the first year, and the heir does not accept it, he will not immediately become free, for the reason that even if the heir did accept it, he would not be free.

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

Where a slave is ordered to be free, and a legacy is left to him to vest when the son of the testator shall reach his fourteenth year, and the son dies before that time, the slave will become free when the term has expired, on account of indulgence with which freedom is regarded; but the condition upon which the legacy is dependent is held to have failed.

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

When his *peculium* is bequeathed to a slave who was ordered to pay ten *aurei* to a stranger, and become free, but the heir prevents him from paying it, and the slave, having afterwards been manumitted, demands his *'peculium* by virtue of the legacy, can the heir, by means of an exception on the ground of bad faith, deduct from his *peculium* the sum which the slave should have paid in order that he, and not the manumitted slave, may be benefited, because the money was not paid; or will the heir be considered unworthy to profit by the money, having acted contrary to the will of the deceased ? As the slave lost nothing, and gained his freedom, it would be invidious for the heir to be fraudulently deprived of the money.

(1) In this case the question arises, if the slave should pay the money without the knowledge or consent of the heir, whether it would belong to the person who received it. Julianus very properly thinks that, in this instance, the right of the slave to pay the money is admitted even against the consent of the heir; and therefore it will become the property of him who receives it.

(2) If a slave is ordered to pay ten *aurei* to the heir, and the latter owes that sum to the slave, if the slave wishes to set off the amount, he will become free.

(3) A man to whom a slave was ordered to pay a certain sum of money in order to become free, died. Sabinus holds that if he had the ten *aurei* ready for payment, he would become free, because it was not his fault that they were not paid. Julianus, however, says that on account of the favor with which liberty is regarded, and by the law, as established, the slave will obtain his freedom even if the money was paid after his death, hence he obtains his freedom rather under the law than by virtue of the will; so that if a legacy was bequeathed to him at the time of the death of the person to whom he was directed to pay the money, he will obtain his freedom, but he will not be entitled to the legacy.

Julianus is of the same opinion, so that, in this instance, he resembles other legatees. The case of a slave whom the heir prevents from complying with the condition is, however, different; for, in this instance, he obtains his freedom under the will.

(4) The Divine Hadrian stated in a Rescript that a slave who is ordered to pay a sum of money to the heir can pay it to the heir of the latter; and, if this was the intention of the testator, the same rule must be held to apply to a legatee.

(5) There are certain conditions which, by their nature, cannot be complied with simultaneously, but require a division of time; as, for example, where a slave is ordered to give the value of ten *aurei* in labor, because labor is reckoned by days. Therefore, if a slave

who is to be free conditionally pays the *aurei,* one by one, he can be said to have complied with the condition.

The case of labor is, however, different because it can necessarily only be performed a part of the time. But if the heir refuses to accept it, the slave will not become free immediately, but after the time required for the labor to be performed has elapsed.

The same rule will apply where the slave is ordered to go to Capua and be free, and the heir forbids him to go; for then he will be free when the time necessary for him to go to Capua has expired, for time is considered essential in the performance of labor, as well as in making a journey.

(6) If a slave should receive his freedom as follows, "Let Stichus be free if my heir should not manumit him," he can be manumitted by the heir, and he is not deprived of his liberty contrary to the will of the testator. But so short a time is not required that the heir will be compelled to hasten or to return from his journey immediately in order to manumit the slave, or to desist from the transaction of necessary business for that purpose.

Nor, on the other hand, can the manumission be protracted for his lifetime, but the heir should emancipate the slave as soon as he can do so without great inconvenience to himself. If a time for the manumission has been prescribed, it must be taken into consideration.

21. *Pomponius, On Plautius, Book VII.*

Labeo, in his Book of Last Works, states the following case: "Let Galenus, my steward, be free, if he appears to have carefully conducted my business, and let him retain all his property, and receive a hundred *aurei* in addition." In this instance we should require such diligence as will benefit the master and not the slave.

Moreover, good faith should be added to the diligence, not only in keeping the accounts, but also in the payment of any balance which may remain. By the word "appears" is meant "can be considered to have." The ancients interpreted the following words of the Law of the Twelve Tables, "If rain-water causes damage," to mean if it can cause damage. And if this question is asked before whom the abovementioned diligence must be established, we must answer that this ought to be decided by the heirs in accordance with the judgment of a reliable citizen; for instance, if a slave is ordered to be free on condition of his paying a certain sum of money, and it is not stated to whom he shall pay it, he will become free just as he would if the testator had written, "If he should pay the sum to my heir."

(1) Pactumeius Clemens said that if a trust had been bequeathed as follows, "I charge you to deliver it to whichever of them you choose," and the heir did not make any choice as to whom he should deliver the property, he must deliver it to all, and this was decreed by the Emperor Antoninus.

22. *Paulus, On Vitellius, Book HI.*

Where a slave was ordered to pay a certain sum of money, and the person to whom he was to pay it was not mentioned, he must pay it to the heirs in proportion to their respective shares of the state, for each one of them must receive a share in proportion to his ownership of the slave.

(1) Where certain heirs are mentioned by the testator as those to whom the slave is required to make payment, he must do so in proportion to their respective shares of the estate.

(2) If a stranger is joined with the heirs who are mentioned, the full share must be paid to him, and amounts in proportion to their respective shares of the estate should be paid to the others. If the testator not only added Titius, but others besides, they will each be entitled to a full share, and their co-heirs to amounts in proportion to their interest of the estate; as is stated by Julianus.

23. *Celsus, Digest, Book XXII.*

"Let Stichus be free if he pays a hundred *aurei* in five years." The slave, after the five years have elapsed, can pay the said amount to the heir of the purchaser.

(1) Where the slave was ordered to be free if he rendered his accounts, and the heir, after the property belonging to the *peculium* has been sold, does not permit the slave to pay over the balance in his hands, he will be free just as if he had complied with the condition.

24. *Marcellus, Digest, Book XVI.*

"Let Stichus be free if he promises my heir ten *aurei,* or swears to give him his services." The condition will be fulfilled if the slave makes the promise, for it can be said that he has, to a certain extent, bound himself, even if the obligation may not be compulsory.

25. *Modestinus, Differences, Book IX.*

The Laws of the Twelve Tables are held to permit slaves, who are to be free conditionally, to be sold. In making the sale, rigorous conditions should, however, hot be imposed; for example, that the slave should not serve in a certain country, or should never be manumitted.

26: *The Same, Rules, Book IX.*

Where freedom has been granted to a slave by a will, under the condition that he renders his account, the heir can not only require a written account, but also one of any business which has been transacted without having been committed to writing.

(1) Where a slave was ordered to obtain his freedom after having rendered his account, he will still become free even if he has not transacted any business.

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

If the person to whom the slave is ordered to make payment should purchase him, and then sell him to another, he must pay the last purchaser, for Julianus decided that if he to whom the slave was ordered to make payment obtains the ownership of him, and alienates him, the condition will also pass to the purchaser.

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

Where the estate of a person who directed that his slave should become free within thirty days after his death, if he rendered his accounts, was not entered upon until after the thirty days had expired, the manumitted slave cannot become free by the strict construction of the law, as the condition was not fulfilled; but the indulgence with which freedom is regarded causes the condition to be considered as complied with, if it was not the fault of the person upon whom it was imposed that this was not done.

(1) It is stated in the Books of Gaius Cassius that if a slave, who is to be conditionally free, should acquire any property before the condition upon which his liberty is dependent is complied with, it will not be embraced in the bequest of his *peculium,* unless the legacy was made to include the time when he was free. As the *peculium* is susceptible of both increase and diminution, let us see whether its increase by the heir will form part of the legacy, provided the slave is not deprived of it. This is our present practice.

29. *Pomponius, On Quintus Mucius, Book XVIII.*

Slaves who are to be free conditionally scarcely differ, in any respect, from our other slaves. Therefore, they are in the same position as the others with reference to legal actions, whether these arise from crimes, from business transacted, or from contracts. The result of which is that in public prosecutions they are liable to the same penalties as other slaves.

(1) Quintus Mucius says that the head of a household stated in his will, "Let my slave Andronicus be free, provided he pays ten *aurei* to my heirs." A controversy then arose with

reference to the estate. One person declared that he was the heir, and alleged that it belonged to him, and another who was in possession of the estate said that he was the heir under the will. Judgment was rendered in favor of the one who said that he was the heir under the will. Then Andronicus asked, if he should pay twenty *aurei* to the latter, whether he would become free, as judgment had been rendered in his favor; or whether the judgment which the successful party had obtained had no reference to the matter in question; hence, if he paid the ten *aurei* to the appointed heir, and the case should be decided against the possessor, he would remain in slavery.

Labeo thinks that the opinion of Quintus Mucius can only be true, if the heir who gained the case should be decided to be the heir at law; for if the appointed heir should be found to have lost his case, through a just decision, and be held entitled to the estate under the will, the slave by paying him, will, nevertheless, comply with the condition, and will become free.

The opinion given by Aristo to Celsus is, however, perfectly correct, namely, that the money can be paid to the heir at law in favor of whom judgment has been rendered; as under the provisions of the Twelve Tables the term "purchase" is understood to have included every kind of alienation, and it makes no difference in what way any of the parties became the master of the slave; and therefore, he in favor of whom judgment was rendered is included in the law, and the slave who paid the money will be free.

Moreover, if he who is in possession and to whom the money was paid should be beaten in a contest for the estate, he will be obliged to surrender the money together with the property to the party who is successful.

30. *The Same, On Various Lessons, Book VII.*

Where a slave is ordered to be free as follows, "Let Stichus be free, if my heir does not alienate him," even if he is to be free conditionally, he can, nevertheless, be alienated.

31. *Gaius, On tine Lex Julia et Papia, Book XIII.*

If a legacy is bequeathed to a slave on the condition of his rendering his accounts, there is no doubt that, under the condition by which he is directed to receive the legacy, he must pay over any balance remaining in his hands.

(1) Therefore, when inquiry was made with reference to the following clause, "Let Stichus, together with his female companion, be free, after he has rendered his accounts," and Stichus should die before the condition is complied with, will his companion be free? Julianus says that there is a point in this case which also arises with respect to legacies, as where a testator says, "I give to So-and-So together with So-and-So," and one of the parties is lacking, the other is permitted to take the legacy; because the better opinion is that the case is just as if the testator had said, "I give to So-and-So and So-and-So." It is also said that there is another question, namely, whether the condition is also imposed upon the female companion. It is held that this is the case; hence, if Stichus has no balance in his hands, the woman will immediately become free; but if a balance remained in his hands, she must pay the money, nor will it be lawful for her to take it out of the *peculium,* because this is only permitted to those who are directed to make payment in their own names, in consideration of the freedom which is granted them.

32. *Licinius Rufinus, Rules, Book I.*

Where two heirs are appointed, and a slave is ordered to be free if he pays ten *aurei* to the heirs, and he is sold and delivered by one of the latter, he will become free by paying half of the sum to the other heir by whom he was not sold.

33. *Papinianus, Questions, Book II.*

The rights of slaves who are to be conditionally free cannot be injuriously affected by the heir.

34. *The Same, Questions, Book XXI.*

A slave was ordered to be free if he paid ten *aurei* to the heir. The heir manumitted the slave, and afterwards died. In this instance, the money should not be paid to the heir of the heir; for when it was decided that he must pay the heir of the heir, you will remember that this applied where the first heir who was to receive the money was the master of the slave; which rendered the condition (so to speak), ambulatory. There are, in fact, two reasons for which the condition should be complied with so far as the first heir is concerned; the first one is the ownership, and the second the designation of the person. The first reason applies to every successor to whom the slave may pass through the continuation of the ownership which is transferred; but the second one only has reference to the person who is especially designated.

(1) The Emperor Antoninus stated in a Rescript that where a slave was ordered to render his accounts and become free, if the heir should delay in receiving the accounts, the slave will, nevertheless, become free. This rescript should be understood to apply where the slave will become free if he does not defer the payment of the balance in his hands, but if he delays to do so, it will only become operative if he tenders the amount which should be refunded in good faith; for it will not be sufficient for the heir to be in default to enable the slave to be manumitted where nothing was done by him which would have contributed to his freedom, if the heir had not been in default. But what if a slave was manumitted as follows, "Let Damas be free, if he goes to Spain next year to gather the harvest," and the heir retains him at Rome, and will not suffer him to depart? Can we say that he will immediately be free before the crops are gathered ? For if a stipulation is made at Rome, as follows: "Do you promise to pay me a hundred *aurei* in Spain?" The time during which you may be able to reach Spain is included in the stipulation, and it has been decided that legal proceedings cannot be instituted until this time has elapsed. If, however, the heir, after having allowed the accounts, and calculated the balance due from the slave, declares publicly that he donates the amount to the latter, because he has nothing to pay it with, or if he states this openly in a letter sent to him; the condition upon which his freedom is dependent is held to have been complied with.

But what course should be pursued if the slave should deny that he has delayed payment of the balance, and therefore, because the heir is to blame for not receiving his accounts, he should become free, and the heir maintains that he was not responsible for delay, and that the slave should pay over the balance in his hands ? It shall be determined by the magistrate who has jurisdiction of the case whether the condition was complied with or not, and it is part of his duty to investigate the alleged default, as well as to cast up the accounts, and if he should ascertain that payment of the balance was delayed, to decide that the slave is not free.

If, however, the slave never denied that a balance was due, and should sue the heir in order to be able to render his accounts, and it was established that he was prepared to pay any balance that might remain, and offered a good surety for the payment of the money, and the heir was found to be in default, judgment must be given in favor of freedom.

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

The slave will be considered responsible for failure to comply with the condition upon which his liberty is dependent if he cannot pay the money out of the *peculium* which he had when under the control of the vendor; because the will of the deceased does not extend to his *peculium* under another owner.

The same rule will apply where the slave was sold with his *peculium,* and the vendor retains it in violation of his contract; for although an action on purchase will lie, still, the slave did not have the *peculium* when he was under the control of the purchaser.

36. *The Same, Definitions, Book IL*

Persons learned in the law have placed in the class of slaves to be conditionally free one who

has been substituted for a son with the grant of his freedom by a second will. This rule is useful, as it prevents a son, who is a minor, from annulling his father's will by permitting the slave to be alienated subject to the charge of his freedom.

This interpretation of the law extends, without any distinction, to every case where the slave is substituted either in the second or the third degree.

37. *Gaius, On Special Cases.*

If it is stated in a will, "I give Stichus to Titius, in order that he may manumit him, and if he does not do so, let him be free," Stichus will immediately become free.

38. *Paulus, On Neratius, Book I.*

Not every impediment for which the heir is responsible has the same effect as compliance with the condition by the slave, but only where this is done for the purpose of preventing him from obtaining his freedom.

39. *Javolenus, On the Last Works of Labeo, Book IV.* "I give and bequeath Stichus to Attius, and if he pays him a hundred *sesterces,* let him be free." If the slave pays the *sesterces* to

Attius under the terms of the will, Labeo holds that the heir cannot recover them, because Attius received them from his own slave, and not from the slave of the heir. Quintus Mucius, Gallus, and Labeo himself think that the slave should be considered conditionally free, and Servius and Ofilius think that he should not. I adopt the former opinion, that is to say, that the slave belongs to the heir and not to the legatee, just as if the legacy had been taken away by the grant of freedom.

(1) "Let Stichus be free, when my debts are paid, or my creditors are satisfied." Even though the heir should be rich, Stichus will, nevertheless, not be free before the creditors have received their money, or their claims have been satisfied, or security has been furnished them in some other way; which is the opinion of Labeo and Ofilius.

(2) Labeo and Trebatius held that if the heir should give a slave money for the purpose of transacting business he cannot become free under the terms of the will, by paying this money, because he is considered rather to have returned it than to have paid it. I think, however, that if the money formed part of his *peculium,* he will become free under the testamentary provision.

(3) "Let my slave Damas be free, after he has given his services to my heir for seven years." The slave was implicated in a capital crime during the seven years, and the last year having elapsed, Servius stated that he should not be liberated. Labeo, however, held that he would be free after having served his master for seven years. This opinion is correct.

(4) "Let Stichus be free, if he pays a thousand *sesterces* to At-tia." Attia died during the lifetime of the testator. Labeo and Ofilius were of the opinion that Stichus could not become free. Trebatius agreed with them, if Attia died before the will was made; but if she died afterwards, he held that the slave would be free. The opinion of Labeo and Ofilius is reasonable, but it is our practice to consider the slave as free under the terms of the will.

(5) Where a slave is ordered to serve a stranger, no one can liberate him by furnishing his own labor in the name of the slave. The rule, however, is different where the payment of money is concerned; as, for instance, where a stranger liberates a slave by paying money in his behalf.

40. *Sctevola, Digest, Book XXIV.*

Freedom was granted to Stichus as follows, "I request my heirs, and I charge them to manumit Stichus, after he renders his accounts." As the slave had collected a great deal of money after the death of the testator, which remained in his hands, and had not included in his own accounts certain sums paid by tenants; and had despoiled the estate by secretly opening

warehouses and stealing furniture and clothing, and exhausting cellars of their contents, the question arose whether freedom under the trust should be granted him before he accounted for what fraudulently remained in his hands, and returned what he had stolen. The answer was that freedom should not be granted him under the terms of the trust until he had made restitution of the balance remaining in his hands, and everything which had been lost by his agency.

(1) "Let Pamphilus be free, if he gives all of his *peculium* to my heirs." As the slave owed more to his master than there was in the *peculium,* and had transferred everything belonging to his *peculium* in good faith to the heirs, the question arose whether he was entitled to freedom under the terms of the will. The answer was that there was nothing in the case stated to show that he was not entitled to it.

(2) A testator bequeathed his slave Stichus as a preferred legacy to his freedman, Pamphilus, whom he had appointed heir to a portion of his estate; and he bequeathed freedom to Stichus, as follows: "You will manumit him if, during the five continuous years from the day of my death, he pays you sixty *sesterces* every month." Pamphilus, having died before the expiration of five years, and having appointed his son and his wife his heirs, made the following testamentary provision with reference to Stichus: "I direct that my slave, Stichus, who was bequeathed to me under a certain condition by the will of my patron, shall give and pay to my son and to my wife, without any dispute, the amount for which he is liable, and if this is done, they shall manumit him after the prescribed time has elapsed."

If Stichus should not pay the sixty *sesterces* every month, the question arose whether he would be entitled to his freedom under the trust, after the five years had expired. The answer was that unless he made the payments he would not be entitled to the freedom granted to him under the terms of the trust.

(3) A slave was manumitted by a will as follows: "Let Stichus, my slave, who is also my steward, be free, if he renders an account of his entire administration to my heir, and satisfies him in this respect; and when he becomes free, I wish twenty *aurei* and his *peculium* to be given to him." The question arose, if the slave was prepared to render accounts of his administration for the many years during which he had conducted it without the signature of the testator approving them whether he would become free under the will, as the testator had not been able to sign the accounts because of his serious illness, but could, nevertheless, sign his will. The answer was that the slave would become free if his accounts were rendered in good faith, and the balance remaining in his hands was paid.

(4) I also ask whether any sums collected by the assistants of the slave, which either were not entered upon his register at all, or were entered fraudulently, will render him liable, as he was placed over his assistants. The answer was, if the matter was one for which he could be held accountable, the necessity for his rendering a statement of the same should be taken into consideration.

(5) I also ask if an account should be rendered of the rents which he had not collected from the lessees of land, or from tenants, over and above any sums which he may have advanced to them. The answer was that this has already been decided.

(6) I also ask whether he will be liable on the ground that he had removed all his property, that is to say, his *peculium,* before rendering his account. The answer was that this was no impediment to the performance of the condition, provided the account was rendered.

(7) Titius bequeathed to different persons by will each of the slaves employed by his steward, on condition that they should render their accounts to his heir. Then, in another clause of his will, he said: "I wish all the stewards whom I have bequeathed, or may manumit, to render their accounts within four months after my death, to their owners to whom they have been bequeathed by me." He then, lower down, ordered others of his stewards to be free, adding,

"If they render their accounts to my heir."

As it was the fault of the heir that their accounts were not rendered, I also ask whether the slaves ceased to be free under the condition; or whether they could, nevertheless, obtain their freedom under the will, by rendering their accounts and paying the balances remaining in their hands. The answer was that the legacies and grants of freedom would not take effect, unless the accounts were rendered, or if it was the fault of the heir that this was not done; but that it must be determined by the court whether time seemed to be included in the condition under which the legacies and the grants of freedom were to become operative; or whether the four months were added by the testator for the purpose of preventing further delay and to afford abundance of time for the rendering of the accounts to the heirs. It is, however, better to hold that the presumption is in favor of the slaves.

(8) The collector of a banker, almost all of whose fortune consisted of claims, gave freedom to his agents, who were his slaves, as follows: "No matter who may be my heir, if Damas, my slave, renders an account to him of the administration which he has carried on in his own name, and in that of Pamphilus, his fellow-slave, I wish both of them to be placed on an equal footing, and to become free within six months." The question arose if the words, "to be placed on an equal footing," applied to all the claims except the bad debts, so that the meaning of it was if they collected all that was due from all the debtors, and paid the heir, or satisfied him in some other way, and if they did not collect the claims within six months, whether they would not be entitled to their freedom.

The answer was, that it was clear that the condition was inserted in the above-mentioned clause of the will, and therefore that the slaves would be free if they complied with it, or the heir was responsible for their not doing so.

41. *Labeo, Epitomes of Probabilities, by Paulus, Book I.*

If you desire to permit one of your slaves to be liberated from servitude within a certain time, it makes no difference whether you make this provision under the condition that he "shall serve," or "render his services for the term of three years, in order to become free."

(1) Paulus: If anyone is ordered to be free if he promises to pay ten *aurei* to the heir, although a promise of this kind will be of no effect, he will, nevertheless, be liberated by making it.

42. *The Same, Probabilities, Book III.*

Where anyone bequeaths a slave to his wife, and orders him to be free in case she marries again, the slave will become free under this condition if she should marry a second time.

TITLE VIII.

CONCERNING SLAVES WHO OBTAIN THEIR FREEDOM WITHOUT MANUMISSION.

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

Whenever a slave is sold on condition of being manumitted within a specified time, even if the vendor and the purchaser should both die without leaving any heirs, he will be entitled to his freedom. This the Divine Marcus stated in a Rescript. Even though the vendor should change his mind, the slave will, nevertheless, become free.

2. *Modestinus, Rules, Book VI.*

By an Edict of the Divine Claudius, a slave who has been abandoned by his master on account of some serious infirmity will be entitled to his freedom.

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

Where a slave has been sold on condition of being manumitted within a certain time, and the

day appointed for Eis freedom arrives during the lifetime of the vendor, and the latter has not changed his mind, the result is that the slave will be manumitted, just as if this had been done by the person who should have liberated him; but if the vendor should be dead, the Divine Marcus and his son stated in a Rescript that it was not necessary to obtain the consent of his heirs.

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

When a slave is sold under the condition that he shall be manumitted during the lifetime of the purchaser, when the latter dies, he will immediately be entitled to his freedom.

5. *Marcianus, Rules, Book V.*

Where a slave has obtained his freedom as a reward for detecting the murderer of his master, he will become the freedman of the deceased.

6. *The Same, On the Hypothecary Formula.*

If anyone purchases a slave, who has been hypothecated, under the condition that he will manumit him, the slave will be entitled to his freedom under the Constitution of the Divine Marcus, even though the vendor may have hypothecated all the property which he had then, or might acquire in the future.

(1) The same must be said if he buys a female slave on condition of not subjecting her to prostitution, and he prostitutes her.

7. *Paulus, On Grants of Freedom.*

Our Emperor and his Father decided that a female slave would become free if the person in possession of her could have kept her from prostitution, but sold his right over her for money; as there is no difference whether you lead her astray and prostitute her, or whether you permit this to be done, and receive money therefor, when you can prevent it.

8. *Papinianus, Opinions, Book IX.*

A mother gave certain slaves to her daughter, under the condition that she would see that they became free after her death. As the condition of the donation was not complied with, I gave it as my opinion that, according to the spirit of the Constitution of the Divine Marcus, the slaves obtained their liberty with the consent of the mother, and that if she should die before her daughter, they would be entitled to their freedom unconditionally.

9. *Paulus, Questions, Book V.*

Latinus Largus sold a female slave under the condition that she should be manumitted, but did not mention any time when this must be done. I ask when she would be entitled to freedom, by virtue of the constitution, if the purchaser failed to manumit her? I answered that the understanding of the parties ought to be considered, whether the purchaser must manumit her as soon as he could, or whether it was in his power to liberate her whenever he chose to do so. In the first instance, the time can easily be determined; in the last, she will be entitled to her freedom at the death of the purchaser. If what was agreed upon is not apparent, the favor conceded to liberty will cause the first opinion to be accepted; that is to say, the slave will be entitled to her freedom within two months, if both the slave and her purchaser are present; but if the slave should be absent, unless the purchaser gives her her freedom within four months, she will obtain it by virtue of the Imperial Constitutions.

TITLE IX.

WHAT SLAVES, HAVING BEEN MANUMITTED, DO NOT BECOME FREE, BY WHOM THIS IS DONE; AND ON THE LAW OF JULIA SENTIA.

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

Celsus, in the Twelfth Book of the Digest, having the public welfare in view, says that a person born deaf can manumit a slave.

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

A slave cannot obtain his freedom if, after having been banished, he remains in the City.

3. *Gaius, Concerning Legacies; On the Urban Edict.*

If the choice of a slave is given by the testator, or the slave is bequeathed without mentioning any particular one, the heir cannot annul or diminish the right of selection belonging to the legatee by manumitting some of the slaves, or all of them. For where the option or choice of a slave is granted, each slave is held to have been bequeathed under a condition.

4. *Ulpianus, Disputations, Book III.*

We cannot manumit a slave who has been given in pledge.

5. *Julianus, Digest, Book LXIV.*

When an estate is not solvent, even though the heir may be wealthy, freedom will not be acquired under the will.

(1) If, however, an insolvent testator leaves a bequest of freedom as follows, "Let Stichus be free, if my creditors are paid in full," he cannot be considered to have ordered his slaves to become free in order to defraud his creditors.

(2) If Titius has no other property than his slaves, Stichus and Pamphilus, and promises them to Msevius, under the following stipulation: "Do you promise to give either Stichus or Pamphilus?" and then, having no other creditor, he should manumit Stichus, the freedom of the latter will be annulled under the *Lex JElia Sentia.* For although it was in the power of Titius to give Pamphilus, still, as long as he did not do so, he could not, without defrauding the stipulator, give Stichus, for the reason that Pamphilus might die in the meantime.

If, however, he only promised to give Pamphilus, I have no doubt that Stichus will obtain his freedom; although in like manner, Pamphilus might die, as it makes a great deal of difference whether the slave who is manumitted was included in the stipulation or not. For anyone who pledges Stichus and Pamphilus as security for five *aurei,* when each of them is worth five *aurei,* can manumit neither; but if he was to give Stichus alone in pledge, he will not be considered to have manumitted Pamphilus for the purpose of defrauding his creditor.

6. *Scaevola, Questions, Book XVI.*

Julianus refers to a person who owned nothing but two slaves; for if he had other property, why can it not be held that he has the power to manumit one of said slaves? For if one of them should die, he will still be solvent, and if one of them should be manumitted, he will also be solvent, and accidents which may occur are not to be considered; otherwise, the person who promised one of the slaves and indicated which one could not manumit any slave.

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

Where anyone who is in possession of all his property confirms a codicil, and then grants freedom to his slaves by the codicil, with the intention of defrauding his creditors, his bequest will be of no force or effect; as, under such circumstances, bequests of freedom are prevented By law. For the intention of the testator to commit the fraud is not referred to the time when the codicil was confirmed, but to the time when freedom was granted by the codicil.

(1) A minor of twenty years of age who desired to manumit a slave, without having any good reason to offer to the Council for doing so, gave him to you, so that you might manumit him. Proculus denied that the slave was free, because a fraud was committed against the law.

8. *Africanus, Questions, Book HI.*

The *Lex Julia Sentia* does not apply where a man who owes money under a condition manumits a slave by virtue of a trust.

(1) Where a soldier makes a will under military law, and bequeaths freedom to slaves for the purpose of defrauding his creditors, and then dies insolvent, the bequest of freedom will be void.

9. *Marcianus, Institutes, Book I.*

A slave will not become free who has compelled his master to manumit him, and the latter, having been intimidated, states in writing that he is free.

(1) Moreover, a slave will not become free who was not defended by his master for a capital crime, and afterwards was acquitted.

(2) Where slaves are sold under the condition that they shall not be manumitted, or where they are forbidden by will to be manumitted, or where this is done by order of the Governor of a province, and they should, nevertheless, be emancipated, they will not obtain their freedom.

10. *Gaius, Diurnal or Golden Matters.*

A person is considered to defraud his creditors by manumitting a slave who was insolvent at the time that he manumitted him, or ceased to be solvent after granting him his liberty. For men very frequently think that their property is more valuable than it really is, which often happens to those who, through the agency of slaves and freedmen, conduct commercial enterprises beyond sea, and in countries in which they do not reside, because they are often impoverished by transactions of this kind for a long time without being aware of it; and they grant their slaves freedom by manumitting them as a favor, without any intention of committing fraud.

11. *Marcianus, Institutes, Book XIII.*

Where a municipality is defrauded by the manumission of slaves, the latter do not obtain their freedom, as has been promulgated in a decree of the Senate.

(1) It is provided by the Imperial Constitutions that when the Treasury is defrauded by grants of freedom, the latter are void. The Divine Brothers, however, stated in a Rescript that grants of freedom are not annulled merely by the fact that the person who emancipated the slaves was a debtor to the Treasury, but that he committed fraud if he was insolvent when he did so.

12. *Ulpianus, On Adultery, Book V.*

The legislator had in view that slaves should not by manumission be released from liability to torture; and therefore he forbade them to be manumitted, and prescribed a certain term within which it would not be lawful to set them free.

(1) Therefore, a woman who is separated from her husband is forbidden, under any circumstances, to manumit or alienate any of her slaves, because in the words of the law, "She cannot either manumit or alienate a slave who was not employed in her personal service, or on her land, or in the province," which is, to a certain extent, a hardship, but it is the law.

(2) And even if the woman, after a divorce, purchases a slave, or obtains one in any way, she cannot manumit him under the provisions of the law. Sextus Csecilius also mentions this.

(3) A father, however, whose daughter is under his control, is only forbidden to manumit or alienate such slaves as have been given to his daughter for her personal service.

(4) The law also prohibits a mother from manumitting or alienating any slaves which she has given for the service of her daughter.

(5) It also forbids a grandfather and grandmother fo manumit their slaves, as the intention of the law is that they also may be subjected to torture.

(6) Sextus Csecilius very properly holds that the time prescribed by the law for alienating or manumitting slaves is too short. For he says, suppose a woman has been accused of adultery within the sixty days; how can the trial for adultery readily take place, so as to be concluded within the said sixty days? Still, according to the terms of the law the woman, even though she has been accused of adultery, is permitted, after this time, to manumit the slave who is suspected of having committed adultery with her, or another slave who should be put to torture.

And, indeed, relief should be granted in this instance, so that slaves wlio are indicated as guilty, or who have knowledge of the crime, may not be manumitted before the trial is ended.

(7) If the father or mother of the woman should die within the sixty days, they can neither manumit nor alienate any of the slaves whom they have given to the daughter for her personal service.

13. *Paulus, On Adultery, Book V.*

If a slave is manumitted before the sixty days have elapsed, he will be conditionally free.

14. *Ulpianus, On Adultery, Book IV.*

If a husband should die within the sixty days, let us see whether the woman can manumit' or alienate the slaves above referred to. I do not think that she can do so, although she may have no other accuser than her husband, as the father of the latter can accuse her.

(1) The law simply prohibits a woman from manumitting her slaves within sixty days after the divorce.

(2) Manumission is also prohibited whether she is divorced or repudiated.

(3) If the marriage is dissolved by the death of the husband, or on account of any penalty to which he has rendered himself liable, manumission will not be prevented.

(4) Even if the marriage is terminated by agreement, it is held that manumission or alienation is not prevented.

(5) When the woman, during the existence of the marriage but while she is contemplating divorce, manumits or alienates a slave, and this is established by conclusive evidence, the alienation or manumission will not be valid, as having been done to evade the law.

(6) We must understand every kind of alienation to be meant.

15. *Paulus, On the Lex Julia, Book I.*

The question arose whether anyone accused of the crime of *lese majeste* could manumit a slave, inasmuch as he was the owner of slaves before his conviction. The Emperor Antoninus stated in a Rescript addressed to Calpurnius Crito that, from the time when the accused party was certain of having the penalty inflicted upon him, he would lose the right of granting freedom rather through his consciousness of guilt, than from his condemnation for crime.

(1) Julianus says that, after a father has granted his son permission to manumit a slave, and the son, not being aware that his father is dead, manumits the slave, the latter will not become free. If, however, the father is living, and has changed his mind, his son will be considered to have manumitted the slave against the consent of his father.

16. *The Same, On the Lex &lia Sentia, Book III.*

Where freedom is granted to a slave by a trust, and a minor of twenty years of age sells the slave under condition that he shall be manumitted, or purchases him under the same condition, the alienation will not be prevented.

(1) If a minor of twenty years of age relinquishes the share which he has in a slave owned in

common, for the purpose of manumitting him, his act 'will be void. If, however, he can prove that there was a good reason for doing so, no fraud will be held to have been committed.

(2) It is provided by this law that no one shall manumit a slave for the purpose of defrauding his creditors. Those are designated creditors who are entitled to an action on any ground whatsoever against the person who intended to defraud him.

(3) Aristo gave it as his opinion that, where a slave was manumitted by an insolvent debtor of the Treasury, he could be returned to servitude, if he had not been free for a long time; that is to say, for not less than ten years. It is clear that anything which has been paid out for funeral expenses, with a view to defrauding the Treasury, can be recovered.

(4) Where money is due from a person who is insolvent to anyone under a condition, and a slave is manumitted by the debtor, his freedom will remain in suspense until the condition is complied with.

(5) If a son should manumit a slave with the consent of his father, and either the father or the son is aware that the former is not solvent, the grant of freedom will be void.

17. *The Same, On Grants of Freedom.*

If a private individual, being compelled by the people, should manumit a slave, the latter will, nevertheless, not be free even though his owner may have given his consent; for the Divine Marcus forbade the manumission of slaves caused by the clamor of the populace.

(1) Likewise, a slave is not emancipated if his master states falsely that he was free, in order to avoid punishment by the magistrates, if he has no intention of manumitting him.

(2) With reference to those whom it is not lawful to manumit within a certain time, if they receive their freedom by a will, the time when it was executed should not be considered, but the time when the slaves were entitled to be free.

18. *The Same, On Plautius, Book XVI.*

If the estate of the testator was solvent at the time of his death, but ceased to be so when it was accepted, any grant of freedom by the testator which defrauds the creditors is void. For, as the increase of an estate is of benefit to liberty, so also its diminution injures it.

(1) Where a slave to whom freedom is bequeathed is ordered to pay to the heir a sum of money equal to his value and become free, let us see whether any fraud is committed against the creditor, because the heir obtains the amount *mortis causa;* or, indeed, where a stranger pays the amount for the slave; or the slave himself pays it out of other property than his *peculium;* is any fraud perpetrated? But, as the fact that the heir is wealthy is of no advantage to the bequest of freedom, so neither should the person who pays the money be able to profit by it.

19. *Modestinus, Rules, Book I.*

Freedom granted by a person who is afterwards himself legally decided to be a slave is of no effect.

20. *The Same, On Cases Explained.*

Where freedom is bequeathed to a slave belonging to another, without the consent of his owner, the bequest is not valid according to law, even though the person who manumits him afterwards becomes the heir of the owner. For even if he becomes his heir by the right of relationship, the grant of freedom will be confirmed by his acceptance of the estate.

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

A female slave cannot be manumitted on account of marriage by anyone but the man who intends to marry her; because if one man should manumit her for this reason, and another

should marry her, she will not become free. Hence Julianus gave it as his opinion that she would not be liberated from servitude even if the person who manumitted and repudiated her should marry her within six months; on the ground that the Senate had reference to a marriage which should have taken place after the manumission, without any other preceding it.

22. *Pomponius, On Quintus Mucius, Book XXV.* The curator of an insane person cannot manumit a slave belonging to the latter.

23. *The Same, Various Passages, Book IV.*

Freedom is always considered to have been granted fraudulently with respect to creditors, when this is done by a person who knows that he is not solvent, even though it was granted to a slave who deserved it.

24. *Terentius Clemens, On the Lex Julia et Papia, Book IX.*

If anyone who has creditors should manumit several slaves, the grants of freedom to all of them will not be void, but only the first ones emancipated will become free; provided enough remains to satisfy the claims of the creditors. This rule was frequently stated by Julianus. For instance, where two slaves are manumitted, and the creditors will be defrauded by granting freedom to both, but not by granting it to either, one of them will not obtain his freedom; and this is generally he who is manumitted second, unless the first one designated is of greater value; and it will not be necessary to reduce the second to slavery if the value of the first will discharge the indebtedness, for, in this instance, the one which is mentioned in the second place will alone be entitled to his liberty.

25. *Papinianus, Opinions, Book V.*

Where freedom is granted by will, in fraud of creditors, although the first creditors may be satisfied, the grants of freedom are void, so far as the others are concerned.

26. *Scaevola, Opinions, Book IV.*

The heir of a debtor manumitted a slave who had been given in pledge. The question arose whether he became free. The answer was that, according to the facts stated, if the debt was still unpaid, he would become free by the manumission.

Paulus: Therefore, if the money was paid, he would be free.

27. *Hermogenicmus, Epitomes of Law, Book I.*

A slave is manumitted in fraud of creditors, and is forbidden to be free, whether the day for payment of the debt has already arrived, or whether the debt is payable within a certain time, or under some condition. The case of a legacy bequeathed under a condition is different, for the legatee will not be included among the creditors until the condition has been complied with. The *Lex &lia, Sentia,* in this respect, applies to creditors of every description whatsoever; and it has been decided that the beneficiary of a trust is also included among them.

(1) A slave who is given in pledge cannot be manumitted without the consent of the creditors before their claims have been satisfied. The consent of a creditor, who is a ward without the authority of his guardian, is of no benefit to a grant of freedom, just as no advantage results where, under similar circumstances, the ward, who is the usufructuary, consents to the manumission.

28. *Paulus, Opinions, Book HI.*

The act of an heir, who manumits his own slave that the testator bequeathed to him, is void, because it has been decided that neither his knowledge nor his ignorance of the bequest should be considered.

29. *Gaius, On Manumissions, Book I.*

When a slave is given by way of pledge, in general terms, there is no doubt that he belongs to the debtor, and can legally obtain his freedom from him, if this is not prevented by the *Lex Mlm Sentia,;* that is to say, if the owner is solvent, and his creditors do not appear to have been defrauded by his act.

(1) Where a slave is bequeathed under a condition, he belongs absolutely to the heir while the condition is pending; but he cannot obtain his freedom from him lest injury be done to the legatee.

30. *Ulpianus, On the Lex JElia, Sentia, Book IV.*

If anyone should purchase a slave under the condition of manumitting him, and, not having done so, the slave obtains his freedom under the Constitution of the Divine Marcus, let us see whether he can be accused of ingratitude. It may be said that, as the purchaser did not manumit him, he is not entitled to this right of action.

(1) If my son should manumit my slave with my consent, it may be doubted whether I have the right to accuse him of ingratitude for the reason that I did not manumit him. I should, however, be considered as having manumitted him.

(2) But if my son manumits a slave forming part of his *castrense peculium,* there is no doubt that I will not have this right, because I, myself, did not manumit him. It is clear that my son himself can accuse him.

(3) Anyone can accuse a freedman of ingratitude as long as he remains his patron.

(4) If, however, several patrons desire to accuse their freedman of ingratitude, let us see whether the consent of all of them will be necessary, or whether only one can do so.

The better opinion is that, if the freedman displayed ingratitude against only one of his patrons, he can accuse him; but the consent of all of them will be necessary, if they are all in the same degree.

(5) If a father should assign a freedman to one of his children, Julianus says he alone can accuse him of ingratitude, for he alone is his patron.

31. *Terentius Clemens, On the Lex Julia et Papia, Book V.*

The question arose, what would be the rule if a patron compelled his freedwoman to swear that she would not marry as long as her children are under the age of puberty? Julianus says that he would not be held to have acted against the *Lex Julia Sentia,* as he did not enjoin her to remain in perpetual widowhood.

32. *The Same, On the Law of Julia et Papia, Book I.*

If he who is under the control of a patron should compel the woman to swear, or to enter into a stipulation not to marry against the consent of the patron, unless the latter releases the woman from her oath, or her promise, he will come within the provisions of the law, for he himself will be held to have acted in bad faith.

(1) Patrons are not prohibited by the *Lex JElm Sentia* from receiving the wages of their freedmen, but they are forbidden to compel them to surrender them. Therefore, if a freedman voluntarily pays his wages to his patron, he will have no recourse against him under this law.

(2) This law does not apply to a freedman who has promised certain days of labor, or a sum of money, as by performing labor he can become free. Octavenus approves this opinion, and adds that a patron is understood to have compelled his freedman to pay him the wages of his labor, where his acts show that his intention was only to obtain the said wages, even if he stipulated for days of labor.

TITLE X.

CONCERNING THE RIGHT TO WEAR A GOLD RING.

1. *Papinianus, Opinions, Book I.*

Where provision for support is left to a freedman along with several others, he will not cease to be entitled to it because he has obtained from the Emperor the right to wear a gold ring.

(1) A different opinion prevails in the case of a freedman who has been judicially declared to be freeborn, and has been returned to his former condition through the collusion of another patron, which has been exposed, and who desires to obtain for himself the support that the third patron relinquished; for, in this instance, it has been established that the freedman will forfeit the right to wear a gold ring.

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

A decision rendered with reference to the free birth of a freedman within five years was set aside. I gave it as my opinion that he had lost his right to wear a gold ring which he had received and relinquished before the decision was rendered.

3. *Marcianus, Institutes, Book I.*

The Divine Commodus also deprived those of the right of wearing a gold ring who had obtained it without the knowledge or consent of their patrons.

4. *Ulpianus, On the Lex Julia et Papia, Book HI.*

Even women can obtain the right to wear a gold ring, as well as that of being considered freeborn, and be restored to the privileges they are entitled to by their birth.

5. *Paulus, On the Lex Julia et Papia, Book IX.*

He who has obtained the right to wear a gold ring is considered as having been freeborn; even though his patron may not have been excluded from his succession.

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

A freedman who has obtained the right to wear a gold ring (although he may obtain the right attaching to the condition of being freeborn, reserving the rights of his patron), is still considered as freeborn. This the Divine Hadrian stated in a Rescript.

TITLE XI.

CONCERNING THE RESTITUTION OF THE RIGHTS OF BIRTH.

1. *Ulpianus, Opinions, Book II.*

Where anyone, who stated to the Emperor that he was born free, has been restored by him to the rights to which he was entitled by birth, is proved to have been born of a female slave, he is considered to have obtained nothing.

2. *Marcianus, Institutes, Book I.*

Persons who are born slaves sometimes obtain the rights of those who are freeborn, by subsequent operation of law; as where a freedman is restored by the Emperor to the rights to which he is entitled by birth; for he is restored to these rights to which all men originally are entitled, but to which he himself could assert no claim by birth, as he was born a slave. He acquires the said rights in their entirety, and is in the same position as if he had been born free, hence his patron cannot succeed to his estate. For this reason the Emperors do not usually restore anyone to his birthright, unless with the consent of his patron.

3. *Scsevola, Opinions, Book VI, Gave the Following Opinion.*

You ask, if our Most Holy and Noble Emperor should restore anyone to his original

birthright, whether he can enjoy all the rights of one who is born free. This does not admit, and never has admitted of any doubt, because it has been established that he who obtains this privilege from the Emperor is restored to all the rights of a person who is born free.

4. *Paulus, Opinions, Book IV.*

A freedman cannot be restored to his birthright without the consent of the son of his patron; for what difference does it make whether the wrong was done to the patron, or to his children?

5. *Modestinus, Rules, Book VII.*

The freedman who desires to be restored to his natural birthright must obtain the consent of his patron, for the authority of his patron over him is lost if he acquires it.

(1) A freedman who is restored to his birthright is considered, in every respect, as if he had become freeborn, and, in the meantime, had not endured the infamy of servitude.

TITLE XII.

CONCERNING ACTIONS RELATING TO FREEDOM.

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

If a person who is free, but is held in possession as a slave, is not willing to go into court to establish his true condition, for the reason that he desires to do some wrong to himself or to his family, in this instance, it is but just that permission should be given to certain persons to appear in his behalf, as for example, to a father who alleges that his son is under his control; for if his son refuses to institute proceedings, he can do so for him.

This right is granted to his father even if he is not under the control of the latter, for it is always to the interest of a parent that his son should not be reduced to servitude.

(1) On the other hand, we say that the same power is granted to children in behalf of their parents, even against the consent of the latter, as it is no small disgrace for a son to have his father a slave.

(2) For the same reason it has been decided that this power is also granted to other blood-relatives,

2. *Gaius, On the Edict of the Urban Prs&tor, Title,: Concerning Actions Relating to Freedom.*

Because the slavery to which our relatives are subjected causes us grief and injury.

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

I go still further, and hold that this power ought to be granted to natural relatives also, so that if a father has a son in servitude who is afterwards manumitted, he can demand his freedom should he again be reduced to slavery.

(1) A soldier is also permitted to appear in court in a case where the freedom of any of his near relatives is involved.

(2) When no one of this kind who can act for the party interested appears in court, then it becomes necessary to authorize his mother, his daughters or his sisters, as well as other women related to him by blood, or even his wife, to appear before the Praetor, and present the case; so that, after proper cause is shown, relief may be granted him even against his consent.

(3) The same rule applies if I should allege that the party in question is my freedman or freedwoman.

4. *Gaius, On the Edict of the Urban Prsetor, Title: Actions Relating to Freedom.*

The right to appear in court should, however, only be granted to a patron where the liberty of

his freedman is involved, and the latter has permitted himself to be sold without his patron's knowledge.

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

For it is to our interest to preserve our rights over our freedmen and freedwomen.

(1) When several of the above-mentioned persons appear in court in behalf of a slave, the authority of the Praetor must be interposed to select the one whom he considers to be preferable.

This rule should also be observed where several patrons appear for that purpose.

6. *Gaius, On the Edict of the Urban Prsetor, Book II.*

It will be even more equitable to adopt such a course where the person who has been reduced to slavery is insane, or an infant; for this privilege should then not only be granted to near relatives but also to strangers.

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

Where men who are free, especially those who are over twenty years of age, have permitted themselves to be sold, or have been reduced to slavery for any other reason, no obstacle will arise to prevent them from demanding their freedom, unless they allowed themselves to be sold in order to share the purchase-money.

(1) When a minor of twenty years of age permits himself to be sold for the purpose of sharing the purchase-money, this will not prejudice him after he reaches the age of twenty years. If, however, he permitted himself to be sold and obtained a portion of the purchase-money after reaching his twentieth year, freedom can be refused him.

(2) If anyone should knowingly buy a man who is free, the right to demand his liberty will not be refused to him who was sold, as against the buyer, no matter at what age he was purchased; for the reason that he who bought him is not excusable, even if when he did so he who was the object of the sale well knew that he was free. But if another, without being aware of the fact, should afterwards purchase him from one who did know, freedom should be refused him.

(3) If two persons should buy a slave together, one of them knowing that he was free, and the other being ignorant of it, let us see whether he who was aware of the alleged slave's condition will prejudice the one who was not. This, indeed, is the better opinion. For, otherwise, the question would be whether he who was ignorant of the man's condition will only be entitled to his share in him, or to the entire alleged slave. Will what we have stated with reference to the share of the other apply to the purchaser who had knowledge? He, however, who bought the man, being aware that he was free, is unworthy to have anything.

Again, the one who was ignorant of his true condition cannot have a greater portion of the ownership than he purchased. The result therefore will be that the ignorance of one will benefit the other who bought the man knowing that he was free.

(4) There are other reasons for which the right to demand freedom is refused; as, for example, where a slave is said to be free by the terms of a will, and the Prsetor forbids the will to be opened, because the testator is said to have been killed by his slaves; for he who desires to appear in court and who may, perhaps, be liable to punishment, should not be entitled to a judgment giving him his freedom.

If, however, the right should be granted because it is uncertain whether he is guilty or innocent, the decision should be deferred until it is established who is responsible for the death of the testator, as it will then appear whether he will be liable to punishment or not.

(5) Where anyone who is in slavery claims his freedom, he occupies the place of a plaintiff. If, however, being at liberty, he is demanded as a slave, the person who alleges that he is his

slave assumes the part of the plaintiff. Hence, when the matter is in doubt, in order that the proceedings may be conducted in their proper order, the question should be argued before the magistrate who has cognizance of cases involving freedom, so that it may be determined whether the alleged slave should be reduced from freedom to servitude; or, on the other hand, whether, being in bondage, he ought to be liberated.

If, however, it should appear that he who contends that he is free was in that condition without having been guilty of fraud, he who alleges that he is his owner will take the part of the plaintiff, and will be required to prove that he is his slave. But if it is decided that, at the time when the proceedings were instituted, the alleged slave was not at liberty, or had fraudulently obtained his freedom, he who asserts that he is free must prove that this is the case.

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

The right to appear in a case involving freedom is granted to an usufructuary, even if the owner (that is to say, he who alleges that he is the owner), also desires to institute proceedings respecting the status of the slave.

(1) Where several persons claim the ownership of the slave, alleging that he belongs to them in common, they shall be sent before the same judge. This was decreed by the Senate. But if each one of them should say that the entire slave and not merely a share in him belongs to him alone, the Decree of the Senate will not apply. For then there will be no reason to apprehend that different decisions will be rendered, as each of the alleged owners claims that the slave is his individual property.

(2) Where, however, one person claims the usufruct in the slave and another the ownership, or where one claims the ownership, and the other says that the slave has been pledged to him, the same judge must decide the case; and it makes little difference whether the slave was pledged to him by the same person who claims him as the owner, or by someone else.

9. *Gaius, On the Edict of the Urban Prsetor, Title: Actions Relating to Freedom.*

Where two parties, that is to say, the alleged usufructuary and the alleged owner, are defendants at the same time against him who has brought an action to obtain his freedom, one of them may happen to be absent. It may be doubted whether, under such circumstances, the Prsetor can permit the one who is present to appear alone against the alleged slave, because the rights of the third party should not be prejudiced by the collusion or the negligence of another.

It can more properly be held that one of them may proceed in such a way that the rights of the other will remain unimpaired. If the absent party should appear before the case has been terminated, he must be sent before the same judge, unless he gives a good reason why this should not be done; for instance, if he alleges that the judge is his enemy.

(1) We say that the same rule will apply where of two or more persons who assert that they are the owners of the alleged slave some are present, and others are absent.

(2) Therefore, in both cases, we must consider if the one who first instituted proceedings should be defeated, whether this will benefit the other, who gained his case, or *vice versa;* that is to say, if either one of them should succeed, whether this will profit the other; as the heir of a freedman obtains an advantage from the fact that his patron had been defrauded by the manumission of slaves.

If it is held that a judgment rendered in favor of one will benefit the other; the result will be that if the latter again brings suit, he can be opposed by a replication on the ground that the matter has already been decided. If, indeed, it is held that he does not derive any advantage from the decision, the doubt will arise whether what was claimed by the party who lost the case belongs to either of them, or whether he against whom the action was brought, or he who was successful, is entitled to it; and it is evident that a praetorian action ought to be granted to

the party who gained the case, as the Prsetor should, by no means, permit the man to be part slave and part free.

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

What we have said with reference to the alleged slave, proving that he has been free, must be understood to mean not that he who demands his liberty must show that he was absolutely free, but that he was in possession of his freedom without any fraud on his part.

But let us see what would be considered fraud on his part. Julianus says, that all those who believe that they are free are not guilty of fraud, provided they act as freemen, even though they are actually slaves. Varus, however, says that one who knows himself to be free, and takes to flight, cannot be considered to be at liberty without any fraud on his part; but at the moment when he ceases to conceal himself as a fugitive slave, and acts as if he was free, he begins to be at liberty without fraud on his part. For he holds that he who knows that he is free, and afterwards conducts himself like a fugitive slave, should be considered to act as a slave from the very fact that he has taken to flight.

11. *Gaius, On the Edict of the Urban Pr&tor, Title: Actions with Reference to Freedom.*

Even though, during his flight he acted as a freeman, we hold that the same rule will apply.

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

Hence, it should be noted that a person who is free can be fraudulently at liberty, and that a slave can be at liberty without being guilty of fraud.

(1) A child who is stolen in infancy served as a slave in good faith, although he was free; and afterwards, while ignorant of his condition, left his master and secretly began to live in freedom. He does not remain at liberty without being guilty of fraud.

(2) A slave can also be at liberty without committing fraud, as, for instance, where he receives his freedom by a will and is not aware that the will is void; or where he obtains it before a magistrate from someone whom he believed to be his owner, when he was not; or where he has been brought up as free, when, in fact, he was a slave.

(3) Generally speaking, whenever anyone thinks that he is free, without being guilty of deceit, whether he is induced to do so by good or bad motives, and he remains at liberty, it must be held that he is in the same condition as if he was free without being guilty of fraud, and therefore he can enjoy all the advantages of a possessor of freedom.

(4) The proof of good faith, however, is referred to the time when he was at liberty without being guilty of fraud, which is when legal proceedings with reference to him were first instituted.

(5) Where the services of a slave are due to anyone, he can also avail himself of the action relating to freedom.

(6) If a person who claims his freedom has caused me any damage during the time when he was serving me as a slave in good faith (as, for example, if I really, believing myself to be his owner, was sued in a noxal action, and judgment was rendered against me, and I paid the appraised damages, instead of surrendering the alleged slave by way of reparation), judgment will be rendered against him in my favor.

13. *Gaius, On the Edict of the Urban Prsetor, Title: Actions Relating to Freedom.*

It is certain that in the action *in factum* under discussion, judgment should only be rendered for the amount of damages which were caused by fraud, and not for what was due to negligence. Therefore, even if the alleged slave should be released from liability in a case of this kind, still, suit can afterwards be brought against him under the Aquilian Law, as by this law he will also be liable for negligence.

(1) Again, it is certain that in this action not only our own property but also that of another for which we are responsible can be claimed as having been lent or hired. But it is clear that this proceeding does not apply to property merely deposited with us for safe-keeping, because it is not at our risk.

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

The Prsetor very properly opposes the deceitful conduct of those who, knowing that they are free, fraudulently permit themselves to be sold as slaves; for he grants an action against them.

(1) This action will lie whenever he who permitted himself to be sold as a slave is in such a position that he cannot be refused permission to demand his freedom.

(2) We do not consider that he has acted in bad faith who did not voluntarily inform the purchaser of the fraud, but only when he himself deceived him.

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

That is to say, no matter whether the person who suffered himself or herself to be sold is of the male or the female sex; provided he or she is of an age at which fraud can legally be committed.

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

The same rule applies to one who pretends to be a slave, and is sold as such, with the intention of deceiving the purchaser.

(1) If, however, he, who was sold was under the influence of either force or fear, we say that he was not guilty of fraud.

(2) The purchaser is entitled to this action when he was not aware that the alleged slave was free, for if he knew that he was free, and then bought him, he cheated himself.

(3) Therefore, if a son under paternal control makes a purchase of this kind, and he himself was aware of the facts, but his father was ignorant of them, he will not be entitled to an action for the benefit of his father, if he made the purchase with reference to his *peculium.* But, in this instance, the question arises whether, if the father directed him to make the purchase, he will be prejudiced by the knowledge of his son. I think that it will prejudice him just as it would prejudice an agent.

(4) If the son was not aware that the man who was sold was free, and his father knew it, I think that it is clear that the father will be barred from bringing an action, even if the son made the purchase with reference to his *peculium;* provided the father was present and could have prevented his son from doing so.

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

The same rule will apply to the case of a slave, and where a purchase was made under our direction by an agent; and it is just as if I had ordered a certain man to be purchased, knowing him to be free, although he who was ordered to buy him may not have been aware of the fact, as an action will not lie in his favor. If, on the other hand, I was not aware that the man was free, but the agent knew it, the action will not be refused me.

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

He, therefore, will be liable for as much as he has paid, or for the amount for which he bound himself, that is to say, for double the price.

(1) Let us see, however, whether merely the purchase money or also whatever may have been added to it should be doubled. I think that either all that was paid on account of the sale ought, by all means, to be doubled,

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

Or what was exchanged or set off, in lieu of the purchase money (for it also is understood to have been given as such under these circumstances) ;

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

And what he bound himself to pay should be doubled.

(1) Hence, if the purchaser has lawfully paid something to anyone in order to obtain this action, it must be said that it comes within the terms of this Edict, and will be doubled.

(2) Where anyone is said to have bound himself, we must understand this to have been done either to the vendor or to someone else; for whatever he, either himself, or through another, gave to the vendor himself, or to some other person by his order, is equally included.

(3) We should consider the purchaser to be bound where he cannot protect himself by an exception, but if he can do so, he is not held to be bound.

(4) It sometimes happens that he who makes the purchase will be entitled to an action for quadruple the value of the property. For a suit for double damages will lie in his favor against the alleged slave himself, who, being free, knowingly permitted himself to be sold; and, in addition to this, he will be entitled to an action for double damages against the vendor, or against him who promised him double damages.

21. *Modestinus, Concerning Penalties, Book I.*

Therefore, double the amount of what the purchaser either paid, or bound himself for with reference to the sale, will be due. According to this, whatever either of the parties may pay will not operate to release the other; because it has been decided that this action is a penal one. Hence, it is not granted after the lapse of a year, nor can it be brought against the successors of the person liable to it, as it is a penal action. Therefore, the action which arises from this Edict may, very properly, be said not to be extinguished by manumission, because it is true that the vendor cannot be sued after legal measures have been taken against him who demanded his freedom.

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

Not only the purchaser himself, but also his heirs, can institute proceedings by means of this action *in factum.*

(1) We understand anyone to make a purchase, even where he does so by another, as, for instance, through an agent.

(2) Where, however, several persons make a purchase, while all of them will be entitled to this action, still, if they have bought different shares, they can bring suit in proportion to the respective amounts of the price which they have paid; or if each one bought the entire interest in the slave, each will be entitled to an action to recover in full; nor will the knowledge or the ignorance of any one of them benefit or prejudice the others.

(3) If the purchaser was not aware that the man who was sold was free, and he afterwards learned this, his rights will not be prejudiced, because he was ignorant of the fact at the time. But if he knew it when the sale took place, and afterwards doubted its truth, this will be of no advantage to him.

(4) Knowledge does not prejudice, nor ignorance benefit the heir and other successors of the purchaser in any way.

(5) If, however, anyone should make the purchase by an agent, who knows that the man is free, it will prejudice him; and Labeo thinks that the knowledge of a guardian will, under these circumstances, prejudice his ward.

(6) This action is not granted after a year, as it is an equitable as well as a penal one.

23. *Pauliis, On the Edict, Book L.*

If I should sell and transfer to you the usufruct in a man who is free, Quintus Mucius says that he will become a slave, but the ownership will not become mine, unless I sell the usufruct in good faith, for, otherwise, there will be no owner.

(1) In a word, it must be noted that what has been said with reference to men sold as slaves, and whose claim to freedom is denied, also applies to such as are donated, and given by way of dowry; just as it does to those who have permitted themselves to be given in pledge.

(2) Where a mother and her son both demand their freedom, the cases of the two should be joined, or that of the son should be deferred until the mother's case has been decided; as was decreed by the Divine Hadrian. For where the mother has instituted proceedings before one judge, and her son before another, Augustus stated that the condition of the mother must first be established, and after that the case of the son should be heard.

24. *The Same, On the Edict, Book LI.*

After the preliminaries of a suit involving the demand for freedom have been legally complied with, he who brought it to establish his status is considered to be free, and actions will not be refused him against one who alleges that he is his owner, no matter what actions he may desire to bring. But what if these are suits, the right to which is extinguished by lapse of time, or by death? Why should he not be granted the power to institute these proceedings in security after issue has been joined?

(1) Moreover, Servius says that, in cases where the right to bring actions is barred after a year has elapsed, the year must be reckoned from the day on which the case relating to freedom was disposed of.

(2) If, however, it is considered desirable to proceed against others, it will not be necessary to wait until the first case has been decided, lest in the meantime means may be found to bar these actions by the introduction of someone who will dispute the right of the alleged slave to be free. In like manner, an action can legally be brought or not, according to the decision in the case involving the freedom of the party in question.

(3) If the alleged owner should bring an action, the question arises whether the defendant will be obliged to join issue. Several authorities hold that if he brings an action *in personam,* he must undertake the defence of the case, but judgment must be suspended until the question of his freedom has been determined; nor should it be held that his attempt to obtain his freedom is prejudiced, or that he remains at liberty with the consent of his master. For after the case brought to establish his freedom has been decided, he is considered, in the meantime, to be free; and as he himself can bring actions, so also, actions can be brought against him; but it will depend upon the result, as the judgment will either be valid if it is in his favor, or it will be void if it is adverse to his freedom.

(4) Where he who demands his freedom is accused of theft, or of wrongful damage by anyone, Mela says that he must, in the interim, furnish security that he will be present when the decision is rendered, to prevent the condition of one whose freedom is in doubt from becoming preferable to that of a person whose freedom is certain; but judgment must be deferred to avoid committing any wrong against liberty.

Likewise, where an action of theft is brought against the possessor of a man alleged to be a slave, and he is afterwards sued in the name of him who claimed his freedom, the decision of the case must be suspended ; so that if the latter is ascertained to be free, the case against him can be transferred, and if the judgment should be unfavorable, the action to enforce it can be granted against him.

25. *Gaius, On the Edict of the Urban Prastor: Title, Actions Relating to Freedom.*

If an option has been bequeathed to anyone demanding his liberty in court, whatever has been stated with reference to the bequest of an estate will also apply to that of an option.

(1) The right to bring a second action to obtain freedom is sometimes granted; as for instance, where a party alleges that he lost the first case because his freedom depended upon a condition which had not previously been complied with.

(2) Although it is commonly stated that, after a case involving freedom has been decided, the person whose condition was in controversy is considered to be free; still, if he is really a slave, it is certain that he, nevertheless, will acquire for his master whatever has been delivered to or promised him, just as if no question had arisen concerning his freedom. We shall see that there is no dispute as to his possession, since his master ceases to possess him after the case has been decided.

The better opinion is that he acquires possession, although he is not possessed by him. And, as it has been settled that we acquire possession by our slaves, even if they are fugitives, why should it be wondered at that we also acquire possession by one whose right to freedom we deny?

26. *The Same, On the Provincial Edict, Book XX.*

Where anyone claims a person who is at liberty as his slave, and only brings the action for the purpose of having recourse in case of eviction, he cannot be sued in an action on injury.

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

The Divine Brothers, in a Rescript addressed to Proculus and Munatius, stated as follows: "As Romulus, whose condition is disputed, is near the age of puberty, and at the request of his mother, Varia Hado, and with the consent of Varius Hermes, his guardian, judgment in the case was postponed until the child should reach the age of puberty, it is left to your discretion to determine what will be advantageous to the minor, the position of the parties interested being taken into account."

(1) If the person who raised the question concerning the condition of another fails to appear at the trial, he who demands his freedom is in the same condition as he was before the controversy arose with reference to it. He, however, is benefited to this extent, namely, that he who disputed his status will lose his case. This fact, however, does not render him freeborn who previously was not so, for the failure of an adversary to appear does not confer the right of freedom.

I think that judges will act lawfully and regularly if they pursue the regular order; so that where the party claiming the man as his slave fails to appear, his adversaries shall be given the choice either of having the case continued, or of having it heard and determined. If the judges should hear the case, they must decide that the party in question does not appear to be the slave of So-and-So. This decision does not take undue advantage of anyone, as the person whose estate is in controversy is not found to be freeborn, but is merely held not to be a slave.

Where, however, one who is in slavery claims his freedom, the better course for the judges to pursue will be to continue the case, in order to avoid deciding that the said person appears to be born free, when no adversary appears, unless there should be good reason to cause them to hold that it is clear that judgment should be rendered in favor of liberty; as is also stated in a Rescript of Hadrian.

(2) If, however, he who demands his freedom fails to appear, and his opponent is present, it will be better to proceed with the case and have judgment rendered. If the adversary offers sufficient evidence, the judge shall decide against freedom. It may, however, happen that the absent party will be successful, for the decision may be rendered in favor of freedom.

28. *Pomponius, On Quintus Mucius, Book XII.*

A slave is not considered to be at liberty with the consent of his master when the latter does not know that he belongs to him. This is perfectly true; for the slave is only at liberty under such circumstances when he acquires possession of freedom with his master's consent.

29. *Arrius Menander, On Military Affairs, Book V.*

Where anyone institutes proceedings to obtain his freedom, and enlists in the army before a decision is rendered, he should be held to occupy the same position as other slaves, and he will not be relieved because, in some respects, he is considered as free. And, although he may have appeared to be free, he can be dishonorably discharged, that is, dismissed from the army, and driven from the camp as one who demanded freedom while in slavery, or who was at liberty through fraud. But anyone who has been falsely and maliciously claimed as a slave shall be retained in the service.

(1) Where anyone who has been judicially declared freeborn enlists in the army, and the decision is reversed within five years, he shall be returned to his new master.

30. *Julianus, On Minicius, Book V.*

Where two persons separately claim a man as their slave, and each of them alleges that he owns half of him, and, by one judgment, he is declared to "be free, and by another, he is pronounced to be a slave, the most convenient course will be for the judges to be compelled to agree. If this cannot be done, Sabinus states that it has been held that the man should be taken as a slave by the party who gained the case.

Cassius (as well as myself), adopts this opinion, and, indeed, it is ridiculous for the man to be considered half slave, and also to be protected in the enjoyment of half his freedom.

It is, however, convenient to decide that he was free, on account of the favor conceded to liberty, and to compel him to pay to the party who gained the case half of his value, as appraised by a reliable citizen.

31. *Ulpianus, Opinions, Book I.*

A son who appears as the heir of his father is forbidden from demanding as a slave one who had been manumitted by his father.

32. *Paulus, Rules, Book VI.*

A decree of the Senate was enacted concerning the property of those who, as slaves or as freedmen, have acquired the status of freeborn persons. With reference to those who were formerly in a state of slavery, it permits them only to take with them what they conveyed into the houses of their alleged masters, and to those who, after their manumission, desired to recover their original rights. This also was conceded, namely, that whatever they had acquired after their manumission (but not anything obtained through the agency of the person who set them free), they could take with them; and that they must leave all other property with him from whose household they departed.

33. *The Same, Actions Relating to Freedom.*

Anyone who knowingly purchases a man who is free, even if the latter permits himself to be sold, cannot, nevertheless, oppose him, if he demands his freedom. Where, however, he sells the man to another person who was ignorant of the facts, the supposed slave will not be permitted to demand his liberty.

34. *Ulpianus, Pandects.*

The Emperor Antoninus decided that no one should be permitted to demand his freedom, unless he previously had rendered an account of the administration which he had conducted

while in slavery.

35. *Papinianus, Opinions, Book IX.*

It has been settled that the slaves destined for the care of a temple which Titia intended to build, and who had not been manumitted, belonged to her heir.

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

A master who has gained his case, and wishes to take away his slave, cannot be compelled to accept the appraised value instead of the slave.

37. *Callistratus, Questions, Book II.*

A private agreement cannot make anyone either the slave or the freedman of another.

38. *Paulus, Opinions, Book XV.*

Paulus gave it as his opinion that if (as is stated) after a sale has been made unconditionally, the purchaser voluntarily sent a letter by which he declared that, after a certain time, he would manumit the slave whom he had bought, this letter had no reference whatever to the Constitution of the Divine Marcus.

(1) He also gave it as his opinion that the Constitution of the Divine Marcus applied to the cases of slaves who were sold under the condition of being manumitted after a certain time; and that a female slave, for whom her master had received money for the purpose of manumitting her, was entitled to the same favor of freedom, as he would also have authority over her as his freedwoman.

(2) The question arose whether a purchaser could legally grant freedom to his slave, if his price had not yet been paid. Paulus answered that if the vendor had delivered the slave to the purchaser, and had been furnished with security for his price, he would belong to the purchaser, even if the money had not been paid.

(3) Gaius Seius sold Stichus, his slave, under the condition that Titius would manumit Stichus at the end of three years, if he served him continually during that time. Stichus fled before the three years had elapsed, and returned in a short time after the death of Titius. I ask whether Stichus would be prevented from obtaining his freedom under the terms of the sale, by having taken to flight before the three years had expired? Paulus gave it as his opinion that, according to the facts stated, Stichus should be manumitted, and was entitled to his freedom after the term which had been prescribed.

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

He who is not required to produce proofs of his free birth should be heard, if he himself voluntarily desires to offer them.

(1) Magistrates who have cognizance of causes involving freedom of birth can impose penalties, to the extent of exile, against anyone who rashly and maliciously institutes proceedings.

(2) Guardians or curators cannot raise any question as to the condition of the wards whose guardianship and whose property they have administered.

(3) A husband is not prohibited from raising a question as to the condition of his wife or his freedwoman.

40. *Hermogenianus, Epitomes of Law, Book V.*

Where a minor of twenty years of age permits himself to be sold under an agreement to share his price, he cannot, after his manumission, demand that he be declared freeborn.

41. *Paulus, Articles Referring to Actions for Freedom.*

If there is any doubt as to the condition of a person who demands his freedom, he should first be heard, if he wishes to prove that he himself is in possession of freedom.

(1) The judge who has jurisdiction of cases where freedom is involved should also take cognizance of property which has been stolen, or serious damage committed by the claimant. For it can happen that, being confident that he will obtain his freedom, he may have ventured to steal, or spoil, or waste property belonging to those whom he was serving as a slave.

42. *Labeo, Last Works, Book IV.*

If a slave whom you have purchased demands his freedom, and an unjust decision is rendered in his favor by the judge, and the master of the said slave makes you his heir, after the case has been decided against you, or the slave becomes yours in any other way, you can again claim him as yours; and the rule relating to *res judicata* cannot be pleaded against you. Javolenus says this opinion is correct.

43. *Pomponius, Decrees of the Senate, Book HI.*

The Emperor Hadrian published a Rescript with reference to those who had stolen the property of the persons whom they were serving as slaves, and afterwards demanded their freedom, the words of which Rescript are as follows: "As it is not just that a slave, in expectation of his freedom, should take property belonging to the estate of his master, where freedom is to be granted him under the terms of a trust, so it is not necessary to seek for any reason to delay the grant of his freedom." Hence, in the first place, an arbiter should be appointed, in whose presence it should be determined what can be preserved for the heir, before he can be compelled to manumit the slave.

44. *Venuleius, Actions, Book VII.*

Although it was formerly doubtful whether only a slave or a freedman could be obliged by his patron to swear to observe the conditions which were imposed upon him in consideration of his liberty, it is, however, better to hold that he cannot be bound to a greater extent than a freeman. Hence it is customary to exact this oath from slaves, in order that they may be restrained by religion, and be required to again be sworn after they become their own masters; provided they take the oath, or make the promise at the very time when they are manumitted.

(1) Moreover, it is lawful to insert the name of the wife with reference to any donation, present, or daily labor to be given or performed by the manumitted slave.

(2) A pratorian action on account of labor to be performed should be granted against one who, before reaching the age of puberty, took the oath, that is to say if he was legally capable of doing so; as a boy under the age of puberty can render services if he is either a nomencla-tor or an actor.

TITLE XIII.

CONCERNING THOSE WHO ARE NOT PERMITTED TO DEMAND THEIR FREEDOM.

1. *Ulpianus, On the Duties of Proconsul, Book I.* Those who are more than twenty years of age cannot demand their freedom, if any of the price for which they have been sold should come into their hands. Where anyone has suffered himself to be sold for any other reason, even though he may be over twenty years of age, he can demand his freedom.

(1) The right to demand his freedom should not be refused a minor under twenty years of age, for the above-mentioned reason, unless he remained in slavery after reaching the age of twenty years; for then, if he had shared in the price, it must be said that the right to demand his freedom will be refused him.

2. *Marcellus, Digest, Book XXIV.*

A certain man extorted a slave from Titius by violence, and directed him to be free by his

will. The slave will not become free, even if the testator died solvent; for otherwise, Titius will be defrauded, as he can bring an action against the heir of the deceased on the ground that the bequest of freedom was void; but if the slave should obtain his freedom, Titius will not be entitled to an action, because the heir will not be held to have gained anything by the fraud of the deceased.

3. *Pomponius, Letters and Various Passages, Book XL*

Permission to demand their freedom is denied those who have suffered themselves to be sold. I ask whether these decrees of the Senate also apply to children born of women who have suffered themselves to be sold. There can be no doubt that a woman of over twenty years of age, who has suffered herself to be sold, will be refused permission to demand her freedom. Nor should it be granted to those children born to her during the time of her servitude.

4. *Paulus, Questions, Book XII.*

"Licinnius Rufinus, to Julius Paulus: A slave who was entitled to freedom under the terms of a trust, permitted himself to be sold after having reached his twentieth year. I ask whether he shall be forbidden to demand his freedom." The example of a man who is free causes me some difficulty; for if the slave should have permitted himself to be sold after having obtained his freedom, he would be refused permission to demand it; nor should he be understood to be in a better position when, being in slavery, he permitted himself to be sold, than if he had done so after having obtained his freedom.

On the other hand, however, a difficulty arises, because in the case in question the sale is valid and the man can be sold, but in the case of a freeman the sale is void, and there is nothing to be sold. Therefore, I ask that you give me the most complete information on this point.

The answer was that the sale of a slave as well as that of a man who is free can be contracted for, and a stipulation providing against eviction can be entered into. For, in this instance, we do not refer to anyone who knowingly purchases a man who is free, as a right to demand his freedom is not refused him as against the purchaser. He, however, who is still a slave, can be sold even against his own consent, although he is acting fraudulently when he conceals his condition, as it is in his power immediately to obtain his freedom, but he cannot be blamed when he is not yet entitled to be free.

Suppose that a slave, who is to be free conditionally, suffers himself to be sold; no one will say that he has not the right to demand his freedom, in case the condition, which is not in his power, should be fulfilled ; and, indeed, I think that the same rule will apply if it was in his power to comply with it. In the case proposed, it will be better to adopt the opinion that he should not be permitted to demand his freedom, if he could have done so, and preferred to let himself be sold; because he is unworthy of the aid of the Praetor having jurisdiction over trusts.

TITLE XIV.

WHERE ANYONE IS DECIDED TO BE FREEBORN.

1. *Marcellus, Digest, Book VII.*

If the'freedman of one person is declared to be freeborn as the result of an action brought by another, his patron can prosecute the same claim against him without being barred by an exception based on prescription.

2. *Saturninus, On the Duties of Proconsul, Book I.*

The Divine Hadrian decided that anyone who was of age, and permitted himself to be sold in order that he might receive a portion of the price, should be forbidden to bring an action to obtain his freedom; but that he could do so under certain circumstances, if he returned his

share of the price which had been paid.

(1) Those who are freedmen, and assert their claim to freedom by birth, shall not be heard after the lapse of five years from the date of their manumission.

(2) Those who, after the lapse of five years, allege that they have discovered documents establishing their rights to be considered freeborn, must have recourse to the Emperor, who will examine their claims.

3. *Pomponius, Decrees of the Senate, Book V.*

By the following words: "Their birth having been acknowledged," the Decree of the Senate must be understood only to refer to those who would have been considered freeborn.

(1) By the clause, "Would have left," it must be understood that whatever such persons have obtained from the property of him by whom they were manumitted must be restored.

Let us see in what manner this must be interpreted, whether they must return whatever has been acquired by them by means of the property of their masters, or what they have abstracted from them without their knowledge, or whether this includes the property which has been granted and donated by the persons who manumitted them. The latter is the better opinion.

4. *Papinianus, Questions, Book XXII.*

The Rescript which forbids freedom of birth to be demanded before the Consuls or Governors of provinces, after the lapse of five years from the date of manumission, excepts no cases or persons.

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

I gave it as my opinion, that a patron should not be barred by prescription after the lapse of five years from the date of the judgment entered in favor of freedom, when he is ignorant that such a judgment has been rendered.

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

Whenever a dispute arises as to whether anyone is a freedman or services are demanded of him, or obedience from him is required, or where an action implying infamy is to be brought, or he who alleges that he is the patron is summoned to court, or proceedings are instituted without good cause, a prejudicial action will lie.

The same prejudicial action will also be granted where a person confesses that he is a freedman, but denies that he has been liberated by Gaius Seius. It will also be granted where one or the other party requests it, but he who represents himself to be the patron shall always take the part of the plaintiff, for he must prove that the person in question is his freedman, and if he does not do so he will lose his case.

TITLE XV.

NO QUESTION AS TO THE CONDITION OF DECEASED PERSONS SHALL BE RAISED AFTER FIVE YEARS HAVE ELAPSED AFTER THEIR DEATH.

1. *Marcianus, On Informers.*

It is not lawful for either private individuals or the Treasury to raise any question with reference to the civil condition of deceased persons after five years from the time of their death.

(1) Nor can the condition of him who died within five years be reconsidered, if, by doing so, the status of one who has died more than five years previously will be prejudiced.

(2) Nor can any question be raised with reference to the condition of a man who is living, if, by doing so, the condition of one who died more than five years previously will be prejudiced.

This point was decided by the Divine Hadrian.

(3) Sometimes, however, it is not permitted to raise a question with reference to the status of the deceased within five years from the time of his death. For it is provided by a Rescript of the Divine Marcus that if anyone has been judicially declared to be freeborn, it may be permitted to review the decision rendered during the lifetime of the person who has been pronounced freeborn, but not after his death. To such an extent is this true that even if the review of the case has been begun, it will be extinguished by death; as is set forth in the same Rescript.

(4) If anyone reviews a decision of this kind in order to reduce the person to an inferior condition, this should be opposed, according to what I have already stated. But what if the intention was to improve his condition, as, for instance, to have him declared a freedman instead of a slave; why should this not be permitted ? What course must be pursued, if he is said to be a slave, the issue of a female slave, who has been dead for more than five years ? Why should he not be alleged to prove that she was free; for this itself is in favor of the deceased?

Marcellus in the Fifth Book of the Duties of Proconsul stated that this should be done. I also adopted the same opinion in the audience room.

2. *Papinianus, Opinions, Book XIV.*

It is settled that, in the reconsideration of a case, no question should be raised with reference to the freedom of children which may involve the reputation of their mothers or fathers, after the latter had been dead for more than five years.

(1) In a matter of this kind, which is worthy of public supervision, relief should be granted to minors instituting proceedings for restitution, where they had no guardians to act for them during the five years which have elapsed.

(2) This prescriptive term of five years which protects the status of deceased persons is not affected by the filing of any action before death; if it can be proved that the right to bring the said action has been extinguished by the long silence of him who originally brought it and then desisted.

3. *Hermogenianus, Epitomes of Law, Book VI.*

The condition of a person who died more than five years previously is considered to be more honorable than at the time of his death, and no one will be prevented from claiming this for him. Therefore, even if he died in slavery, he can be proved to have been free at his decease, even after the lapse of five years.

4. *Callistratus, On the Rights of the Treasury.*

The Divine Nerva was the first of all who, by an Edict, forbade that any question should be raised regarding the condition of anyone after five years from the date of his death.

(1) The Divine Claudius also stated in a Rescript addressed to Claudian that if, by the pecuniary question which had been raised, any prejudice appeared to be caused to the status of the deceased, the inquiry must cease.

TITLE XVI.

CONCERNING THE DETECTION OF COLLUSION.

1. *Gaius, On the Edict of the Urban Prsetor, Title: Actions Relating to Freedom.*

To prevent the excessive indulgence of certain masters toward their slaves from contaminating the highest Order in the State, through suffering their slaves to claim the right of free birth and to be judicially declared free, a Decree of the Senate was enacted in the time

of Domitian, by which it was provided, that: "If anyone can prove that an act was due to collusion, and the man pronounced to be free was actually a slave, the latter will belong to him who exposed the collusion."

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

The Emperor Marcus decided that collusion could be detected within five years after a decision declaring a person entitled to the privilege of free birth.

(1) We understand that the five years must be continuous.

(2) If it is clear that if the age of him who is accused of collusion renders it necessary that the investigation should be deferred until the age of puberty, or to some other time, it must be held that the term of five years will not run.

(3) Moreover, I think that the term of five years has been prescribed not to terminate the inquiry, but to begin it. It is, however, different with respect to him who, being a liberated slave, demands that he be given the rights of a person who is freeborn.

(4) It is provided by a Rescript of the Divine Marcus that even strangers, who have the right to assert claims for others, shall be permitted to expose collusion.

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

Where anyone, without having any legal adversary, is judicially declared to be entitled to the rights of a freeborn person, the decision will be without effect, and just as if none had been rendered. This is provided by the Imperial Constitutions.

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

Where a freedman, through collusion, has been declared to be entitled to the rights of a freeborn person, and the collusion has been established, he is, in some respects regarded, as a freedman. In the meantime, however, before the collusion has been exposed, and after the decision with reference to his rights as a freeborn person has been rendered, he will be regarded as freeborn.

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

It is only permitted, under the pretext of collusion, to review a judgment rendered with reference to the right of free birth but once.

(1) Where several persons appear at the same time for the purpose of proving the collusion, when proper cause is shown, a decision must be rendered after taking into account the morals and the ages of all the parties concerned; and especially should it be ascertained which one of them has the greatest interest in exposing the collusion.

THE DIGEST OR PANDECTS.

BOOK XLI.

TITLE I.

CONCERNING THE ACQUISITION OF THE OWNERSHIP OF PROPERTY.

1. *Gaius, Diurnal or Golden Matters, Book II.*

We obtain the ownership of certain property by the Law of Nations, which is everywhere observed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the Civil Law, that is to say, by the law of our own country. And because the Law of Nations is the more ancient, as it was promulgated at the time of the origin of the human race, it is proper that it should be examined first.

(1) Therefore, all animals which are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.

2. *Florentinus, Institutes, Book VI.*

The same rule applies to their offspring, born while they are in our hands.

3. *Gaius, Diurnal or Golden Matters, Book II.*

For what does not belong to anyone by natural law becomes the property of the person who first acquires it.

(1) Nor does it make any difference, so far as wild animals and birds are concerned, whether anyone takes them on his own land, or on that of another; but it is -clear that if he enters upon the premises of another for the purpose of hunting, or of taking game, he can be legally forbidden by the owner to do so, if the latter is aware of his intention.

(2) When we have once acquired any of these animals, they are understood to belong to us, as long as they are retained in our possession; for if they should escape from our custody and recover their natural freedom, they cease to belong to us, and again become the property of the first one who takes them,

4. *Florentinus, Institutes, Book VI.*

Unless, having been tamed, they are accustomed to depart and return.

5. *Gaius, Diurnal or Golden Matters, Book II.*

Wild animals are understood to recover their natural freedom when our eyes can no longer perceive them; or if they can be seen, when their pursuit is difficult.

(1) It has been asked whether a wild animal which has been wounded in such a way that it can be captured is understood immediately to become our property. It was held by Trebatius that it at once belongs to us, and continues to do so while we pursue it, but if we should cease to pursue it, it will no longer be ours, and will again become the property of the first one who takes it. Therefore, if during the time that we are pursuing it another should take it, with the intention of himself profiting by its capture, he will be held to have committed a theft against us.

Many authorities do not think that it will belong to us, unless we capture it, because many things may happen to prevent us from doing so. This is the better opinion.

(2) The nature of bees, also, is wild. Hence, if they settle upon one of our trees, they are not considered to belong to us until we have enclosed them in a hive, any more than birds who have made their nests in our trees. Therefore, if anyone else should shut up the bees, he will become their owner.

(3) Likewise, if bees make honey, anyone can take possession of it without being guilty of

theft. But, as we have already stated, if anyone enters upon the land of another for such a purpose, he can legally be forbidden by the owner from doing so, if the latter is aware of his intention.

(4) A swarm of bees which has left our hive is understood to be ours as long as it is in sight and its pursuit is not difficult; otherwise, it becomes the property of the first one who takes possession of it.

(5) The nature of peacocks and pigeons is also wild. Nor does it make any difference whether or not they have the habit of flying away and returning; for bees, whose nature has been decided to be wild, do the same thing. Certain persons have stags, which are so tame that they go into forests and return, and no one denies that their nature is wild. Moreover, with reference to such animals as have the habit of going away and returning, the following rule has been adopted, namely : "That they shall be understood to belong to us, as long as they have the intention of returning, but if they should cease to have this intention, they will no longer be ours, and will become the property of the first occupant." They are understood to have ceased to have the intention to return where they have lost the habit of doing so.

(6) The nature of chickens and geese is not wild, for it is well known that there are wild chickens and wild geese. Hence, if my geese or my chickens, having been frightened for any reason, fly so far that I do not know where they are, I will, nevertheless, retain ownership over them, and anyone who takes them with the intention of profiting by it will be held to have committed theft.

(7) Likewise, anything which is taken from the enemy immediately becomes by the Law of Nations the property of him who takes it.

6. *Florentinus, Institutes, Book VI.*

Likewise, the increase of animals of which we are the owners belongs to us by the same law.

7. *Gaius, Diurnal, or Golden Matters, Book II.*

To such an extent is this true that even men who are free become the slaves of the enemy; but, still, if they escape from the power of the enemy they will recover their former freedom.

(1) Moreover, anything which a river adds to our land as alluvium is acquired by us under the Law of Nations. That, however, is considered to have been added by alluvium which is added little by little, so that we cannot perceive the amount which is added at each moment of time.

(2) But if the force of a stream takes a portion of your land away from you, and brings it upon mine, it is evident that it will continue to be yours. If, however, it should remain on my land for a long time, so that the trees which it brought with it take root in my soil, it will be considered to form part of my land from that time.

(3) Where an island arises in the sea (which rarely happens), it becomes the property of the first occupant; for it is considered to belong to no one. Where an island is formed in a river (which takes place very frequently), and it occupies the middle of the stream, it becomes the common property of those who have land near the banks on both sides of the stream in proportion to the extent of the land of each person along the banks. If the island is nearer to one side than the other, it will belong to him alone who has land along the bank on that side of the stream.

(4) If a river overflows on one side, and begins to run in a new channel, and afterwards the new channel turns back to the old one, the field which is included between the two channels and forms an island will remain the property of him to whom it formerly belonged.

(5) If, however, the stream, having abandoned its natural bed, begins to flow elsewhere, the former bed will belong to those who have land along the bank, in proportion to the extent of the land situated there, and the new bed will come under the same law as the river itself does,

that is, it will become public by the Law of Nations. But if, after a certain length of time, the river should return to its former bed, the new bed will again belong to those who own the land along the banks. Where the new bed occupies all the land, even though the river may have returned to its former channel, he to whom the land belonged cannot, strictly speaking, assert any right to the bed of the stream; because the land which formerly belonged to him has ceased to be his, having lost its original form; and since he has no adjoining land, he cannot, by reason of neighborhood, be entitled to any part of the abandoned bed. To rigidly observe this rule, however, would be a hardship.

(6) The rule is different when anyone's field is entirely covered by water, for the inundation does not change the form of the land; and it is clear that when the water subsides, the land will belong to him who previously owned it.

(7) When anyone makes an article in his own name with materials belonging to another, Nerva and Proculus think that its ownership will belong to him who made it, for the reason that what has been fabricated formerly belonged to no one. Sabinus and Cassius think that, in accordance with natural reason, he who owned the materials would also be the proprietor of what was made out of them, because no article can be manufactured without materials; as, for instance, if I should make a vase out of your gold, silver, or brass; or a ship, a cupboard, or a bench cut out of your boards; or a garment out of your cloth; or mead out of your wine and honey; or a plaster, or an eye-wasli out of your drugs; or wine out of your grapes, or grain; or oil out of your olives.

There is, however, a moderate opinion entertained by persons of good judgment, who believe that, if the article can be reduced to its original form and material, what Sabinus and Cassius hold is true, but if this cannot be done, the opinion of Nerva and Proculus should be adopted; for example, when a vase of gold, silver, or copper can be melted and returned to its original rough metallic mass, but wine, oil, or grain cannot be restored to the grapes, olives, and ears from which it was derived; nor can mead be restored to the honey and wine of which it is composed, nor can a plaster or an eye-wash be resolved to the drugs out of which it was compounded. Still it seems to me that some authorities very properly held that no doubt should exist on this point, when wheat has been obtained from the ears of others to whom the latter belonged,"for the reason that the grain retains the ears in its perfect form, and he who threshes it does not manufacture a new article, but only extracts what is already in existence.

(8) If two owners agree to mix materials belonging to them, the entire compound becomes their common property, whether the materials are of the same description or not; as where they mix wine or melt silver, or combine different kinds of substances; or where one contributes wine and the other honey, or one gold and the other silver, although compounds of mead and electrum are products of a dissimilar character.

(9) The same rule of law will apply where materials belonging to two persons are mingled without their consent, whether they are of the same, or of a different nature.

(10) Where one person erects a building on his own ground out of materials belonging to another, he is understood to be the owner of the building, because everything is accessory to the soil which is built upon it. Nevertheless, he who was the owner of the materials does not, for this reason, cease to be such, but, in the meantime, he cannot bring an action to recover them, or to compel their production, under the Law of the Twelve Tables, by which it is provided that no one can be forced to remove timbers belonging to another which were used in the construction of his own house, but he must pay double their value. By the term "timbers" out of which buildings are constructed, all materials are meant. Therefore, if for any reason a house should be demolished, the owner can then bring an action to recover the materials, and have them produced.

(11) The question was very properly asked, if the person who built the house under such

circumstances should sell it, and it, after having been owned for a long time by the purchaser, should be demolished, whether the owner would still have a right to claim the materials as his own. The reason for the doubt is that, although the entire building can be acquired by prescription after a long time has elapsed, it does not follow that the separate materials of which it was composed can also be acquired. The latter opinion has not been adopted.

(12) On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom the ground belongs. If he knew that the land was owned by another, he is understood to have lost the ownership of the materials voluntarily; and therefore if the house is demolished he will have no right to claim them.

Where, however, the owner of the ground claims the building, and does not reimburse the other for the value of the materials and the wages of the workmen, he can be barred by an exception on the ground of fraud; and if he who constructed the building did not know that the land belonged to another, and hence erected it in good faith, this course should certainly be pursued. For if he was aware that the land belonged to another, it can be alleged that he was to blame for rashly building a house upon land which he knew was not his.

(13) If I plant a shrub belonging to another upon my ground, it will belong to me. If, on the other hand, I plant one of mine upon the ground of another, it will belong to him; provided that in either case it has taken root; for, otherwise, it will remain the property of him who previously owned it. In accordance with this, if I press a tree belonging to another into my soil, so it takes root, it will become my tree; for reason does not permit that a tree shall be considered to belong to another unless it takes root in his soil. Hence, if a tree planted near a boundary line sends its roots into the adjoining earth, it becomes the common property of both owners,

8. *Marcianus, Institutes, Book III.*

In proportion to the place it occupies on each tract of land.

(1) If, however, a stone is formed on a boundary line of two tracts of land held in common, but undivided, the stone also undivided will belong to the joint-owners if it is removed from the ground.

9. *Gaius, Diurnal or Golden Matters, Book II.*

For this reason plants which have taken root on land belong to it, and grain which has been sowed, is also considered to form a part of the soil. Moreover, as in the case of one who builds upon land belonging to another, if the latter brings an action to recover the building, he can be barred by an exception on the ground of fraud; so, likewise, he who has, at his own expense, sowed seed upon the land of another, can protect himself by means of an exception.

(1) Letters, also, even though they may be of gold, form part of the papyrus and parchment on which they are written; just as materials of which houses are constructed are accessory to the land, and, on the same principle, seeds that have been sown form part of it.

Hence, if I write a poem, a history, or a speech of my own upon papyrus or parchment belonging to you, not I, but you, will be understood to be the owner of the work. If, however, you bring an action against me to recover your books or your parchment, and refuse to pay me the expense incurred by writing, I can protect myself by an exception on the ground of fraud, provided I have obtained possession of the articles in good faith.

(2) Pictures, however, do not usually constitute part of the tablets on which they are painted, as letters do of the papyrus and parchment on which they are written; but, on the other hand, it has been decided that the tablet is accessory to the painting. Still, it is ever p'erfectly proper that a praetorian action should be granted to the owner of the tablet against him who painted the picture, provided he is in possession of the tablet; of which action he can effectually avail

himself if he tenders the expense of painting the picture: otherwise, he will be barred by an exception on the ground of fraud, as he certainly should have paid the expense if he was the *bona fide* possessor of the tablet.

We say, however, that an action to recover the tablet will properly lie in favor/of him who painted it, against the owner, but he should tender him the value of the tablet; otherwise, he will be barred by an exception on the ground of fraud.

(3) Property which becomes ours by delivery is acquired by us under the Law of Nations; for nothing is so conformable to natural equity as that the wish of an owner, who intends to transfer his property to another, should be complied with.

(4) It, however, makes no difference whether the owner himself delivers the article in person to another, or whether someone else does it with his consent. Hence, where the free administration of his affairs is entrusted to anyone by a person about to depart upon a journey to a distant country, and the former, in the regular course of business, sells and delivers anything to a purchaser, he transfers the ownership of the same to him who receives it.

(5) Sometimes, even the mere wish of the owner is sufficient to transfer the property without delivery, as, for instance, if I have lent or hired an article to you, and then after having deposited it with you, I sell it to you. For, although I have not delivered it to you for this reason, still, I render it your property by the mere fact that I permit it to remain in your hands on account of it having been purchased.

(6) Likewise, if anyone sells merchandise which is stored in a warehouse, and, at the same time, delivers the keys of the warehouse to the purchaser, he transfers to him the ownership of the merchandise.

(7) Moreover, at times, the will of the owner transfers the title to property to a person who is not designated; for example, where someone throws anything into a crowd, for he does not know how much of it any individual may pick up; and, still, as he is willing that whatever anyone may pick up shall belong to him, he immediately renders him the owner of the same.

(8) The rule is different where merchandise is thrown into the sea during a storm for the purpose of lightening a ship, for it remains the property of the owner, as it was not thrown overboard with the intention of relinquishing it, but that the owner together with the ship might the more readily escape the perils of the sea. For which reason, if anyone obtains the property while on the sea itself, or after it has been cast on la'nd by the force of the waves, and removes it with the intention of profiting by it, he commits a theft.

10. *The Same, Institutes, Book II.*

Property is acquired for us not only by ourselves, but also by those whom we have in our power; as, for instance, by slaves in whom we have the usufruct, and also by freemen and slaves belonging to others of whom we have possession in good faith.

Let us consider each of these cases in detail.

(1) Hence, anything which our slaves obtain by delivery, or which they stipulate for, or acquire in any other way whatsoever, is acquired by us; for he who is in the power of another can have nothing of his own. Therefore, if our slave is appointed an heir, he cannot enter upon the estate unless by our order, and if we order him to do so, the estate is acquired by us, just as if we ourselves had been appointed heirs. In conformity with this principle, a legacy also is acquired by us through our slave.

(2) Moreover, not only is ownership acquired for us by those whom we have under our control, but possession is also; for when they obtain possession of the property of anyone, we, ourselves, are considered to possess it; hence ownership is also acquired for us by long-continued possession.

(3) With reference to those slaves in whom we have only the usufruct, it has been decided that when they acquire anything through the use of our property, or by their own labor, it is acquired by us. If, however, they obtain anything by any other means, it will belong to him in whom the ownership of them is vested. Therefore, if a slave of this kind is appointed an heir, or if anything is bequeathed or given to him, it will not be acquired by me but for the owner of the property.

(4) The same rule which has been adopted with reference to an usufructuary is also applicable to one who is possessed by us in good faith, whether he is free, or a slave belonging to another; and is available in the case of a *bona, fide* possessor. Hence, whatever is acquired in any other way than the two above mentioned will either belong to the person himself if he is free, or to his master if he is a slave.

(5) Still, where a *bona fide* possessor obtains a slave by usucaption, for the reason that, under these circumstances, he becomes his owner, he can acquire property through him in every way. An usufructuary, however, cannot acquire a slave by usucaption; first, because he does not actually possess him, but merely has the right of using and enjoying him; second, because he knows that the slave belongs to another.

11. *Marcianus, Institutes, Book HI.*

A ward does not need the authority of his guardian for the purpose of acquiring property, but he cannot alienate anything unless his guardian is present and consents; nor (as was held by the Sabinians) can he even transfer possession although it may be natural. This opinion is correct.

12. *Callistratus, Institutes, Book II.*

Although lakes and ponds sometimes increase in dimensions, and sometimes dry up, they still retain their original boundaries, and therefore the right of alluvium is not admitted, so far as they are concerned.

(1) If a vessel of any kind is made by melting my copper and your silver together, it will not become our common property; because, as copper and silver are different materials, they can be separated by the artificers, and returned to their former condition.

13. *Neratius, Rules, Book VI.*

If my agent, by my direction, should purchase anything for me, and it is delivered to him in my name, the ownership of the article, that is to say, the title to it, is acquired by me, even if I am not aware of the fact.

(1) The guardian of a male or female ward, just like an agent, acquires property for him or her by purchasing it in the name of the ward, even without his or her knowledge.

14. *The Same, Parchments, Book V.*

Whatever anyone builds upon the shore of the sea will belong to him; for the shores of the sea are not public like the property which forms part of the patrimony of the people, but resembles that which was formed in the first place by Nature, and has not yet been subjected to the ownership of anyone. For their condition is not dissimilar to that of fish and wild animals, which, as soon as they are taken, undoubtedly become the property of him under whose control they have been brought.

(1) Where a building which has been erected upon the seashore is removed, it should be considered what the condition of the ground on which it was situated is, that is to say whether it will remain the property of him to whom the building belonged, or whether it will revert to its former condition and again become public; just as if it had never been built upon. The latter should be deemed the better opinion, provided it remains in its former condition as a part of the shore.

15. *The Same, Rides, Book V.*

He, however, who erects a house on the bank of a stream does not thereby make it his own.

16. *Florentinus, Institutes, Book VI.*

It is established that the right of alluvium does not exist with reference to land having boundaries. This was also decided by the Divine Pius. Trebatius says that where land taken from conquered enemies is granted under the condition that it shall belong to some city, it will be entitled to the right of alluvium, and has no established boundaries; but that land taken by individuals has prescribed boundaries, so that it may be ascertained what was given, and to whom, as well as what was sold, and what remained public.

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

Where two masters deliver property to a slave owned by them in common, he acquires for one of his masters the share of the other.

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

Property forming part of an estate cannot be acquired by the heir through a slave belonging to the same estate, and still less can the estate itself be acquired in this way.

19. *Pomponius, On Sabinus, Book HI.*

Aristo says that a freeman who is serving me in good faith as a slave will undoubtedly acquire for me whatever he earns by his labor through the use of my property. But whatever anyone gives him, or whatever he obtains in transacting business, will belong to him.

He says, however, that any estate or legacy which has been bequeathed will not be acquired by me through him, because it is not derived from my property, or from his labor; for he has performed no work to obtain the legacy, and it is, to a certain extent, an estate, because it is accepted by him. This was at one time doubted by Varius Lucullus. The better opinion, however, is that the estate is not acquired, even though the testator may have intended it to belong to me. But even if the supposed slave does not acquire it for me, still, if it was the evident intention of the testator that this was to be done, the estate should be delivered to me.

Trebatius thinks that where a freeman is serving anyone in good faith as a slave, and enters upon an estate by order of the person whom he is serving, he himself will become the heir; for it makes no difference what a man intended to do, but what he did do.

Labeo holds the contrary opinion, provided he was compelled to do this; but if he desired to do it, he will become the heir.

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

A delivery of property should not and cannot transfer any more right in the same to him who receives it than he who delivers it possessed. Therefore, anyone who owns land, can transfer it by delivery; but if he did not have the ownership of the same, he does not convey anything to him who receives it.

(1) When the ownership is transferred to him who receives it, it is transferred in the same condition that it was while in the possession of the grantor. If it is subject to a servitude, it passes with the servitude; if it is free, it passes in that condition; and if servitudes are due to the land which is transferred, it is conveyed together with the rights to the servitudes imposed for its benefit. Hence if anyone should allege ' that certain land is free, and he delivers a tract which is charged with a servitude, he diminishes nothing of the right of the servitude attaching to the said land, but he, nevertheless, binds himself, and must furnish what he agreed to do.

(2) If Titius and myself purchase property, and delivery of it is made to Titius individually,

and also as my agent, I think that the property is also acquired by me, because it is established that possession of every kind of property, and consequently the ownership of the same, can be obtained through the agency of a person who is free.

21. *Pomponius, On Sabinus, Book XI.*

If my slave is serving you in good faith, and he purchases something which is delivered to him, Proculus says that it will not become mine, because I have not the slave in my possession; nor will it be yours, because it was not acquired by means of your property. If, however, a freeman buys anything while he is serving you as a slave, it will belong to him individually.

(1) If you are in possession of property belonging to me, and I wish it to be yours, it will become yours, even though it may not have come into my hands.

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

No one who is in possession of a slave either by force or clandestinely, or by a precarious title, can acquire a right to him by any stipulation he may enter into, or by delivery of the property.

23. *The Same, On Sabinus, Book XLHL*

Whoever serves anyone in good faith as a slave, whether he is the slave of another, or is free, will acquire for his possessor whatever he obtains by means of the property of the latter, while serving in good faith as a slave. He will, in like manner, acquire for him whatever he earns by his own labor, for it is, to a certain extent, considered as the property of the former, because he owes his labor to him whom he is serving in good faith.

(1) He will, however, acquire the property for his possessor only as long as he serves him in good faith as a slave; but as soon as he ascertains that he belongs to someone else, or is free, let us ascertain whether he will continue to acquire property for him. In examining this question, we must determine whether we shall consider the beginning of the possession, or all the moments included in it.

The better opinion is that all the time should be taken into account.

(2) Generally speaking, it must be said that whatever he who is serving in good faith cannot acquire by means of the property of his possessor he will acquire for himself; but what he cannot acquire for himself by means of property other than that of his possessor, he will acquire for him whom he serves in good faith as a slave.

(3) Where anyone serves two persons in good faith as a slave, he will acquire property for both of them, but for each one in proportion to the use he has made of his capital. The question, however, may arise, whether what he acquires with the capital of one of them will partly belong to the person whom he is serving in good faith as a slave, and partly to his own master, if he is a slave; or, if he is free, whether it will belong to him whom he is serving in good faith, or whether he should acquire the entire amount for the benefit of him whose property he has used. Scsevola discusses this point in the Second Book of Questions. He says that if a slave belonging to another serves two persons in good faith, and acquires property by the use of something belonging to one of them, it is reasonable to hold that he acquires it for him alone. He also says, if the slave mentions the name of him with reference to whose property he enters into a stipulation, there is no doubt that he makes the acquisition solely for him; because if he had stipulated expressly in the name of one of his masters with reference to his property, he would acquire the entire amount for his .benefit. He afterwards adopted the opinion that where anyone is serving several masters in good faith as a slave, he will acquire for me alone, even if he had not stipulated with reference to my property, either in my name or by my express order; for it has been established that whenever a slave owned in common cannot acquire property for all his owners, he can acquire it for him alone who will be

benefited thereby. I have repeatedly stated that Julianus held this opinion: which we also approve.

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

It must be said with reference to everything which can be restored to its former condition, that if the material remains as it was, and the form only is changed (as, for instance, if you make a statue out of my bronze, or a cup out of my silver), I will be the owner of it:

25. *Callistratus, Institutes, Book II.*

Unless this is done in the name of another with the consent of the owner; for then, by virtue of his consent, the entire article will belong to him in whose name it was made.

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

If, however, you build a ship out of my boards, it will belong to you, for the reason that the cypress tree, of which they formed a part, is no longer in existence, any more than wool, where a garment is made of it; but a new form, composed of the cypress or the wool, • has been produced.

(1) Proculus informs us that men ordinarily follow the rule adopted by Servius and Labeo; that is to say, in cases where the quality of property is considered, anything that is added becomes accessory to all, as where a foot or a hand is added to a statue, a bottom or a handle to a cup, a support to a bed, a plank to a ship, or stones to a building, for they will all belong to him who formerly owned the property.

(2) If a tree is torn up by the roots, and deposited upon the land of another, it will belong to the former owner until it has taken root; but, after it has done this, it will become an accessory of the land and if it is torn up by the roots a second time, it will not revert to the former owner: for it is probable that it became another tree through the different nourishment it received from the soil.

(3) Labeo says that if you dye my wool purple, it will still be mine, because there is no difference between wool after it has been dyed, and where it has fallen into mud or filth, and has lost its former color for this reason.

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

It must be admitted that if you add any silver belonging to another to a mass of that metal of which you are the owner, all of it will not belong to you. On the other hand, if you solder your cup with lead or silver belonging to another, there is no doubt that the cup will be yours, and that you can legally recover it by an action.

(1) Where several drugs belonging to different persons are contributed at the same time, and a similar remedy is compounded of them or where you make an ointment by combining different perfumes, none of the former owners can, in this instance, properly claim that the product belongs to him; therefore it is best to hold that it belongs to the one in whose name it was made.

(2) Where two parts of an article belonging to different owners are soldered together, the question arises, to whom do they belong? Cassius says that this must be determined in accordance with the size or the value of each of the parts; but if neither one can be considered as accessory to the other, let us see whether it cannot be considered as a mass which has been melted, or whether it will belong to him in whose name the parts were soldered together.

Both Proculus and Pegasus hold that each part will belong to the person who owned it before it was soldered to the other.

28. *The Same, On Sabinus, Book LIH.*

If your neighbor builds upon your wall, Labeo and Sabinus say that what he builds will belong to him. Proculus, however, holds that it will belong to you, just as anything which another builds upon your land becomes your property. This is the better opinion.

29. *Paulus, On Sabinus, Book XVI.*

When an island is formed in a stream, it becomes the common property of those who own land along the bank, not undivided, but separated by distinct boundaries; for each one of them will have a right to that portion of it which is opposite to his land on the bank of the stream, just as if a straight line were drawn through the island.

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

Hence, if an island which has been formed accrues to my land, and I sell the lower part of the latter, which is not opposite to the island, none of the island will belong to the purchaser, for the reason that it would not have been his in the beginning, even if he had been the owner of that part of my land at the time when the island was formed.

(1) Celsus, the son, says that if a tree grows along the bank of a river where my land is situated, it will belong to me, because the soil itself is my individual property and the public is only entitled to the use of the same; and, therefore, if the bed of the river should dry up, it will become the property of the neighbors, for the reason that the people no longer make use of it.

(2) An island is formed in a river in three different ways; first, when the stream flows around land which did not originally belong to its bed; second, when it leaves the place, which was formerly its bed, dry, and commences to flow around it; third, when, by removing soil little by little, it raises a high place above the bed of the river and increases it by alluvium. By the last two ways the island becomes the private property of him whose land was nearest to it when it first appeared. For it is the nature of a stream to change its bed, when it alters its course, and it does not make any difference whether merely the soil forming the bed is changed, or whether it is raised by earth being deposited upon it, as it is always of the same character. In the first instance, the condition of the property is not altered.

(3) Alluvium restores a field to the state in which it was before the force of a stream entirely removed it. Therefore, if a field which is situated between a public highway and a river is covered with water by the overflow of the stream, whether it is inundated little by little, or not, and it is restored by the same force through the receding of the river, it will belong to its former owner. For rivers perform the duties of those officials who designate the boundaries of land, and adjudge them sometimes from private individuals to the public, and sometimes from the public to private individuals. Hence, as the land above mentioned became public when it served as the bed of a river, it now should again become private, and belong to its original owners. (4) If I drive piles into the sea, and build upon them, the edifice will immediately be mine; as what belongs to no one becomes the property of the first occupant.

31. *Paulus, On the Edict, Book XXXI.*

The mere delivery of an article does not transfer its ownership, for this takes place only where a sale or some other just cause precedes delivery.

(1) A treasure is an ancient deposit of money, the memory of which no longer remains, so that it now has no owner. Hence, it becomes the property of him who finds it, because it belongs to no one else. On the other hand, if anyone, for the sake of profit, or actuated by fear, with a view to its preservation, hides money in the ground, it is not a treasure, and anyone who appropriates it will be guilty of theft.

32. *Gaius, On the Provincial Edict, Book XI.*

We acquire by means of our slaves in almost every way, even against our consent.

33. *Ulpianus, Disputations, Book IV.*

Marcellus, in the Twentieth Book, discusses the point as to whom a stipulation or a legacy applies when it is made by a slave forming part of the *castrense peculium* of a son under paternal control, who was serving in the army, before the estate was entered upon. I think that the opinion entertained by ScaBvola, and discussed by Marcellus himself, is the correct one; namely, if the estate is entered upon, everything is acquired where the slave forms part of it; but if it is not entered upon, the acquisition should be considered as made by a slave of the father.

Where an usufruct is bequeathed to such a slave, it will sometimes be considered as left to the father, and sometimes to the heir, without being held to have passed from one of these persons to the other.

(1) The same distinction is applicable where property has been taken in order to determine whether an action for theft will lie or not; since if the heir should enter upon the estate, the property will not be considered as having been stolen from it; or if he should not enter upon it, an action on the ground of theft, and also a personal one for the recovery of property, will be granted to the father.

(2) Whenever a slave belonging to an estate enters into a stipulation, or acquires property by delivery, his act takes effect through the person of the deceased; as is held by Julianus, whose opinion that the person of the testator should be considered in a case of this kind is still accepted.

34. *The Same, On Taxes, Book IV.*

For an estate does not represent the person of the heir, but that of the deceased, which rule has been established by many precepts of the Civil Law.

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

If my agent, or the guardian of a ward, delivers his own property as belonging to me, or to the ward, to another, he will not be deprived of the ownership of the same, as the alienation is void, because no one can lose his property through a mistake.

36. *Julianus, Digest, Book XIII.*

When we agree as to property which has been delivered, but dissent as to the causes for its transfer, I do not understand why the delivery should not be valid; for example, if I think that I am obliged to transfer a tract of land to you in compliance with the terms of a will, and I transfer it, and you are under the impression that I should do so by virtue of a stipulation. For if I pay you a sum of money for the purpose of making a donation of the same, and you think I intend to lend it to you, it is settled that the ownership will pass to you, and the fact that we differed with respect to the cause of giving and receiving it will be no impediment to its legal transfer.

37. *The Same, Digest, Book XLIV.*

Possession of property is not acquired for a creditor by a slave who has been given in pledge, for the reason that neither by stipulation nor by mandate, nor in any other way whatsoever, can anything be acquired by him, even though he may have possession of the slave.

(1) If one of several masters gives money to a slave owned in common, it is in the power of the master to bestow the money upon the said slave held in common in whatever way he may desire; for if he should only do this in order to deduct it from his accounts, and let it form part of the *peculium* of the slave, it will still remain the property of the said master.

If, however, he should give the money to the slave held in common, in the same way that we are accustomed to make donations to the slaves of others, it will become the common property of the joint-owners in proportion to the share which each one has in the slave.

(2) However, in order that the following question may be considered, let us suppose that one joint-owner has given a sum of money to a slave owned in common, in order to retain his ownership of the property; and if the slave should purchase a tract of land with the said money, it will be owned in common by the joint proprietors in proportion to the share which each one has in the slave; for, even if the common slave bought the tract of land with stolen money, it will become the property of the joint-owners, according to their interest in the slave. A slave in whom someone has an usufruct does not acquire property for his owner by reason of the usufruct; nor can a slave held in common acquire property for one master by means of that belonging to another. But, just as property is acquired from others under these circumstances, the condition of a slave subject to an usufruct differs from that of a slave owned in common (for instance, one of them does not acquire property for the usufructuary, but the other acquires it for his masters), as where anything is obtained by making use of the property of the usufructuary it will belong to him alone, but what a slave owned in common acquires by means of the property of one master will belong to both.

(3) As a slave owned in common, by expressly stipulating for one of his masters, acquires property for him alone, so also he acquires property solely for him through receiving it by delivery.

(4) When a slave belonging to one person receives property by delivery, alleging that he receives it for his master, and Titius, he acquires half of it for his master, but his act with reference to the other half is void.

(5) If a slave, subject to usufruct, should say that he received property acquired through the usufruct by delivery, for his owner, he will acquire all of it for him; for if he enters into a stipulation with reference to property belonging to the usufruct, he will acquire it for his owner.

(6) If you wish to make me a donation, and I direct you to deliver the property to a slave jointly owned by Titius and myself, and the slave receives it with the intention of obtaining it for Titius, the transaction will be void; or if you deliver property to my agent with the intention that it shall become mine, and he receives it with the intention of making it his, this transaction will also be void. If a slave owned in common r.eceives property with the intention of acquiring it for both his masters, the transaction, so far as one of them is concerned, will be of no force or effect.

38. *Alfenus Varus, Epitomes of the Digest of Paulus, Book IV.*

Attius had a tract of land along a public highway; beyond the highway there was a river, and a field belonging to Lucius Titius. The river gradually surrounded the field, which was situated between the road and the river, and afterwards covered the road, then it receded little by little, and by alluvium returned to its ancient bed.

The conclusion arrived at was that, since the river had covered both the field and the highway, the field became the property of him who owned land on the other side of the stream, and afterwards, having little by little receded to its former channel, the land was taken away from him whose property it had become, and was added to that of him who was on the other side of the highway, as his land was nearest to the river. The highway, however, which was public, could belong to no one by accession. It was decided that the highway offered no impediment to prevent the field which was left on the other side of it by alluvium from becoming the property of Attius, for the highway itself was also part of his land.

39. *Julianus, On Minicius, Book III.*

Even a slave who has been stolen acquires for a purchaser in good faith, if he makes a stipulation, or receives by delivery anything obtained by means of his property.

40. *Africanus, Questions, Book VII.*

The question was raised, if a person whom a freeman was serving in good faith as a slave should die, and leave an heir who knew that the alleged slave was free, whether the heir could acquire any property by his agency. It cannot be said that he is a *bona fide* possessor, since, when he begins to have possession, he is aware that the man is free; because, if anyone should devise land to him and the heir knew that it had been devised, there is no doubt that the crops from the land do not become his; and there is much more reason for the application of this principle, if the testator had possession of the land in good faith, having bought it from one who was not the owner.

The same rule must be observed with reference to the labor and agency of slaves; so that, whether they are ours or belong to strangers, and whether they have been bequeathed or manumitted by will, nothing will be acquired by them for the heirs, provided the latter were not ignorant of their status; for at the same time it must be admitted that, in the case where a *bona fide* possessor renders the crops, which he has used and which were derived from the land, his own, the profits of his labor or his property will also be acquired for him by the slave.

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

Trebatius and Pegasus hold that statues erected in a town do not belong to the citizens; but the Praetor must see that whatever has been placed there with the intention of rendering it public shall not be removed by any private person, not even by him who erected it. Therefore, the citizens will be entitled to an exception against anyone claiming the statues, and to an action against anyone having possession of them.

42. *Paulus, On the Edict, Book XL*

A substitution which has not yet taken place is not considered to form part of our property.

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

A man who is possessed in good faith as a slave does not acquire for the possessor anything which he obtains by means of the capital of another.

(1) It is clear that incorporeal property is not capable of delivery and usucaption.

(2) If a slave, the usufruct of whom belongs to another than his owner, himself purchases a slave who is delivered to him before he pays the price, it is uncertain for whom he acquires the ownership. For if he should pay the price out of the *peculium* belonging to the usufructuary, it is understood that the slave will become his; but if he pays it out of the *peculium* to which the owner is entitled, the slave will be considered to belong to the latter.

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

Pomponius discusses the following point. Wolves carried away some hogs from my shepherds; the tenant of an adjoining farm having pursued the wolves with strong and powerful dogs, which he kept for the protection of his flocks, took the hogs away from the wolves, or the dogs compelled them to abandon them. When my shepherd claimed the hogs, the question arose whether they had become the property of him who recovered them, or whether they were still mine; for they had been obtained by a certain kind of hunting.

The opinion was advanced that, as where animals were captured on sea or land, and regained their natural freedom, they ceased to belong to those who took them, so, where marine or terrestrial animals deprive us of property, it ceases to be ours when the said animals have escaped beyond our pursuit. In fact, who can say that anything which a bird flying across my courtyard or my field carries away still belongs to me? If, therefore, it ceases to be mine, and is dropped from the mouth of the animal, it will belong to the first occupant; just as when a fish, a wild boar, or a bird, escapes from our control, and is taken by another, it becomes the property of the latter.

Pomponius inclines to the opinion that the property continues to be ours, as long as it can be recovered; although what he states with reference to birds, fishes, and wild beasts is true. He also says that if anything is lost by shipwreck, it does not immediately cease to be ours, and that anyone who removes it will be liable for quadruple its value. And, indeed, it is better to hold that anything which is taken away by a wolf will continue to be ours as long as it can be recovered. Therefore, if it still remains ours, I think that an action on the ground of theft will lie. For if the tenant pursued the wolves, not with the intention of stealing the property (although he might have had such an intention), but admitting that he did not pursue them with this object in view, still, as he did not restore the hogs to my shepherd when he demanded them, he is held to have suppressed and concealed them; and therefore I think that he will be liable to an action on the ground of theft, as well as one to produce the property in court; and after this has been done, the hogs can be recovered from him.

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

When a slave owned in common acquires anything by means of the property of one of his masters, it will, nevertheless, belong to both of them; but the one by means of whose property it was acquired can recover the entire amount by an action in partition; for good faith demands that each of the owners shall have a preferred claim to whatever the slave obtained by means of his property; but if the slave should acquire it in some other way, it will belong to all the joint-owners in proportion to their ownership.

46. *Ulpianus, On the Edict, Book LXV.*

There is nothing extraordinary in the fact that anyone can transfer to another the ownership of property which he does not possess; for a creditor, by selling a pledge, transfers to the purchaser a title which he himself did not have.

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

An estate cannot be acquired by the usufructuary through a slave, for an estate cannot consist of the services of a slave.

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

A bona fide purchaser undoubtedly obtains as his own any profits acquired by means of the property of another in the interim, and this not only refers to such as are acquired by his diligence and labor, but to all others, because, as far as the profits are concerned, he practically occupies the position of the owner; for, even before he obtains the crops, and immediately after they are separated from the soil, they become the property of a *bona fide* purchaser. Nor does it make any difference whether what I buy in good faith can be acquired by prescription or not; as, for instance, if it belongs to a ward, or has been obtained by violence, or has been given to the Governor of a province contrary to the law against extortion, and has afterwards been transferred by him to a *bona fide* purchaser.

(1) On the other hand, if at the time when the property was delivered to me I thought that it belonged to the vendor, and I afterwards ascertained that it belonged to someone else, the question arises whether I am entitled to the profits, because possession had lasted for a long time. Pomponius says that it must be apprehended that a purchaser of this kind is not one in good faith, although he may hold the property, for prescription has reference to the law, and whether he possesses the property either in good or bad faith is a question of fact. Nor can this be controverted by alleging that a long time has elapsed; as, on the other hand, he who can not acquire property by prescription on account of a defect in the title to the same has still a right to the profits thereof.

(2) The increase of sheep is a profit, and therefore it belongs to a *bona fide* possessor, even if they should have been sold while pregnant, or had been stolen while in that condition. And, indeed, it cannot be doubted that a possessor in good faith is entitled to the milk, even though

the animals may have been sold ready to be milked. The same rule applies to wool.

49. *The Same, On Plautius, Book IX.*

Whatever the usufructuary of a slave gives him out of his own property will continue to be his. If, however, he did this with the intention that the property should belong to the owner, it must be said that it will be acquired by him. But where a stranger gives it to him, it will unquestionably be acquired for the owner alone.

We make the same statement with regard to a freeman who is serving in good faith as a slave, so that, if I should give him anything, it will continue to remain mine. Therefore, Pomponius says, that even if I should give the slave his labor, whatever he acquires by means of it he will, nevertheless, acquire for me.

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

Although whatever we construct on the public shore or in the sea will belong to us, still, a decree of the Praetor must be obtained to permit this to be done; and, indeed, if anyone should do something of this kind which inconveniences others, he can be prevented by force; for I have no doubt that he who puts up the building will have no right to a civil action.

51. *Celsus, Digest, Book XL*

We can seize a deserter by the law of war.

(1) Any property of the enemy, which may be in our hands, does not belong to the public, but to the first occupant.

52. *Modestinus, Rules, Book VII.*

We are understood to hold property as our own, whenever, being in possession, we have a right to an exception, or when, having lost the property, we are entitled to an action to recover it.

53. *The Same, On Quintus Mucius, Book XIV.*

Property acquired by the Civil Law is obtained by us through those who are under our control; as, for example, in the case of a stipulation. Whatever is acquired naturally, as, for instance, possession, we can acquire by the agency of anyone, if we desire to obtain it.

.54. *The Same, On Quintus Mucius, Book XXXL*

A freeman cannot acquire an estate for us. Anyone who is serving us in good faith as a slave can acquire one for us, if he enters upon it voluntarily, and is fully aware of his own condition. If, however, he should enter upon it by our order, he will neither acquire it for himself nor for us, if he did not have the intention of acquiring it for himself. But, if he had such an intention, he will acquire the estate for himself.

(1) Likewise, a freeman who is serving us in good faith as a slave can legally bind himself, by making a contract with us, which involves a purchase, a sale, or hiring, or leasing.

(2) If he wrongs us in any way, he will be liable to an action for injury, and, in this case, we can collect heavier damages from him than we can from a stranger.

(3) If persons of this kind transact any business with reference to our property, under our direction, or perform any acts as agents during our absence, an action should be granted against them, not only when we have purchased them as slaves, but also if they have been given to us; or have been acquired as dowry, or through having been bequeathed to us; or are due to us from an estate; not only if we think that they are ours, but also where they are slaves owned in common, or are subject to usufruct; so that they do not acquire for us any more than they would have done if they had actually been slaves owned in common, or subject to the usufruct of others.

(4) Whatever a freeman, or a slave belonging to another, or one who serves us in good faith as a slave, cannot acquire for us, the freeman can acquire for hfmself, and the slave belonging to another can acquire for his master; except that a freeman who is serving in good faith can scarcely obtain property by usucaption based on possession, because he who is himself possessed is not understood to have possession. Nor can the owner of a slave of whom we have possession in good faith unconsciously acquire by usucaption what is included in the *peculium* of the slave, just as he cannot do this by means of a fugitive slave of whom he is not in possession.

55. *Proculus, Epistles, Book II.*

A wild boar was caught in a trap which you set for the purpose of hunting, and after he was caught, I released him, and carried him away; is it your opinion that I have taken away your wild boar? And if you thought that it was yours, and I should release him and let him go into the woods, would he, in this instance, cease to be yours, or would he still remain your property? If he ceased to be yours, I ask what action you would be entitled to against me, and whether it would be necessary for an action *in factum* to be granted? The answer was, that we should first take into consideration the trap, and whether it does not make a difference if I set it on public or on private land; and if I set it on private land, whether I did so upon my own or upon that of another, and if I set it upon that of another, whether I did so with the permission of the owner of the said land, or without it.

Moreover, it should be considered whether the wild boar was caught in the trap in such a way that he could not release himself, or whether, by struggling longer, he might have been able to escape.

I think the conclusion should be that if the wild boar was under my control he became my property; but if you, by your act, restored him to his natural freedom, he ceased to belong to me; and I would be entitled to an action *in factum;* as was decided in a case where a person threw a cup belonging to another from a ship into the sea.

56. *The Same, Epistles, Book Vill.*

An island arose in a river opposite to my land. At first the length did not exceed the boundary of the latter, but afterwards the island increased in size, little by little, and projected opposite to the boundaries of my upper and lower neighbors. I ask whether the increase belongs to me, as it adjoins my premises, or whether the rule of law would be the same as it would if the island had been as long in the beginning as it is at present.

Proculus answered, if the law of alluvium applies to the river, in which you have stated an island arose opposite to the boundary of your property in such a way that it did not exceed the length of the latter, and the island in the first place was nearer to your premises than to those of him who owned land across the stream, it all becomes yours, and whatever afterwards accrued to the island by way of alluvium also becomes yours, even though the increase was such as to cause the island to extend opposite to the boundaries of your upper and lower neighbors, or even to place it nearer to the property of him owning land across the river.

(1) I also ask, if an island arises near my bank, and afterwards the entire river begins to flow between my land and the said island, after leaving its own bed where the greater portion of it had flowed, whether you have any doubt that the island continues to be mine, and whether, nevertheless, a part of the bed itself which was left by the river will become my property. I request you to write me your opinion on this point.

Proculus answered that if the island in the first place was nearer to your land, and the river, having left its principal channel, which it occupied between the island and the land of the neighbor who was on the other side of the stream, began to flow between the said island and your land, the island will continue to be your property; but the bed which was between the

island and the land of the neighbor should be divided in the middle, so that the part which was nearer to your island will be understood to belong to you, and that which is nearer to the land of your neighbor will be understood to belong to him. I think that the bed of the river which dried up on the other side of the island has ceased to be an island; but In order that the matter may be better understood, in this instance, the field which was formerly an island will still be designated such.

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

Julianus says that nothing can be acquired through a slave donated by a husband, not even by means of the property of the wife to whom the slave was given; for this is only conceded in the case of those who are serving in good faith as slaves.

58. *Javolenus, On Cassius, Book XL*

Anything which is taken from the sea does not begin to be the property of him who obtains it until the owner of said property begins to consider it as abandoned.

59. *CaUistratus, Questions, Book II.*

Property purchased by my order does not become mine until the person who bought it has delivered it to me.

60. *Scasvola, Opinions, Book I.*

Titius placed a movable granary for wheat constructed of wooden boards upon the land of Seius. The question arises, who is the owner of the granary? The answer is that, according to the facts stated, it does not become the property of Seius.

61. *Hermogenianus, Epitomes of Law, Book VI.*

An estate is often considered in law as an owner, and therefore anything that is acquired by a slave forming part of the same is considered to be acquired by it as his master. It is clear that, in matters in which the act or labor of a person is essential, nothing can be obtained for the estate by the agency of a slave; and therefore, although a slave belonging to the estate can be appointed an heir, still, as the personal order of his master is necessary to enable him to enter upon the same, we must wait until an heir appears.

(1) As an usufruct cannot be created without someone to enjoy it, so it cannot be acquired for an estate through the medium of a slave.

62. *Paulus, Manuals, Book II.*

There are certain things which cannot themselves be alienated but pass by universal custom; hence a dotal tract of land and property which is not an object of commerce pass to the heir; for although it cannot be bequeathed to him, it, nevertheless, becomes his after his appointment.

63. *Tryphoninus, Disputations, Book VII.*

If anyone who is under the control of another finds a treasure, it must be said with reference to the person for whom it is acquired that if the former finds it upon the land of another, he will be entitled to half of it; but if he finds it upon the land of his father or master, the whole of it will belong to the latter; (and only half, if it is discovered upon the land of someone else).

(1) If a slave owned in common finds a treasure upon the land of another, will he acquire the same in proportion to the shares of his masters, or will he always acquire it for both of them equally? This case resembles one where property which is derived from the State, or bequeathed by a legacy, or donated by strangers, is delivered to a slave, because a treasure is considered a gift of fortune; hence the part to which the finder is entitled will belong to the joint-owners in proportion to the interest which each one has in the slave.

(2) If a slave owned in common finds a treasure on the land of one of his masters, no doubt can arise with reference to the share to which the master is always entitled, as it belongs to the owner of the land alone. But, on the other hand, it should be considered whether the other joint-owner will not have a right to part of the remaining half, and whether the case is not similar to that where a slave makes a stipulation by the order of one of his masters, or receives something by delivery, or specifically, for the other. The latter may be said to be the better opinion.

(3) Where a slave in whom anyone has the usufruct finds a treasure on the land of him who has the ownership of the slave, will it all belong to him? And if he finds it on the land of another, will he acquire half of it for his owner, or for the usufructuary? In this instance, an examination must be made to ascertain whether the usufructuary can acquire property by the labor of the slave. Suppose that the slave found a treasure by digging in the ground; then it may be said to belong to the usufructuary. If, however, he should suddenly find it concealed in some retired place, while he was doing nothing but walking about, it will belong to the owner of the property. I, however, do not think that half the treasure should belong to the usufructuary, for no one seeks for treasure with the labor of a slave, and it was not on his account that the slave was digging in the earth, but he was doing work for another purpose, and fortune gave him something else. Therefore, if he should find a treasure on the land of the usufructuary himself, I think that the latter will be entitled to only half of it, as the owner of the land, and that the other half will belong to him who has the ownership of the slave.

(4) If a creditor finds a treasure on land which has been hypothecated to him, he will be considered to have found it on the land of another. Hence, he can take half of it himself, and give the other half to the debtor; and when the borrowed money is paid, he can retain the half which he has taken from the treasure by the right of the finder, and not by the right of the creditor. This being the case, if the creditor has begun to hold the land as his own by the right of ownership, under the authority of the Emperor the claim to the pledge will be considered to exist during the time appointed for payment; but, after this time has elapsed, the debtor will be entitled to any treasure found on the land before the money has been paid.

Where, however, the amount of the debt is tendered within the time prescribed by law, the creditor must return the treasure, as everything must be restored which belongs to the land, just as in the case where it is returned by a possessor; but he will only be obliged to surrender half of it, because it is settled that the finder is always entitled to half.

64. *Quintus Mucius, Scsevola, Definitions.*

When anyone enters property belonging to another in his accounts for taxation, it does not by any means become his.

65. *Labeo, Epitomes of Probabilities, by Paulus.*

If I send a letter to you, it will not become yours until it has been delivered to you.

Paulus: I am of the opposite opinion, for if you send your secretary to me, and I send you a letter by way of answer, the letter will become yours as soon as I have delivered it to your secretary. The same thing happens in the case of a letter which I send to you merely as a favor; for instance, if you have asked me to recommend you to someone, and I send you a letter for that purpose.

(1) If an island in a river belongs to you, none of it is public property.

Paulus: The contrary is true, for in this kind of islands, the banks of a river and the shores of the sea are, to a certain extent, public property; and the rule of law is the same with reference to a field which adjoins the bank, or the shore.

(2) If an island is formed in a public stream, which is near your property, it will belong to you.

Paulus: Let us see if this is not false with reference to an island which is not contiguous to the channel of the river, but is suspended by branches, or some other light material, above the stream, so that the soil does not reach it, and the island can change its position. An island of this kind is, to a certain extent, public property, and belongs to the river itself.

(3) Paulus: If an island which is formed in the river becomes yours, and another island is afterwards formed between the first one and the opposite bank, the measure will be taken from your island, and not from your land on account of which the island became your property; for what difference does it make what the character of the land may be, on account of whose situation the ownership of the last island is claimed?

(4) Labeo, in the same Book, says that if anything is formed or built in a public place, it becomes public, and that an island which is formed in a public stream should also be considered public property.

66. *Venuleius, Interdicts, Book VI.*

When a pregnant woman is bequeathed, acquired by usucaption, or alienated in any other way, and brings forth a child, it will become the property of him who purchased her, and not of him to whom she belonged when she conceived.

TITLE II.

CONCERNING ACQUIRING OR LOSING POSSESSION.

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

Possession, as Labeo says, is derived from the term *sedes,* or position, because it is naturally held by him who has it; and this the Greeks designate .....

(1) Nerva, the son, asserts that the ownership of property originated from natural possession, and that the trace of this still remains in the case of whatever is taken on the earth, on the sea, and in the air, for it immediately belongs to those who first acquire possession of it. Likewise, spoils taken in war, and an island formed in the sea, gems, precious stones, and pearls found upon the shore, become the property of him who first obtains possession of them.

(2) We also acquire possession by ourselves.

(3) An insane person, or a ward, cannot begin to acquire possession without the authority of his curator or guardian; because, although the former may touch the property with their bodies, they have not the disposition to hold it, just as where anyone places something in the hands of a man who is asleep. A ward can begin to obtain possession by the authority of his guardian. Ofilius, and Nerva, the son, however, say that a ward cannot begin to obtain possession without the authority of his guardian, for possession is a matter of fact, and not of law. This opinion may be accepted where the ward is of such an age as to be capable of understanding what he is doing.

(4) Where a husband gives possession to his wife for the purpose of making her a donation, several authorities hold that she is in actual possession, as a question of fact cannot be annulled by the Civil Law. And, indeed, what use would it be to say that the wife is not in possession, as the husband immediately lost it when he no longer desired to retain it?

(5) We also acquire possession by means of a slave or a son who is under our control; and this is the case with property constituting his *peculium,* even if we are ignorant of the fact, as was held by Sabinus.

Cassius and Julianus: because those whom we have permitted to have *'peculium* are understood to be in possession with our consent. Therefore, an infant and an insane person can obtain possession of property forming *peculium,* and can acquire it by usucaption; an heir also can do this, where a slave belonging to the estate makes a purchase.

(6) We can also acquire possession through anyone whom we possess in good faith as a slave, even though he belongs to another, or is free. If, however, we have possession of him fraudulently, I do not think that we can acquire possession through his agency. He who is in possession of another can neither acquire property for his master nor for himself.

(7) When we are joint-owners of a slave, we can individually acquire property through him to the full amount, as if he were one of our own slaves, if he intends to make the acquisition for one of his masters; just as is the case of acquiring ownership.

(8) We can obtain possession through a slave in whom we have the usufruct in the same way that he is accustomed to acquire property for us by means of his labor; nor does it make any difference if we do not actually possess him, for the same rule applies to a son.

(9) Moreover, he through whom we desire to obtain possession should be such a person as to be able to understand what possession means.

(10) Therefore, if you send a slave, who is insane, to take possession, you will by no means be considered to have acquired it.

(11) If you send a boy under the age of puberty to take possession, you will begin to do so; just as a ward acquires possession, and especially by the authority of his guardian.

(12) There is no doubt that you can obtain possession by means of a female slave.

(13) A ward can acquire possession by means of a slave, whether the latter has arrived at the age of puberty, or not, if he directs him to take possession with the authority of his guardian.

(14) Nerva, the son, says that we cannot acquire possession by means of one of our slaves who is a fugitive, although it has been held that ,he remains in our possession as long as he is not in that of another ; and therefore that, in the meantime, property can be acquired by him through usucaption. This opinion, however, is adopted on account of public convenience, so that usucaption may take place as long as no one has obtained possession of the slave. It is the opinion of Cassius and Julianus that possession may be acquired by such a slave, as well as by those whom we have in a province.

(15) Julianus says that we cannot acquire possession by means of a slave who has been actually given in pledge, for he is held to be possessed by the debtor in one respect, that is to say, for the purpose of usucaption. Nor can the slave who is pledged acquire property for the creditor, because although the latter may have possession of him, he cannot acquire property through him by means of a stipulation, or in any other way.

(16) The ancients thought that we could acquire anything by means of a slave belonging to an estate, because he was part of the said estate. Hence, a discussion arose whether this rule should not be extended farther so that where some slaves were bequeathed, the others could be possessed by the act of one of them. It was also discussed whether this would be the case if they were all purchased or donated together.

The better opinion is that I cannot, under such circumstances, acquire possession by the act of one of them.

(17) If a slave is partially bequeathed to an appointed heir, he can acquire possession of the land of the estate for him, in proportion to his share in the said slave, by virtue of the legacy.

(18) The same rule will apply if I order a slave owned in common to accept an estate, because I obtain possession of my share of it on account of my interest in him.

(19) What we have stated with reference to slaves also applies where they themselves desire to acquire possession for us; for if you order your slave to take possession, and he does so with the intention of acquiring the property not for you, but for Titius, possession is not acquired for you.

(20) Possession is acquired by us by means of an agent, a guardian, or a curator. But when they take possession in their own names, and not with the intention of merely rendering their services, they cannot acquire possession for us.

On the other hand, if we say that those who obtain possession in our name do not acquire it for us, the result will be that neither he to whom the property was delivered will obtain possession, because he did not have the intention of doing so, nor will he who delivered the article retain it, as he has relinquished possession of the same.

(21) If I order a vendor to deliver the property to my agent, while it is in our presence, Priscus says that it will be held to have been delivered to me.

The same rule will apply if I order my debtor to pay to another the sum which is due to me, for it is not necessary to take possession bodily and actually, but this can be done merely by the eyes and the intention. The proof of this appears in the case of property which, on account of its weight, cannot be moved, as columns, for instance; for they are considered to have been delivered if the parties consent, with the columns before them; and wines are held to have been delivered when the keys of the wine-cellar have been handed to the purchaser.

(22) Municipalities cannot possess anything by themselves, because all the citizens cannot consent. They do not possess the forums, and the temples, and other things of this kind, but they make use of them promiscuously. Nerva, the son, says that they can acquire, possess, and obtain by usucaption, the *peculium* of their slaves; others, however, hold the contrary; as they do not have possession of the slaves themselves.

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

The present rule is that municipalities can both hold possession and acquire by usucaption, and that this can be done through a slave, or a person who is free.

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

Moreover, only corporeal property can be possessed.

(1) We obtain possession by means of both the body and the mind, and not by these separately. When, however, we say that we obtain possession by the body and the mind, this should not be understood to mean that where anyone desires to take possession of land he must walk around every field, as it will be sufficient for him to enter upon any part of the land, as long as it is his intention to take possession of it all, as far as its boundaries extend.

(2) No one can obtain possession of property which is uncertain; as, for instance, if you have the intention and desire to possess everything that Titius has.

(3) Neratius and Proculus think that we cannot acquire possession solely by intention, if natural possession does not come first. Therefore, if I know that there is a treasure on my land, I immediately possess it, as soon as I have the intention of doing so; because the intention supplies what is lacking in natural possession.

Again, the opinion of Brutus and Manilius, who hold that anyone who has had possession of land for a long time has also had possession of any treasure to be found there, even though he was ignorant of its existence, is not correct. For he who does not know that there is any treasure there does not possess it, although he may have possession of the land; and, if he was aware of its presence, he cannot acquire it by long possession, because he knows that it is the property of someone else.

Several authorities hold that the opinion of Sabinus is the better one; namely, that he who knows that there is a treasure on his land does not gain possession of it unless it has been removed from its place, because it is not in our custody. I concur in this opinion.

(4) We can hold possession of the same thing by several different titles; for example, certain

authorities think that he who obtains property by usucaption does so not only as a purchaser, but as the owner. For if I am the heir of him who has possession as a purchaser I possess the same property, but as purchaser and as heir; for while ownership can only be established by a single title, this is not the case with possession.

(5) On the other hand, several persons cannot have possession of the same thing without division; for, indeed, it is contrary to nature that while I hold something you should also be considered to hold it. Sabinus, however, says that he who gives property held by a precarious title possesses it himself, as well as he who received it with the risk. Trebatius, also, approves this opinion, for he thinks that one person can have possession justly, and another unjustly, but that both of them cannot possess it either unjustly or justly.

Labeo contradicts him, since, in the case of complete possession, it does not make much difference whether anyone has possession justly or unjustly. This is correct, for the same possession cannot be held by two persons, any more than you can be considered to stand on the very place on which I am standing, or to sit exactly where I am seated.

(6) When possession is lost, the intention of the party in possession must be considered. Therefore, although you may be on a tract of land, still, if you do not intend to retain it, you will immediately lose possession. Hence, possession can be lost by the intention alone, although it cannot be acquired in this way.

(7) If, however, you have possession solely by intention, even though another may be on the land, you will still have possession of the same.

(8) If anyone should give notice that a house is invaded-by robbers, and the owner, being overcome with fear, is unwilling to approach it, it is established that he loses possession of the house. But if a slave or a tenant, through whose agency I actually possess property, should either die, or depart, I will retain possession by intention.

(9) If I deliver an article to another, I lose possession of the same; for it has been decided that we hold possession until we voluntarily relinquish it, or are deprived of it by force.

(10) If a slave, of whom I am in possession, asserts that he is free, as Spartacus did, and is ready to maintain his.freedom in court, he will not be considered to be in possession of the master whom he is preparing to oppose. This, however, is only correct when he has remained for a long time at liberty; otherwise, if, from his condition as a slave, he demands his freedom, and petitions for a judicial decision on this point, he, nevertheless, remains under my control, and I hold possession of him by intention, until he has been pronounced to be free.

(11) We possess by intention the places to which we resort in summer and in winter, although we leave them at certain times.

(12) Moreover, we can have possession by intention, and also corporeally, by means of another, as we have stated in the case of a tenant and a slave. The fact that we possess certain property without being aware of it (as is the case where slaves obtain *peculium),* should not present any difficulty, for we are held to possess it by both the intention and the actual agency of the slaves.

(13) Nerva, the son, thinks that we can possess movable property, with the exception of slaves, as long as it remains in our charge; that is to say, as long as we can obtain natural possession of it, if we wished to do so. For if a flock should be lost, or a vase should fall in such a way that it cannot be found, it immediately ceases to be in our possession, although no one else can obtain possession of it; but the case is different where anything cannot be found which is in my charge, because it still remains in the neighborhood, and diligent search will discover it.

(14) Likewise, wild animals which we shut up in enclosures, and fish which we throw into ponds, are in our possession. But fish which are in a lake, or wild animals that wander in

woods enclosed by hedges, are not in our possession, as they are left to their natural freedom; for otherwise, if anyone purchased the woods, he would be considered to have possession of all the animals therein, which is false.

(15) Moreover, we have possession of birds which we have shut up or tamed, and subjected to our control.

(16) Certain authorities very properly hold that pigeons, which fly away from our buildings, as well as bees which leave our hives, and have the habit of returning, are possessed by us.

(17) Labeo and Nerva, the son, have given it as their opinion that I cease to possess any place which a river or the sea has overflowed.

(18) If you appropriate any property which has been deposited with you, with the intention of stealing it, I cease to have possession of the same. If, however, you do not move it from its place, and have the intention of denying that it was deposited with you, several ancient authorities, and among them Sabinus and Cassius, very properly hold that I still retain possession, for the reason that a theft cannot be committed without handling the article, nor can theft be committed by mere intention.

(19) The rule that no one can himself change his title to the possession of property has been established by the ancient authorities.

(20) If, however, he who deposited an article with me, or lent it to me, should sell or give me the same thing, I will not be considered to have changed the title by which I hold possession, since I did not have possession.

(21) There are as many kinds of possession as there are ways of acquiring property which does not belong to us; as, for example, by purchase, by donation, by legacy, by dowry, as an heir, by surrender as reparation for damage committed, by occupancy, as in the case where we obtain property from the land or the sea, or from the enemy, or which we ourselves create. And, in conclusion, there is but one genus of possession, but the species are infinite in number.

(22) Possession may be divided into two kinds, for it is acquired either in good, or in bad faith. The opinion of Quintus Mucius, who included among the different kinds of possession that given by order of a magistrate, for the purpose of preserving the property, or where we obtain possession because security against threatened injury is not furnished, is perfectly ridiculous. For where anyone places a creditor in possession for the purpose of preserving property, or where this is done because security has not been furnished against threatened injury, or in the name of an unborn child, he does not really grant possession, but merely the custody and supervision of the property. Hence, when a neighbor does not give security against threatened injury, and we are placed in charge, and this condition continues for a long time, the Praetor, upon proper cause being shown, will permit us to obtain actual possession of the property.

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

A father immediately possesses whatever his son acquires as a part of his *peculium,* although he may not be aware that he is under his control. Moreover, the same rule should be adopted even if the son is in possession of another as a slave.

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

If I owe you Stichus under the terms of a stipulation, and I do not deliver him, and you obtain possession of him in some other way, you are a depredator. Likewise, if I should sell you any property and do not deliver it, and you obtain possession of the same without my consent, you will not do so as a purchaser, but as a depredator.

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

We say that he holds anything clandestinely who takes possession of it by stealth, suspecting that the other party, not knowing what he has done, may raise a controversy, and fearing that he will contend his right. He, however, who does not take possession secretly, but conceals himself, is in such a position that he is not considered to have clandestine possession. For not the manner in which he acquired possession, but the beginning of his acquiring it, should be taken into account, nor does anyone begin to acquire possession clandestinely who does so in good faith, with the knowledge or consent of him to whom the property belongs, or for any other good reason. Hence Pomponius says that he obtains clandestine possession who, fearing that some future controversy may arise, and the person of whom he is apprehensive being ignorant of the fact, takes possession by stealth.

(1) Labeo says that where a man goes to a market, leaving no one at home, and on his return from the market finds that someone has taken possession of his house, the latter is held to have obtained clandestine possession. Therefore, he who went to the market still retains possession, but if the trespasser should not admit the owner on his return, he will be considered to be in possession rather by force than clandestinely.

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

If the owner is unwilling to return to the land because he fears the exertion of superior force, he will be considered to have lost possession. This was also stated by Neratius.

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

As possession cannot be acquired except by intention and a corporeal act, so in like manner, it cannot be lost, except in a case where the opposite of both of these things takes place.

9. *Gaius, On the Edict, Book XXV.*

Generally speaking, we are considered to have possession when anyone as an agent, a host, or a friend, holds it in our name.

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

Where anyone leases property, and afterwards claims it by a precarious title, he is considered to have abandoned his lease. If he claims it at first by a precarious title, and afterwards leases it, he is considered to hold possession under the lease; for whatever is done last should rather be taken into consideration. Pomponius, also, is of this opinion.

(1) Pomponius discusses a very nice question; namely, whether a man who leases land, but claims it by a precarious title, does so, not for the purpose of possessing it, but merely to remain in possession; for there is a great difference, as it is one thing to possess, but quite another to be in possession. Persons placed in possession for the purpose of preserving the property, as legatees or neighbors, on account of threatened injury, do not possess the property but are in possession of the same for the purpose of caring for it. When this is done both of the above ways are merged into one.

(2) Where anyone leases land, and asks to be placed in possession by a precarious title, if he leased it for one *sesterce* there is no doubt that he holds it at will, as a lease for only that sum is void. If, however, he leases it for a fair rent, it must then be ascertained what was done first.

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

He possesses justly who does so by the authority of the Praetor.

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

He who has the usufruct of property is held to possess it naturally.

(1) Ownership has nothing in common with possession, and therefore an interdict *Uti possidetis* is not refused to one who has begun proceedings to recover the property, for he

who does so is not held to have relinquished possession.

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

Pomponius relates that stones were sunk in the Tiber by a shipwreck and were afterwards recovered; and he asks whether the ownership remained unchanged during the time that they were in the river. I think that the ownership, but not the possession, was retained. This instance is not similar to that of a fugitive slave, for the slave is considered to be possessed by us, in order to prevent him from depriving us of possession; but the case of the stones is different.

(1) Where anyone makes use of the agency of another, he should do so with the liabilities and defects attaching to it. Hence, with reference to the time during which the vendor has had possession of the property, we also take into consideration the questions of violence, secrecy, and precarious title.

(2) Moreover, where anyone returns a slave to the vendor, the question arises whether the latter can profit by the time that the slave was in possession of the purchaser. Some authorities think that he cannot, for the reason that the return of the slave annuls the sale; others hold that the purchaser can profit by the time of possession by the vendor, and the vendor by that of the purchaser. This opinion, I think, should be adopted.

(3) If a freeman, or a slave belonging to another who is serving in good faith, purchases property, and a third party acquires possession of the same, neither the alleged slave, when he becomes free, nor the real owner can profit by the time that the property has been in the hands of a *bona fide* possessor.

(4) Where an heir did not possess in the first place, the question arose whether he cah profit by the possession of the testator. And, indeed, possession is interrupted between the parties to the sale, but many authorities do not hold the same opinion with reference to heirs, as the right of succession is much more extensive than that of purchase. It is, however, more in accordance with a liberal interpretation of law that the same rule should be adopted concerning heirs which applies to purchasers.

(5) Not only does the possession of the testator, which he had at the time of his death, benefit the heir, but also that which he had at any time whatsoever has this effect.

(6) With reference to dowry also, if property has been either given or received as such, the time of possession will profit either the husband or the wife, as the case may be.

(7) Where anyone has transferred property by a precarious title, the question arises whether he can profit by the time during which it was in possession of the person to whom it was transferred. I think that he who transfers it by a precarious title cannot profit by the time of possession, as long as the title continues to be precarious; but if he again acquires possession, and the precarious title is extinguished, he can profit by the possession during the time when the property was held by a precarious title.

(8) In a certain case, it was asked if a manumitted slave has possession of property forming part of his *peculium* (his *peculium* not

having been given to him) and his master desires to profit by the time it was held by the freedman, 'possession of the property having been surrendered, whether he can do so. It was decided that he should not be granted the benefit of the time of possession, because his conduct was clandestine and dishonest.

(9) Where property has been restored to me by order of court, it has been decided that I am entitled to the benefit of the time during which it was held by my opponent.

(10) It must, however, be remembered that a legatee is entitled to the benefit of the time when the property was in the hands of the testator. But let us see whether he will be benefited by the

time that the property was in the possession of the heir. I think that, whether the legacy was bequeathed absolutely or conditionally, it should be held that the legatee can profit by the time that it was in the possession of the heir, before the condition was fulfilled, or the property delivered. The time that it was in the possession of the testator will always profit the legatee, if the legacy or the trust is genuine.

(11) Moreover, he to whom property is donated has a right to profit by the time it was possessed by the person who made the donation.

(12) Times of possession are applicable to those who themselves have possession of what is their own; but no one will be entitled to this privilege unless he himself has been in possession.

(13) Again, time of occupancy will be of no advantage where the possession is defective; possession, however, which is not defective, causes no injury.

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

If my slave, or my son who is under my control, should make a sale, the benefit of the time that he was in my power will be granted; that is, provided he acted with my consent, or had the free administration of his *peculium.*

(1) Where anything is sold by a guardian or a curator, the purchaser will be entitled to the benefit of the time during which the ward or the insane person possessed the property.

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

We are understood to cease to possess property which has been stolen from us, just as if we had been deprived of it by force. But if someone who is under our control should steal anything from us, we will not lose possession of it, as long as it remains in his hands; for the reason that possession is acquired for us by means of persons of this kind. This is why we are considered to possess a fugitive slave; for, as we cannot be deprived of the possession of other things which he has, so, in like manner, we cannot be deprived of him.

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

Anything which a wife gives to her husband, or a husband to his wife, is held by him or her as its possessor.

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

If anyone is forcibly dispossessed he should be considered to have remained in possession, as he has the power to recover it by means of an interdict on the ground of violence.

(1) The difference between ownership and possession is that ownership continues to exist, even against the wishes of the owner; but possession is lost as soon as anyone decides that he is unwilling to keep it. Therefore, if a man delivers possession with the intention that the property shall afterwards be returned to him, he ceases to possess it.

18. *Celsus, Digest, Book XXIII.*

What I possess in my own name I can possess in that of another. For I do not change the title to my possession when I hold it through another, but I cease to possess the property, and I render him possessor by my own act. It is not the same thing to possess personally and to possess in the name of another; for he possesses in whose name possession is held. A representative lends his agency to the possession of another.

(1) If you deliver property to an insane person whom you think is in the enjoyment of his faculties, for the reason that, while in your presence he appeared to be quiet, and have his mind unclouded, although he will not obtain possession, you will "lose it. For it is sufficient to have relinquished possession, even if you did not legally transfer it, as it would be absurd

to say that anyone did not intend to relinquish it unless he legally transferred it; and, indeed, it is because he thinks he transferred it that he manifests his intention to give possession.

(2) If I order the vendor, of whom I have made a purchase, to deliver the article at my house, it is certain that I possess the property, even if no one has yet touched it. Or, if the vendor should show me from my tower a neighboring tract of land of which he says that he delivers me the possession, I begin to possess the said land, and just as if I had placed my foot within the boundaries of the same.

(3) If, when I am on one side of my land, some other person enters upon the opposite side, with the intention of clandestinely obtaining possession, I am not considered to have immediately lost possession, as I can easily eject him from the premises, as soon as I am informed of his act.

(4) Again, if an army enters upon land with great violence, it will only gain possession of that portion which it occupied.

19. *Marcellus, Digest, Book XVII.*

A man who purchased a tract of land from another in good faith afterwards leased the same land from the owner. I ask whether he ceased to possess it or not. I answered that he immediately ceased to do so.

(1) When it is stated by the ancients that no one could himself change the title of his possession, it is probable that they had in mind

one who, being in possession of property bodily, as well as by intention, determined to possess it under some other title; and not one who, having relinquished possession under his first title, desired to obtain possession a second time, under another.

20. *The Same, Digest, Book XIX.*

Where anyone who has lent an article to be used, sells it, and directs it to be delivered to the purchaser, and the borrower does not deliver it; in some instances the owner will be held to have lost possession, and in others he will not. For the owner will only lose possession when the article which has been lent is not returned when he demands it. But what if there was a just and reasonable cause for returning it, and not merely that the borrower desired to retain possession of the property?

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

We can sometimes deliver to another the possession of property which we ourselves do not hold; as, for instance, when he who possesses an article as heir, and, before becoming the owner of the same, claims it under a precarious title from the real heir.

(1) Property which has been thrown overboard in a shipwreck cannot be acquired by usucaption, since it has not been abandoned, but merely lost.

(2) I think that the same rule of law applies to property which has been thrown into the sea to lighten the ship, as that cannot be considered as abandoned which has been temporarily relinquished on account of safety.

(3) When anyone claims the property of another by a precarious title, and leases it from him, possession of the same will revert to the owner.

22. *The Same, On Cassius, Book XIII.*

He who obtains possession in such a way that he cannot retain it is not considered to have acquired it at all.

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

When we are appointed heirs, and the estate has been accepted, all rights to it pass to us; but possession does not belong to us until it is taken naturally.

(1) So far as those who fall into the hands of the enemy are concerned, the law relating to their retention of the rights of property is a peculiar one, for they lose corporeal possession of the same, nor can they be held to possess anything when they themselves are possessed by others; therefore it follows that, when they return, a new acquisition of possession is required, even if no one had possession of their property in the meantime.

(2) I also ask, if I chain a freeman in order to possess him, whether I possess through him everything which he possesses. The answer is that if you claim a freeman, I do not think that you possess him; and, as this is the case, there is much less reason that his property should be possessed by you; nor does the nature of things admit that we can possess anything by the agency of one whom I do not legally have in my power.

24. *The Same, Epistles, Book XIV.*

Anything that your slave obtains possession of by violence, without your knowledge, you do not possess, because he who is under your control cannot acquire corporeal possession if you are not aware of it; but he can acquire legal possession, as, for instance, he possesses what comes into his hands as part of his *peculium.* For when a master is said to possess by his slave, there is an excellent reason for this, because what is held by the slave actually, and for a good reason belongs to his *peculium,* and the *peculium* which a slave cannot possess as a citizen, but holds naturally, his master is considered to possess. Anything, however, which the slave acquires by illegal acts, is not possessed by the master, because it is not included in the *peculium* of the slave.

25. *Pomponius, On Quintus Mucius, Book XXV.*

We cease to possess anything -which has been in our possession, and which has been so completely lost that we do not know where it is.

(1) We possess through the medium of our farmers, our tenants, and our slaves. If they die, become insane, or are hired by others, we are understood to still retain possession of them. There is no difference whatever, in this respect, between our tenant and our slave by whose agency we retain possession of property.

(2) When we only possess property by intention, the question arises whether we continue to do so until another actually enters upon it, so that his actual possession becomes preferable; or, indeed (and this is the better opinion) whether we possess the same until, upon our return, someone prevents us from entering; or whether we cease to possess by intention, because we suspect that we will be driven away by the person who has taken possession. This seems to be the more reasonable opinion.

26. *The Same, On Quintus Mucius, Book XXVI.*

A definite portion of a tract of land can be possessed and acquired by long possession, and also a certain portion which is. undivided and which is obtained by purchase, by donation, or by any other title whatsoever, can also be acquired in this manner. A portion, however, which is not specifically designated can neither be delivered nor received; as, for instance, if I transfer to you "all of such-and-such a tract of land that I am entitled to;" for anyone who is ignorant of the facts can neither transfer nor receive something which is uncertain.

27. *Paulus, Epistles, Book V.*

If a person who has become insane retains possession of a forest, he does not lose possession of it as long as he remains in that condition, because a lunatic cannot lose the intention of possessing.

28. *Tertullianus, Questions, Book I.*

If I possess property, and afterwards lease it, do I lose possession? It makes a great deal of difference as to what the intention of the testator was in this case. First, it is important to ascertain whether I know that I am in possession, or am ignorant of the fact; and whether I lease the property as my own, or as belonging to someone else, and, knowing it to be mine, whether I lease it with reference to the ownership, or merely to obtain possession. For if you are in possession of my property, and I purchase the possession of the same from you, or enter into a stipulation with reference thereto, both the purchase and the stipulation will be valid; and the result is that there will be both a precarious title and a lease, if there was an express intention of only leasing possession, or an intention of claiming it by a precarious title.

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

It has been decided that a ward can lose possession without the authority of his guardian, but he does not cease to possess the property by intention, as he does by the performance of a corporeal act, for he can lose what depends upon an act.

The case is different where he desires to lose possession by intention, for he cannot do so.

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

When anyone possesses an entire house, he is not considered to possess the different articles which are contained in the building.

(1) We lose possession in several ways; as, for instance, if we bury a dead body in a place which we possess, for we cannot possess a place which is religious or sacred, even if we despise religion, and continue to hold it as 'private property.

The same rule applies to a freeman who is held as a slave.

(2) Labeo says that the owner of a building loses possession against his will when the Praetor orders possession of it to be taken, where security against threatened injury is not furnished.

(3) Likewise, we do not cease to possess land which is occupied by the sea, or by a river, or if anyone who has possession of property comes under the control of another.

(4) Again, we cease to possess property which is movable, in several ways, as where we are unwilling to possess it, or where for example, we manumit a slave. Moreover, if I possess something and its form is changed, as, for instance, a garment is made out of wool, the same rule will apply.

(5) Anything that I possess by a tenant, my heir cannot possess, unless he actually obtains possession of it, for we can retain, but we

cannot acquire possession by intention alone. What I possess as a purchaser, however, my heir can obtain by usucaption through the agency of a tenant.

(6) If I lend you anything, and you lend it to Titius, and he thinks that it is yours, I will still continue to possess it. The same rule will apply if my tenant sublets my land, or he with whom I have deposited property should again deposit with another; and the same rule must be observed, even if this is done by several persons.

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

If a tenant leaves the land without the intention of relinquishing possession, and returns, it is held that the same lessor holds possession.

32. *Paulus, On Sabinus, Book XV.*

Although a ward is not bound without the authority of his guardian, we can still retain possession by him.

(1) If a lessee sells the property, leases it from the purchaser, and pays rent to both lessors, the

first one who rented it legally retains possession through the lessee.

(2) An infant can lawfully possess anything if he obtains it with the consent of his guardian, for the want of judgment of the infant is supplied by the authority of the 'guardian. This opinion has been adopted on account of its convenience, for otherwise, an infant who receives possession of property would not know what he was doing. A ward can, nevertheless, obtain possession without the authority of his guardian, and an infant can possess *peculium* through the medium of a slave.

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

Even if the vendor of a tract of land should direct someone to place a purchaser in full possession of the same, the purchaser himself cannot legally acquire possession before this is done. Likewise, if a friend of the vendor, not being aware that the latter is dead, should place the purchaser in possession without being prevented from doing so by the heirs, possession will legally be delivered. But if he did this, knowing that the owner was dead, or if he was aware that the heirs were unwilling that it should be done, the contrary rule will apply.

34. *Ulpianus, Disputations, Book VII.*

If you place me' in full possession of the Cornelian Estate, and I think that I am placed in possession of the Sempronian estate, but enter upon the Cornelian estate, I do not acquire possession unless we are only mistaken in the name, and agree with reference to the property. Since, however, we agree with reference to the property, a doubt may arise whether you do not lose possession; because Celsus and Marcellus say that we can lose and change possession merely by intention. And if possession can be acquired by intention, can it also be acquired in this instance? I do not think that a person who is mistaken can acquire it. Therefore, he who only relinquishes possession, as it were conditionally, does not lose it.

(1) If, however, you deliver possession, not to me but to my agent, it should be considered whether possession will be acquired by me if I make a mistake, but my agent does not. As it is held that it can be acquired by a person who is ignorant of the facts, it can also be acquired by one who is mistaken. But if my agent is mistaken, and I am not, the better opinion is that I will acquire possession.

(2) My slave also acquires possession for me without my knowledge. For even a slave belonging to another, as Vitellius says, can acquire possession for me, if he takes the property in my name, whether he is possessed by me or by no one at all. This also should be admitted.

35. *The Same, On All Tribunals, Book V.*

A controversy for possession is terminated as soon as the judge decides which party is in possession. This is done in such a way that he who loses possession can take the position of plaintiff, and then bring an action against the owner.

36. *Julianus, Digest, Book XIII.*

He who transfers a tract of land to a creditor, by way of pledge, is understood to retain possession of the same. But even if he should claim it by a precarious title, he can also acquire a good one by lapse of time; for, as possession by the creditor does not interfere with prescription, there is less reason that the claim of the debtor under a precarious title should present no obstacle, since he has much better right who claims property by a precarious title and is in possession, than he who has no possession at all.

37. *Marcianus, On the Hypothecary Formula.*

When land is given in pledge, and possession is delivered, and the property has then been leased by the creditor, and it is agreed that he who encumbered it shall be considered as a tenant in the country, and as a lessee in the city, the creditor is considered to possess the property through the debtor who has leased it.

38. *Julianus, Digest, Book XLIV.*

A master who writes to his absent slave to remain at liberty has not the intention of immediately relinquishing possession of the slave; but his intention is rather deferred until the time when the slave will be informed of the fact.

(1) When anyone delivers possession of land in such a way that he does not intend it to be given us, unless the land belongs to him, he is not considered to have delivered possession if the land is the property of another.

It should, moreover, be understood that possession can be delivered conditionally, just as property is transferred under a condition and does not pass to the person who receives it unless the condition is complied with.

(2) Where a man who sold a slave to Titius delivers him to his heir, the latter can obtain possession of the estate by means of the slave; not for the reason that the slave came into his hands from the estate, but because he is entitled to an action on purchase. For if a slave is due to a testator in accordance with the terms of a stipulation, or of a will, and the heir receives him, he will not be forbidden to obtain possession of the property of the estate by means of the slave.

39. *The Same, On Minicius, Book II.*

I think that it makes a difference with what intention property is deposited in the hands of an arbiter; for if this is done for the purpose of relinquishing possession, and is clearly proved, the possession of the arbiter will be of no benefit to the parties for the purpose of usucaption. If, however, the property was deposited for safe-keeping, it is settled that he who gains the case can profit by the possession, in order to acquire the property by prescription.

40. *Africanus, Questions, Book VII.*

If your slave ejects you from' land, which I gave you in pledge while it was in my possession, it is held that you continue to be in possession of the same, as you still retain possession by this same slave.

(1) If the tenant by whom the owner holds possession should die, it has been decided for the sake of public convenience that possession is retained and continued through the agency of the tenant. It should not be held that possession is immediately interrupted by the death of the latter, for this is not the case unless the owner neglects to take possession. A different opinion must be held, if the tenant voluntarily relinquishes possession. This, however, is only true where a stranger has not, in the meantime, been in possession, but it always remains as part of the estate of the tenant.

(2) I purchased your slave from Titius in good faith, and possessed him after he had been delivered, and then when I ascertained that he was yours, I concealed him, to prevent you from claiming him. It is held that, on his account, I should not be considered to have possessed him clandestinely during this time. For, on the other hand, if I should knowingly purchase your slave from someone who is not his owner, and should then retain clandestine possession of him, even after I notified you, I would not, for that reason, cease to have clandestine possession of the slave.

(3) If I clandestinely remove my own slave from a *bona fide* purchaser, it has been decided that I ought not to be considered to have clandestine possession of him, because the owner does not hold him under a precarious title, nor under a lease of his own property; and there are no other methods of acquiring clandestine possession.

41. *Paulus, Institutes, Book I.*

Anyone who enters upon a tract of land as a friend, by the right of familiarity, is not considered to possess it, because he did not enter upon it with the intention of doing so,

although he may have actual possession of the land.

42. *Ulpianus, Rules, Book IV.*

Where a slave owned in common is possessed by one of the joint-owners in the name of all, he is understood to be possessed by all.

(1) Where an agent purchases property by the direction of his principal, he immediately acquires possession of it for him. This is not true if he purchases it on his own responsibility, unless his principal ratifies the sale.

43. *Marcianus, Rules, Book HI.*

Julianus says that if anyone buys a tract of land, a small part of which he knows to belong to another, and he was aware that the said small part has been divided; he can acquire the remainder of the land by prescription. If, however, the said part was undivided, he can also acquire the land by prescription, although he may not know where the part in question was situated; because what he thought belonged to the vendor passes by prescription to the purchaser, without any damage resulting.

(1) Pomponius, also, in the Fifth Book of Various Passages, says that if the purchaser knows, or thinks that the usufruct of the property belongs to another, he can still obtain the latter by long-continued possession.

(2) The same rule applies, as he says, if I purchase property which I know has been pledged.

44. *Papinianus, Questions, Book XXIII.*

Where a man, about to start upon a long journey, buried his money in the ground for safe-keeping, and, having returned, could not remember the place where the treasure was concealed, the question arose whether he had ceased to possess it, or if, afterwards, he should find the place, whether he would immediately begin to acquire possession. I gave it as my opinion that, as the money was not said to have been hidden for any other purpose than safe-keeping, he who concealed it should not be considered to have been deprived of the right of possession; nor did the failure of his memory prejudice that right, as no one else had appropriated the money.

On the other hand, it might be held that we lose possession of our slaves during the time when we no longer see them. Nor does it make any difference whether I hide the money on my own premises, or on those of another; for if anyone should hide his property on my premises, I would not obtain possession of it unless I did so where it was above ground. Hence, the fact that the land belongs to another does not deprive me of my own possession, as there is no difference whether I have possession above, or under ground.

(1) The question arises why the possession of property belonging to his *peculium* is acquired by a slave for his master, without the knowledge of the latter. I said that this rule had been adopted on the ground of public convenience, to prevent masters from inquiring constantly about property belonging to the *peculium* of their slaves, and the reason why it was found there; so that, in this instance, it could not be held that possession was acquired by intention alone. For if any property is obtained which does not form part of the *peculium,* the knowledge of the master is necessary, but possession is acquired by the mere act of the slave.

(2) These matters having been explained, the question of losing possession comes up for discussion; and I hold that it makes a great deal of difference whether we hold possession by ourselves or through the agency of others. For, so far as the possession which we hold by our own act is concerned, it can be lost either by intention, or by our act, provided we relinquish it with the expectation of no longer holding it; but possession to property which is acquired by the act of a slave or a tenant is not lost, unless another has appropriated the property; and this can also occur even without our knowledge.

There is still another distinction applicable to loss of possession, for the possession of winter and summer resorts is retained by mere intention,

45. *The Same, Definitions, Book II.*

Although we do not leave a slave or a tenant there when we depart.

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

Even if another may have been entered upon property with the intention of taking possession of the same, the former possessor is held to retain possession, as long as he is ignorant that it has been taken by another. For, as the bond of an obligation is released in the same way that it has been made, so, where possession is held by intention alone, it should not be taken away without anyone's knowledge.

47. *The Same, Questions, Book XXVI.*

If you decide not to return movable property which has been deposited with you, or of which you have been given possession as- a loan, it has been held that the other party will lose possession immediately, even if he is not aware of your intention. The reason for this is, that where the care of movable property is neglected, or abandoned, even though no one else appropriates it, the former possession is usually prejudiced. This was stated by Nerva, the son, in his Books on Usucaption.

He also says that the case is different, if proper care was not used, where a slave had been lent; for possession of him only will continue as long as no one else seizes him, that is to say, because a slave can retain possession for his master if he has the intention of returning to him; and we can likewise obtain possession of other property by his agency. Therefore, possession of such objects as are destitute of reason, or life, is immediately lost, but that of slaves is retained, if they have the intention of returning.

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

A certain man donated a tract of land together with slaves attached to the same, and stated in a letter that he delivered possession of the property. If one of the slaves, who was donated, should come into the hands of him who received the house, and be afterwards sent back to the land, it has been decided that possession of the land and of the other slaves has been acquired by means of those above mentioned.

49. *The Same, Definitions, Book II.*

Possession can be acquired by me through a slave in whom I have the usufruct if this is done by means of my property, or the services of the slave; because the latter is naturally held by the usufructuary, and possession borrows many things from the law.

(1) Those who are under the control of others can hold property belonging to their *peculium,* but they cannot possess it; for the reason that possession is not only a matter of fact, but is also one of law.

(2) Although possession through an agent can be acquired by a principal without his knowledge, usucaption can only benefit one who knows that possession has been taken; still, an action for eviction is not granted to the principal against the vendor without the consent of the agent, but he can be compelled to grant it by an action on mandate.

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

Neither possession nor ownership, nor anything else whatsoever, can be acquired through the use of my property by one whom I have been induced to erroneously consider my son under my control.

(1) Possession can be acquired for us by a runaway slave, if he has not been taken possession

of by another, and does not think that he is free.

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

Labeo says that we can acquire possession of certain things by intention; as, for instance, if I purchase a pile of wood, and the vendor directs me to remove it, it will be considered to have been transferred to me, as soon as I place a guard over it. The same rule applies to a sale of wine where all the jars are together.

But, he says, let us see whether this is an actual delivery, because it makes no difference whether I order the custody of the property to be delivered to me, or to someone else. I think that the question in this case is, that even if the pile of wood or the jars have not been actually handled, they should, nevertheless, be considered to have been delivered. I do not see that it makes any difference whether I, myself,

take charge of the pile of wood, or someone else does so by my direction. In both instances, whether or not possession was obtained must be determined by the character of the intention.

52. *Venuleius, Interdicts, Book I.*

The titles to the possession and usufruct of property must not be confused, just as possession and ownership should not be intermingled. For possession is prevented if another has the use and enjoyment, nor can the usufruct of one person be computed if another is in possession of the property.

(1) It is clear that when anyone is forbidden to build, he is also forbidden to retain possession.

(2) One method of placing a person in possession of property is to prohibit any violence being manifested toward him when he enters upon it. For the judge orders the adverse party immediately to surrender and relinquish possession, which is much more decisive than to order him merely to restore it.

53. *The Same, Interdicts, Book V.*

Possession which is defective is usually only advantageous as against strangers.

TITLE III.

CONCERNING THE INTERRUPTION OF PRESCRIPTION, AND USUCAPTION.

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

Usucaption was introduced for the public welfare, and especially in order that the ownership of certain property might not remain for a long time, and almost forever, undetermined; as a sufficient time is granted to owners to make inquiry after their property.

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

Usurpation is the interruption of usucaption. Orators call usucaption frequent use.

3. *Modestinus, Pandects, Book V.*

Usucaption is the addition of ownership by means of continuous possession for a time prescribed by law.

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

In the next place, we must speak of usucaption; and, in doing so, we must proceed in regular order, and examine who can acquire property by usucaption, what property can be acquired in this manner, and what time is necessary.

(1) The head of a household can acquire by usucaption; a son under paternal control can also do so; and this is especially the case where, as a soldier, he obtains by usucaption property acquired during military service.

(2) A ward can acquire property by usucaption if he takes possession of it with the consent of his guardian. If he takes possession without the consent of his guardian, but still has the intention of doing so, we say that he can acquire the property by usucaption.

(3) An insane person, who takes possession before his insanity appears, acquires the property by usucaption; but such a person can only acquire it in this manner if he has possession by a title through which usucaption may result.

(4) A slave cannot hold possession as an heir.

(5) If the crops, the children of slaves, and the increase of flocks did not belong to the deceased, they can be acquired by usucaption.

(6) The Atinian Law provides that stolen property cannot be acquired by usucaption, unless it is restored to the control of the person from whom it was stolen; and this must be understood to mean that it must be restored to the owner, and not to him from whom it was secretly taken. Therefore, if property is stolen from a creditor to whom 'it was lent or pledged, it should be returned to the owner.

(7) Labeo also says that, if the *peculium* of my slave is stolen without my knowledge, and he afterwards recovers it, it will be held to have been restored to my control. It is more accurate to say, provided I was aware that the property had been returned to me. For it is not sufficient for the slave merely to recover the property which he had lost without my knowledge, but I must also have intended it to form part of his *peculium,* for if I did not wish this to be done, it will then be necessary for me to obtain actual control of it.

(8) Hence, if my slave steals anything from me, and afterwards returns the article to its place, it can be acquired by usucaption as having been restored to my control, just as if I did not know that it had been stolen; for if I did know it, we require that I should be aware that it had been returned to me.

(9) Moreover, if the slave should retain as part of his *peculium* the same property which he stole, it will not be considered to have been returned to me (as is stated by Pomponius), unless I have possession of it in the same way that I did before it was stolen; or if, when I learned that it had been taken, I consented that the slave should include it in his *peculium,*.

(10) Labeo says that if I deposit any property with you, and you sell it for the sake of gain, and then, having repented, you repurchase it, and retain it in the same condition in which it formerly was, whether I am ignorant or aware of the transaction, it will be considered to have been restored to my control, according to the opinion of Proculus, which is correct.

(11) Where the property of a ward is stolen, it must be held to be sufficient if his guardian was aware that it had been returned to the house of the ward. In the case of an insane person, it will be sufficient if his curators know that the property has been returned.

(12) Property must be considered to have been restored to the control of the owner when he recovers possession of it in such a way that he cannot be deprived of it. This must be done just as if the property was his; for if I purchase an article, not knowing that it has been stolen from me, it will not be held to have been restored to my control.

(13) Even if I should bring suit to recover property which has been stolen from me, and I accept payment of the amount at which it was appraised in court, it can be acquired by usucaption, even though I did not obtain actual possession of it.

(14) The same rule must be said to apply even if the stolen property has been delivered to another with my consent.

(15) An heir who succeeds to the rights of the deceased cannot acquire by usucaption a female slave whose mother had been stolen, and was found among the property of the deceased, provided the latter was not aware of the fact, if she conceived and brought forth the child

while in his possession.

(16) If my slave steals a female slave and gives her to me in return for his freedom, the question arises whether I can acquire by usucaption the child of said female slave who conceived while in my possession. Sabinus and Cassius do not think that I can, because the illegal possession which is obtained by the slave would prejudice his master; and this is correct.

(17) If, however, anyone gives me a female slave who has been stolen, in order to induce me to manumit my slave, and the female slave conceives and has a child while in my possession, I cannot acquire that child by usucaption.

The same rule will also apply if anyone gives me the said female slave in exchange, or by way of payment, or as a present.

(18) If the purchaser ascertains before she has the child that the female slave belongs to another, we say that he cannot acquire the child by usucaption, but he can do so if he was not aware of this. If, however, he should learn that she belongs to someone else, when he had already begun to acquire the child by usucaption; we must take into consideration the beginning of the usucaption, as has been decided in the case of property that has been purchased.

(19) If stolen sheep have been sheared while in possession of the thief, the wool cannot be acquired by usucaption. The rule is otherwise, however, in the case of a *bona, fide* purchaser, as there is no need of usucaption, since the wool is a profit, the right to which immediately vests in the purchaser. The same rule can be said to apply to lambs, if they have been disposed of. This is true.

(20) If you make a garment of stolen wool, the better opinion is that we should consider the original material, and therefore the garment is stolen property.

(21) If a debtor steals anything given by him in pledge, and sells it, Cassius says that it can be acquired by usucaption, because it is considered to have come under the control of the owner who pledged it, although an action for theft can be brought against him. I think that this opinion is perfectly correct.

(22). If you forcibly deprive me of the possession of land, and you yourself do not take possession, but Titius, finding it unoccupied, does,

he can acquire it by usucaption through lapse of time, for although it is true that an interdict on the ground of violence will lie, because I have been forcibly ejected; still, it is not true that Titius obtained possession by violence.

(23) But if you should eject me from land which I possess in bad faith, and sell it, it cannot be acquired by usucaption, for while it is true that possession has been obtained by force, this has not been done by the owner.

(24) The same rule must be said to apply to the case of one who ejected a person having possession as the heir, although he knew that the land formed part of an estate.

(25) If one man should knowingly eject another who is in *bona fide* possession of land belonging to someone else, he cannot obtain it by usucaption, because he forcibly obtained possession.

(26) Cassius says that if the owner of land forcibly ejects the ' party in possession, the land will not be considered to have again been brought under his control, as he who was ejected can recover possession of it by means of an interdict based on violence.

(27) If I have a right of way through your land, and you forcibly prevent me from using it, I will lose the right of way by not making use of it for a long time, because an incorporeal right

is not considered susceptible of possession; and no one can be said to be deprived of a right of way, that is to say, of a mere servitude, in this manner.

(28) Likewise, if you take possession of land which is vacant, and afterwards prevent the owner from entering upon the same, you will not be considered to have taken forcible possession of the property.

(29) It is true that a release of a servitude can be acquired by usucaption, because the Scribonian Law, which established a servitude, prohibited the usucaption of one; but it does not grant a release if the servitude has already been extinguished. Hence, if I owe you a servitude, for instance, that which prevents me from building my house any higher, and I have kept it built higher for the prescribed time, the servitude will be extinguished.

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

Possession is naturally interrupted when anyone is forcibly deprived of it, or the property is stolen from him; in which instance possession is interrupted, not only with reference to him who stole the property, but with reference to everyone else. Nor, under these circumstances, does it make any difference whether he who obtained legal possession is the owner of the property or not. Nor is it material whether the person in question possesses the property as the owner, or merely for the purpose of profiting by it.

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

In the case of usucaption, the time is not reckoned from moment to moment, but we compute the entire last day of the prescription.

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

Therefore, anyone who begins to have possession at the sixth hour of the day of the *Kalends* of January will complete the usucaption on the sixth hour of the night preceding the *Kalends* of January.

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

Labeo and Neratius held that all the property which slaves have acquired as their *peculium* can be obtained by usucaption, because it is obtained in this way by their owners, even without the knowledge of the latter. Julianus says the same thing.

(1) Pedius says that a person who cannot acquire anything by usucaption in his own name cannot acquire it by his slave.

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

Corporeal property is especially subject to usucaption, with the exception of sacred and holy things, and such as are the public property of the Roman people, and of cities, as well as persons who are free.

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

Where property belonging to another has been purchased in good faith, the question arises in order that the usucaption may run, whether, for the preservation dt good faith, it should date from the beginning of the purchase, or from the time of delivery. The opinion of Sabinus and Cassius, which is that it dates from the time of delivery, has been adopted.

(1) It is our practice that servitudes can never, of themselves, be acquired by usucaption, but that this can be done along with the buildings upon which they are imposed.

(2) Scsevola, in the Eleventh Book of Questions, says that Marcellus thought that if a cow should conceive while in the possession of a thief, or of his heir, and bring forth while in the possession of his heir, the calf, separated from its mother, cannot be acquired by usucaption by the heir; just as he says this cannot be done with the child of a female slave. Scsevola,

however, states that, in his opinion, the child can be acquired by usucaption, because it does not form part of the stolen property. If, however, it should be a part of it, it can be acquired by usucaption, if it was born while in possession of a *bona fide* purchaser.

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

Neither a slave, nor a master who is in the power of the enemy, can acquire possession through the medium of his slave.

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

If you purchase property from one whom the Praetor has forbidden to alienate it, and you are aware of the fact, you cannot acquire it by usucaption.

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

We cannot acquire by usucaption property which has been taken in pledge, because we possess it in behalf of another.

(1) It has been decided that anyone who has purchased property in good faith from an insane person can acquire it by usucaption.

(2) If I direct you to buy a tract of land, you can obtain it by usucaption, after it has been delivered to you for this reason, although you cannot be considered to possess it as yours, as the fact that you are liable to an action on mandate makes no difference.

14. *The Same, On Plautius, Book XIII.*

The time during which the vendor held property before selling it is an advantage to the purchaser, for if the vendor obtained possession afterwards, this will be of no benefit to the purchaser.

(1) With reference to property which is bequeathed, the legatee is considered to occupy the same position as the heir, so far as the benefit of the time during which the testator possessed the property is concerned.

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

If a person who possessed the property as a purchaser is taken prisoner by the enemy before usucaption has taken place, let us see whether his heir will obtain any benefit from the usucaption, for it is interrupted; and if it is of no advantage to him on his return, how can it profit his heir ? It is, however, true that he has ceased to possess the property, and therefore the right of *postliminium* will not benefit him to the extent that he may be considered to have acquired it by usucaption.

If the slave of a person who was in the power of the enemy should purchase property, Julianus says that the usucaption of the same will remain in abeyance; for if the owner returns, the usucaption is understood to have taken place. If, however, the owner should die while in the hands of the enemy, it may be doubted whether the property will belong to his successors under the Cornelian Law. Marcellus thinks that the legal fiction is capable of a broader application, for one who has returned under the law of *postliminium,* has a better right to things which have been acquired by his slaves than to those which he himself acquired, or which he possessed by means of his slaves before he was captured by the enemy; as it has been decided, in some instances, that the estate takes the place of the person, and therefore that the right of usucaption is transmitted to the heirs of prisoners of war.

(1) If a slave of whom I am in possession should take to flight, and represent himself to be free, he will be considered as still in the possession of his master. This, however, must be understood to apply where, if he is caught, he is not prepared to maintain in court that he is free; for, if he is ready to do so, he will not be considered to be possessed by his master, against whom he is about to appear as an adversary.

(2) If a possessor of property in good faith should ascertain that it belongs to another, after having lost possession of it before the time necessary for usucaption has elapsed, and he should obtain possession of it a second time, he cannot acquire it by usucaption, because the beginning of the second possession is defective.

(3) If property to which we are entitled is delivered to us in accordance with the terms of a will, or under a stipulation, we must take into account the time when it was delivered, because property can be made the subject of a stipulation, even if it does not belong to the promisor.

16. *Javolenus, On Plautius, Book IV.*

When suit is brought for the production of a slave who has been given in pledge, proceedings must be instituted against the creditor, and not against the debtor; for the reason that he who gave the slave in pledge only possesses him by the right of usucaption. In all other respects, however, he who receives property possesses it, and this is true to such an extent that the possession of him who gives property in pledge can also be included.

17. *Marcellus, Digest, Book XVII.*

If, in a case in partition, I begin to hold possession under a judgment rendered by mistake, which has reference to the land of others supposed to be owned in common, I can acquire the said land by holding it for a long time.

18. *Modestinus, Rules, Book V.*

Although usucaption is of no advantage as against the Treasury, it has been decided that where property without an owner has not yet been reported to the Treasury, and a purchaser appears who has bought land forming part of said property, he can legally acquire it by long-continued possession.

19. *Javolenus, Epistles, Book I.*

If you purchase a slave with the understanding that, if some condition should be complied with, the sale will be void, and the slave is delivered to you, and fulfillment of the condition afterwards annuls the transaction, I think that the time during which the slave was in possession of the purchaser should benefit the vendor, because a sale of this kind is similar to the redhibitory clause for the return of property, which is introduced into contracts for sales; and, in a case of this kind, I have no doubt that the time that the purchaser held the property will benefit the vendor, as properly speaking, no sale took place.

20. *The Same, Epistles, Book IV.*

The possession of a testator will profit the heir if, in the meantime, no one else had possession.

21. *The Same, Epistles, Book VI.*

I rented land to a man against whom I was about to assert my claim, founded on prescription, as an heir. I ask whether you think

that this lease has any force or effect. If you think that it has no effect, do you believe that the right of usucaption of said land will, nevertheless, continue to exist? I also ask, if I should sell the land, what is your opinion of the points which I have just raised? The answer was that if he who is in possession of the land, as heir, leased it to the owner of the same, the lease is void, because the owner rented his own land. Hence it follows that the lessor does not retain possession, and prescription based upon long occupancy will not continue to exist.

The same rule of law applies to a sale, because, as in the case of a lease, the purchase of one's own property is void.

22. *The Same, Epistles, Book VII.*

An heir and an estate, although they have two different names, are still regarded as one person.

23. *The Same, Epistles, Book IX.*

I do not think that he who has purchased a house possesses anything but the house itself. For if he is considered to possess the different things of which the house is built, he does not possess the house itself; as, after the materials of which it is composed are separated, they cannot be understood to represent the entire house. Add to this, if anyone should say that the separate materials of which the house was composed are possessed, it will be necessary to hold that there will be ground for the prescription of the movable property composing the house, during the time fixed for that purpose, and that a longer time will be necessary to acquire by usucaption the soil on which it stands. This is absurd, and it is by no means in conformity to the Civil Law that the same thing should be obtained by usucaption at different times; as, for example, since a house is composed of two different things, the soil, and what is erected upon it, that they united should change the time established for the usucaption of all immovable property by long-continued possession.

(1) If you should be judicially deprived of a column forming part of your house, I think that you will be entitled to an action on purchase against the vendor, and, in that way, can hold the entire property.

{2) If, however, the house has been demolished, in order that the movable property may be entirely acquired by usucaption, where it has been in possession for the term prescribed for that purpose, the time during which it composed the building cannot be legally reckoned; for, as you were not in possession of the materials alone and apart from the building, so, the house having been demolished, you cannot separately and distinctly possess the materials of which it was constructed; nor can it be held that the same property was possessed at the same time as both real estate and personalty.

24. *Pomponius, On Quintus Mucius, Book XXIV.*

When the law forbids usucaption, the good faith of the possessor is of no advantage to him.

(1) Sometimes usucaption is an advantage to the heir, even though it was not begun to be acquired by the deceased: as, for instance, where the defect, which does not arise from the person but from the property itself, has been remedied. It arises from the property, for example, where it has ceased to belong to the Treasury, or possession of it has been obtained through theft or violence.

25. *Licinius Rufinus, Rules, Book I.* Usucaption cannot take place without possession.

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

A building can never be acquired by lapse of time separate from the ground on which it stands.

27. *The Same, On Sabinus, Book XXXI.*

Celsus, in the Thirty-fourth Book, says that they are mistaken who believe that anyone who has obtained possession of property in good faith can acquire it, by usucaption, as his own; and that it makes no difference whether or not he purchased it, or it was given to him, provided he thinks it was purchased by, or given to him; for the reason that usucaption does not apply to a legacy, a gift, or a dowry, if no donation, dowry, or legacy exists.

The same rule is held to be applicable to the case of an appraisement made in court, for if the party did not agree to the appraisement, he cannot acquire the property by usucaption.

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

It is established that where property is delivered to the slave of an insane person, or an infant,

the latter can obtain it by usucaption through the slave.

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

If I am the sole heir to an estate, but believe that you are an heir to half of the same, and I deliver half of the estate to you, it is very probable that you cannot acquire the property by usucaption, because what is in possession of an heir cannot be obtained in this way by another, as the heir; and you have no other ground for possession. This is only true when done under the terms of a settlement.

We hold that the same rule applies if you think that you are the heir; for, in this instance, the possession of the true heir will prevent you from obtaining the property by usucaption.

30. *The Same, On Sabinus, Book XXX.*

It is asked whether a mixture of different things interrupts the usucaption which has begun to run with reference to each of them. There are three kinds of things which can be divided; first, those which are included in a substance of the same nature, styled by the Greeks i}vo)ju^vov,.that is to say, united, as a slave, a piece of timber, a stone, and other property of this kind. Second, things which are joined by contact, that is to say, which have coherence, and are connected, as a house, a ship, a cupboard. Third, such as are formed of distinct objects, as different bodies which are not united but are included under a single appellation, for instance, a people, a legion, a flock. No question can arise with reference to the usucaption of the first of these, but there is doubt as far as the second and third are concerned.

(1) Labeo, in the Book of Epistles, says that where anyone who has only ten days left, in which to acquire the usucaption of tiles or columns, uses them in building a house, he will still be entitled to them by usucaption if he has possession of the house. What course must be pursued in case that articles are not joined to the soil, but remain movable property, as a precious stone set in a ring? In this instance, it is true that both the gold and the precious stone are in possession, and can be acquired by usucaption, if possession of both continues to exist.

(2) Let us take into consideration the third class of things. An entire flock is not acquired by usucaption in the same way as distinct articles, or as those which are united, are. What, then, must be done? Although the nature of a flock is that it continues to exist by the addition of new animals, usucaption, nevertheless, cannot take place with respect to the flock as a whole, but it follows the same rule as possession, which applies to the separate individuals composing it. For if other animals are purchased and mingled with the flock for the purpose of increasing it, the title to the latter by possession will not be changed; so that if the remainder of the flock belongs to me, the sheep which have been purchased are also mine; but each of the latter will be held by its own title, so that if any of those included in the flock have been stolen, they cannot be acquired by usucaption.

31. *Paulus, On Sabinus, Book XXXII.*

In cases of usucaption, an error of law never benefits the possessor. Hence Proculus says that, if through mistake, a guardian does not, at the beginning of a sale or for a long time after it has been concluded, grant authority to his ward to make it, there will be no ground for usucaption, because an error of law exists.

(1) In an usucaption of movable property, the time is computed continuously.

(2) A slave, even though he may be at liberty, possesses nothing, and another does not possess anything by him. If, however, he should obtain possession in the name of another, while he is at liberty, he will acquire the property for him in whose name he obtained it.

(3) If my slave, or my son, holds anything in my name, or as part of his *peculium,* so that I am not aware that I possess it, or even that I am entitled to acquire it by usucaption, and he becomes insane, then it must be understood that the property remains in the same condition,

and that I still retain possession of it, and have a right to usucaption, just as these rights continue to exist in our favor, even when the parties are asleep.

The same rule must be said to apply to the case of a lessee, or a tenant through whom we acquire possession.

(4) Where anyone has obtained possession either by violence, clandestinely, or under a precarious title, and afterwards becomes insane, the possession and the title remain unchanged with reference to the property which the insane person holds precariously; just as, by means of an interdict, and by an action to obtain possession, we can legally institute proceedings in the name of an insane person, on account of the possession which he himself obtained before his reason became impaired, or acquired by means of another after his insanity had begun.

(5) The time which intervened before the estate was accepted, or after this was done, will benefit the heir in usucaption.

(6) Julianus says that if the deceased had made a purchase, and the heir thinks that he was in possession of the same as a donation, he can acquire the article by usucaption.

32. *Pomponius, On Sabinus, Book XXXII.*

If a thief should purchase the stolen property from its owner, and hold it as delivered to him, he ceases to possess it as having been stolen, and begins to possess it as his own.

(1) When anyone thinks that he is not legally entitled to acquire by usucaption property which is in his possession, it must be said that even if he is mistaken, he cannot profit by usucaption; either because he is not considered to possess it in good faith, or because usucaption is of no advantage where an error of law exists.

(2) No one can possess a portion of anything, the amount of which is uncertain. Therefore, if several persons own land, and each is ignorant of the amount of his share, Labeo says that, strictly speaking, none of them has possession.

33. *Julianus, Digest, Book XLIV.*

Not only *bona fide* purchasers, but also all those who have possession under any title by which usucaption is ordinarily acquired, can obtain as their own the child of a female slave; and I think that this rule has been legally established. For, in every instance, anyone can acquire a female slave by usucaption, unless it is prohibited by the Law of the Twelve Tables, or the Atinian Law. The child of such a slave can be acquired by usucaption, if it was conceived and brought forth at a time when the alleged possessor did not know that its mother had been stolen.

(1) The common opinion that a person himself cannot change the title of his possession is only correct where he knows that he is not a possessor in good faith, and obtains it for the purpose of profit. This can be proved as follows: If anyone purchases a tract of land from another, knowing that it does not belong to the latter, he will hold it as the possessor; but if he purchases the same land from the owner, he will possess it as the purchaser; nor will he himself be considered to have changed the title to his possession. The same rule will apply even if he did not purchase the land from the owner, if he believed it to be his.

In like manner, if he was appointed heir by the owner, or obtained praetorian possession of his estate, he will possess the land as the heir. Further, if he had good reason to think that he was the heir, or was entitled to praetorian possession of the estate, he will possess the land as the heir, and will not be held to have himself changed the title to possession.

As this rule must be adopted with reference to him who has possession, how much more is it applicable to the case of a tenant, who has no possession either during the lifetime, or after the death of/the owner of the land? And, indeed, if the tenant, at the time of the death of the owner, purchased the land from him whom he believed to be the heir of the former, or the

possessor of his estate under the Praetorian Edict, he will begin to hold the property as a purchaser.

(2) If the owner of land thinks that armed men are coming, and, for this reason, takes to flight, he will be considered to have been forci-biy dispossessed, even though none of them should enter upon the land. Still, the same land can be acquired by usucaption by a *bona fide* possessor, even before it again comes under the control of the owner, because the *Lex Plautia et Julia* forbids property which has been taken possession of by force to be acquired by long possession, but not by those who have been driven from it by violence.

(3) If Titius gives me possession of land which I had the intention of bringing suit to recover from him, I shall have good ground for usucaption. But if he from whom I had the intention of demanding a tract of land on account of a stipulation grants me possession of the same, and does so for the purpose of discharging his indebtedness, he places me in such a position that I can obtain the land by prescription.

(4) Anyone who gives property in pledge can acquire it by usucaption as long as it remains in the hands of his creditor, but if the creditor should transfer his possession to another, the usucaption will be interrupted. And, so far as the usucaption is concerned, the case is similar to that of a person who deposited, or lent an article; for it is clear that he ceases to acquire it by usucaption, if the article which was lent or deposited should be delivered to a third party by him who received it as a loan, or a deposit. It is evident if the creditor hypothecated it by a mere agreement, the debtor will continue to acquire it by usucaption.

(5) If I possess in good faith property which belongs to you, and pledge it to you, you not being aware that it was yours, I cease to acquire it by usucaption, because no one is understood to hold his own property in pledge. If, however, it should be pledged by a mere agreement, I will still continue to acquire it by usucaption, because in this way the property is not considered to have been pledged.

(6) If a slave should steal property which has been pledged to his master, as the creditor still continues to be in possession of it, the usucaption of the debtor will not be interrupted, because a slave does not deprive his master of possession. But if a slave of the debtor should steal the property, although the creditor ceases to have possession of the same, the usucaption of the debtor will remain the same as if the creditor had delivered the property to the debtor.

For so far as usucaption is .concerned, slaves do not injure the conditions of their owners by the theft of property. The question will be more easily decided if the slave of a debtor, having precarious possession, steals the property; for if it should be hired, the result will be the same as if it had remained in the hands of the creditor, since, in this instance, the creditor has possession of it. If, however, both titles existed, that is to say, one that is precarious, and another based upon the hiring, the creditor is understood to hold possession, for the claim under a precarious title is not, in this instance, introduced to enable the debtor to have possession, but only to permit him to retain the property.

34. *Alfenus Verus, Epitomes of the Digest by Paulus, Book I.* If a slave, without the knowledge of his master, sells property belonging to his *peculium,* the purchaser can acquire it by usucaption.

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

If a slave, the usufruct of whom has been bequeathed, and who has never been in possession of the heir, should be stolen, the question arises, can the slave be acquired-by usucaption, because the heir is entitled to an action of theft ? Sabinus says that no usucaption can exist in the case of property on account of which an action for theft will lie, but that he who is entitled to the usufruct can bring this action. This, however, must be understood to apply to a case where the usufructuary can use and enjoy his right; for otherwise, the slave would not be in

the condition in which he should be. But if the slave had been stolen from the usufructuary, while in the enjoyment of his right, not only he himself, but also his heir, can bring the action for theft.

36. *Gaius, Diurnal or Golden Matters, Book II.*

It can happen in several ways, that a person laboring under some mistake may sell or give away property as his own which belongs to another; and, under such circumstances, it can be acquired by usucaption by a *bona fide* possessor; for instance, if the heir should sell property which was lent to the deceased, or leased by him, or deposited with him, believing that it belonged to the estate.

(1) Likewise, if anyone, misled by some opinion, and thinking that he is entitled to an estate, which is not the case, should alienate property forming part of the same; or where a person to whom the usufruct of a female slave belongs, believing her children to be his, for the reason that the increase of flocks belongs to the usufructuary, should sell the children;

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

He does not commit a theft, for a theft cannot be committed without the intention of stealing.

(1) Anyone can also obtain possession of the land of another without violence, where it has become vacant through the neglect of the owner, or where the latter has died without leaving an heir, or has been absent for a long time.

38. *The Same, Diurnal or Golden Matters, Book III.*

A person cannot, himself acquire the property by usucaption in this case, because he knows that it belongs to another, and therefore he is a possessor in bad faith; but if he transfers it to someone else who receives it in good faith, the latter can acquire it by/usucaption, for the reason that he has gained possession of property which has not been acquired by force, and has not been stolen: as the opinion of certain ancient authorities, who held that a theft of land or a house could be perpetrated has been abandoned.

39. *Marcianus, Institutes, Book III.*

If the soil cannot be acquired by usucaption, what stands upon it can not be acquired in the same way.

40. *Neratius, Rules, Book V.*

It has been established that where usucaption has been begun by a deceased person, it can be completed before the estate has been entered upon.

41. *The Same, Parchments, Book VII.*

If my agent recovers property which has been stolen from me, although, generally speaking, it is now almost conclusively settled that we can obtain possession by means of an agent, the property, nevertheless, will not again come under my control so that it can be acquired by usucaption, because to decide otherwise would be fallacious.

42. *Papinianus, Questions, Book III.*

If a husband should sell a dotal tract of land to someone who knew, or.was not aware that the property was a part of the dowry, the sale will not be valid. If the woman should afterwards die during the marriage, the transaction must be confirmed, if the entire dowry was given for the benefit of the husband.

The same rule applies where he who sold stolen property subsequently becomes the heir of the owner of the same.

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

If the heir of him who purchased property in good faith knows that it belongs to another, he cannot acquire it by usucaption, provided possession of it has been delivered to him personally; but the knowledge of the heir will not prejudice him so far as the continuance of possession is concerned.

(1) It is certain that a father cannot acquire by usucaption anything which his son has purchased, if he or his son knew that it was the property of someone else.

44. *The Same, Questions, Book XXIII.*

Having been deceived by a plausible error, I believe Titius to be my son, and to be under my control, but the arrogation of him by me was found to be illegal. I do not think that, under the circumstances, he has a right to take charge of my property, for the same rule has not been established in this case as in that of a freeman who serves in good faith as a slave; as it was for the interest of the public to establish this rule, on account of the constant and daily transactions with reference to slaves. For we often purchase freemen, not knowing that they are such, and the adoption and arrogation of children is not as easy, or as frequent.

(1) It is settled that if you sell me property belonging to another, and I know that this is the case, and you deliver it at the same time that the owner ratifies the sale, the time of delivery must be taken into account and the property becomes mine.

(2) Although it has been decided that, so far as usucaption is concerned, the beginning of the possession, and not the time when the contract was made, must be considered; still, it sometimes happens that we take into consideration not the beginning of the present possession, but the reason for a former delivery, which was made in good faith; for instance, where the right to the child of a female slave, whose mother was possessed in good faith, is in question, as the child cannot any the less be acquired by usucaption, although the possessor knew that the mother was the property of another before the child was born.

The same rule applies to the case of a slave who returns under the law of *postliminium.*

(3) The time which has elapsed before the acceptance of an estate is granted for the benefit of usucaption, whether a slave belonging to the estate purchased any property, or whether the deceased had begun to acquire by usucaption. This principle is established as a special privilege.

(4) A son under paternal control bought property belonging to another, and then, becoming the head of a household without knowing it, began to possess the property, which had been delivered to him. Why can he not obtain it by usucaption, as he acted in good faith at the time that he obtained possession, although he was mistaken when he thought that he could not obtain property which he acquired as part of his *peculium?*

The same rule must be said to apply if he had good reason to think that the property which was purchased had come into his hands as a part of his father's estate.

(5) Usucaption which takes place in favor of a purchaser or an heir does not prevent the pursuit of a pledge by a creditor; for, as an usufruct cannot be the subject of usucaption, so the right to pursue a pledge, which is in no way connected with ownership but is founded on an agreement alone, is not extinguished by the usucaption of the property.

(6) The opinion that anyone who becomes insane, and who had previously begun to acquire by usucaption, can continue to do so until it is completed under any title whatsoever, is based on considerations of convenience, in order to prevent his mental weakness from injuriously aifecting his property.

(7) If a slave or a son purchases property while the master or the father is in the hands of the enemy, will he begin to hold the same? If he has possession on account of his *peculium,* usucaption will begin to run, nor will the captivity of his father or master offer any

impediment to this, as his knowledge of it would not be necessary if he was at home.

If, however, the purchase was made without reference ;to the *peculium,* the property cannot be acquired by usucaption, nor can it be understood to be obtained by the right of *postliminium;* for, in order for this to take place, what is said to be obtained by usucaption must already have been possessed. But if the father should die in captivity, for the reason that the time of his death is held to date from the day of his capture, it may be said that the son has had possession for himself, and he can be understood to have acquired the property by usucaption.

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

Prescription based upon long possession is not usually granted for the acquisition of places which are public by the Law of Nations. An instance of this is, where anyone abandons a building which he had constructed upon the seashore, or it was demolished, and another person, having built a house in the same place, the former opposes him by an exception based upon previous occupancy; or where anyone, for the reason that he alone has been accustomed to fish for years in a certain part of a river, under the same prescriptive right forbids another to do so.

(1) A slave who belonged to an estate, after the death of his master, obtained possession of property forming part of his *peculium.* The beginning of usucaption will date from the time when the estate was entered upon, for how can property be acquired in this manner which was not previously in the possession of the deceased?

46. *Hermogenianus, Epitomes of Law, Book V.*

Property which has been received in payment is subject to usucaption where it has been obtained in the discharge of a debt. Not only what is due, but also whatever is given in discharge of the debt is subject to usucaption.

47. *Paulus, On Neratius, Book III.*

If my agent, without my knowledge, takes charge of property purchased in my name, although I may have possession of the same, I cannot acquire it by usucaption; because while we can acquire property by usucaption without knowing that we have possession of it, this has been decided to only be true where something forming part of the *peculium* is concerned.

48. *The Same, Manuals, Book II.*

If, believing that I am indebted to you, I give you property in payment, usucaption can only take place if you yourself think that it is due. The case is different, if I think that I am bound on account of a sale, and therefore deliver the property to you, for no action will lie against me, and you, as the purchaser, will not be entitled to usucaption. The reason for the difference arises from the fact that, in other instances, the time of payment should be considered. Nor does it matter whether, at the time when I make the stipulation, I am aware that the property belongs to another or not, as it will be sufficient if I think it is mine, when you give it to me in payment for a purchase; however, not only the time when a contract was entered into, but also that of payment is taken into account, for no one can acquire property by usucaption as a purchaser who did not buy it, and he cannot, as in other contracts, say that it has been received in payment.

49. *Labeo, Epitomes of Probabilities by Paulus, Book V.*

Property which has been stolen cannot be acquired by usucaption before it has again come under the control of the owner.

Paulus: Perhaps the contrary opinion is true; for if you should steal property which you have given to me in pledge, it becomes stolen goods, but it can be acquired by usucaption as soon as it again comes under my control.

TITLE IV.

CONCERNING POSSESSION ACQUIRED BY A PURCHASER.

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

A possessor who tenders the appraised value of the property in court begins to possess it as a purchaser.

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

He has possession as a purchaser who has actually bought the property, and it will not be sufficient for him merely to be of the opinion that he is in possession as purchaser, but the title to the property, as purchased, must actually exist. If, however, I think that I owe you something, and I deliver it to you without your being aware that it belongs to someone else, you can acquire it by usucaption. Why, therefore, can you not acquire it by usucaption if I deliver it to you, thinking that I have sold it to you? This is because the time of the delivery is considered in all other contracts; hence, if I knowingly stipulate for property belonging to a third party, I can acquire it by usucaption if I thought that it belonged to you when it was delivered to me. In the case of a purchaser, however, the time when the contract was entered into is considered, and therefore the purchase must be made in good faith, and also possession must be obtained in this way.

(1) Title to possession and title to usucaption are different, for anyone may truthfully be said to have made a purchase, but to have made it in bad faith; for anyone who knowingly buys property in bad faith has possession of it as the purchaser, although he cannot acquire it by usucaption.

(2) Where a purchase is made under a condition, the purchaser cannot acquire the property by usucaption while the condition is pending. The same rule applies if he thinks that the condition has been fulfilled, and this has not yet taken place, for he resembles a person who thinks that he has made a purchase, when this is not the case.

On the other hand, if the condition has been complied with and he is ignorant of the fact, he can be said to acquire it by usucaption, according to Sabinus, who held that this could be done by considering rather the nature of things than mere opinion. Some difference, however, exists between these two instances, because where anyone thinks that property belongs to another, which, in fact, belongs to the vendor, he occupies the position of a purchaser. But when he thinks that the Condition has not yet been complied with, it is just as if he thought that he had not yet made the purchase.

This point can be presented more clearly if possession is delivered to the heir, who does not know that the deceased bought the property but thinks it was delivered to him for some other reason; but should it be held that usucaption cannot be acquired under such circumstances?

(3) Sabinus says that if property has been purchased in such a way that the sale will be void unless payment is made within a certain time, it cannot be acquired by usucaption, unless payment has actually been made. Let us see, however, whether this is a condition or an agreement; for if it is an agreement, the result will more readily be accomplished by payment than by complying with the condition.

(4) If settlement is to be made within a specified time (that is to say, if anyone does not offer to pay a better price within that time), Julianus thinks that the sale is perfected, and that the profits will belong to the purchaser, who will have a right to acquire the property by usucaption; but others have held that the sale was made under a condition. He said that it was not made under a condition, but that it was annulled under a condition, which opinion .is correct.

(5) A sale is absolute where it is agreed that it shall be void in case the purchaser should not

be content with the property within a certain time.

(6) I purchased Stichus, and Damas was delivered to me instead of him, by mistake. Priscus says that I cannot acquire this slave by usucaption, because what was not bought cannot be acquired in that way by the purchaser. If, however, a tract of land was purchased and a larger amount has been in possession than what was conveyed, it can be acquired by lapse of time, as the entire tract, and not separate portions of the same, is possessed.

(7) You purchase the property of a person with whom slaves have been deposited. Trebatius says that you cannot acquire the said slaves by usucaption, because they were not purchased.

(8) A guardian bought an article at an auction of his ward, which he thought belonged to him. Servius says that he can acquire it by usucaption, and his opinion has been accepted, for the reason that the condition of the ward does not become worse if he has a purchaser in his guardian, who will pay more money for the property. If he should purchase it for less, he will be liable to an action on guardianship, just as if he had transferred it to some other person for less than it was worth. This, it is said, was also decided by the Divine Trajan.

(9) Many authorities hold, if an agent buys property at auction by the direction of his principal, that he can acquire it by usucaption, as a purchaser, on the ground of public convenience.

The same rule applies if, while transacting the business of his principal, he makes the purchase without the knowledge of the latter.

(10) If your slave purchases property for his *peculium* which he knows belongs to another, you cannot acquire it by usucaption, even if you are not aware that it belongs to someone else.

(11) Celsus says that if my slave, without my knowledge, obtains possession of property for his *peculium,* I can acquire it by usucaption. If he does not obtain it as a part of his *peculium,* I cannot acquire it, unless I know that he has obtained it; and if he has possession which is defective in law, my possession will also be defective.

(12) Pomponius also says, with reference to property which is possessed in the name of the owner, that the intention of the latter, rather than that of the slave, should be considered. If the slave possesses property as part of his *peculium,* then his intention must be taken into consideration; and if the slave possesses it in bad faith, and his master obtains it in order to hold it in his own name, for instance, by depriving the slave of his *peculium,* it must be said that the same reason for possession exists, and therefore, that the master cannot avail himself of usucaption.

(13) If my slave should purchase property for his *peculium* in good faith, and when I first heard of it I knew the property belonged to another, Cassius says that usucaption can take place, for the beginning of the possession was without any defect. If, however, at the time he purchased the property, even though he did so in good faith, I knew that it belonged to someone else, I cannot acquire it by usucaption.

(14) If my slave should give to me, in consideration of his freedom, certain property which he had purchased in bad faith, I cannot acquire it by usucaption; for Celsus says that the first defective possession still continues to exist.

(15) If I make a purchase from a ward without the authority of his guardian, believing that he has reached the age of puberty, we hold that usucaption can take place, as this rather applies to the property than to the opinion. If, however, you know the vendor to be a ward, and you still believe that wards have the right to transact their own affairs without the authority of their guardians, you will not acquire' the property by usucaption, because an error of law is of no advantage to anyone.

(16) If I purchase property from an insane person whom I think to be of sound mind, it has

been established that I can acquire it by usucaption on the ground of public convenience, although the purchase was void; and therefore I will neither be entitled to an action founded upon eviction, nor will the Publician Action lie, nor will any benefit result from previous possession.

(17) If you sell me property which you are about to acquire by usucaption as a purchaser, and I know that it belongs to another, I cannot acquire it by usucaption.

(18) Although possession may benefit the immediate' heir of the deceased, a more distant heir cannot obtain possession of the property.

(19) If the deceased bought property in good faith, it can be acquired by usucaption, even though the heir knew that it belonged to someone else. This rule should be observed, not only in the case of praetorian possession, but also in that of trusts by virtue of which an estate is transferred under the Trebellian Decree of the Senate, as well as with reference to all other praetorian successors.

(20) The time that the property was possessed by the vendor benefits the purchaser in acquiring usucaption of the same.

(21) If I purchase property belonging to another, and while I am in the course of acquiring it by usucaption, the owner brings an action to recover it from me, my usucaption will not be interrupted by the joinder of issue in the case.

If, however, I should prefer to pay the appraised value of the property in court, Julianus says that the title to possession is changed, so far as he who paid the value of the property in court is concerned.

The same rule will apply, if the owner donates the property to him who purchased it from one who is not its owner. This opinion is correct.

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

Payment of the appraised value of the property in court resembles a purchase.

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

A purchaser knew that a part of the land which he bought belonged to another. The opinion was given that he could not obtain any of the land by virtue of long possession. I think that this is true, if the purchaser was not aware what part of the land belonged to another; for if he knew that it was a certain tract of it, I have no doubt that he could obtain the remainder on the ground of long possession.

(1) The same rule of law applies, if a man who purchased an entire tract of land was aware that an undivided part of it belonged to someone else; for he can not only acquire that part by usucaption, but he will not be prevented from acquiring the remaining parts by long possession.

5. *Modestinus, Pandects, Book X.*

If I have pledged property with you, and then steal and sell it, a doubt arises as to whether it can be acquired by usucaption. The better . opinion is that it can be so acquired.

6. *Pomponii's, On Sabinus, Book XXXII.*

Where anyone who is in a way to acquire by usucaption any property, either as heir or as purchaser, has claimed it by a precarious title, he cannot acquire it by usucaption. For what difference is there between these things, when he claims the property by a precarious title, he ceases in both instances to hold possession under his first title?

(1) If, out of ten slaves whom I have purchased, I think that some belong to other persons, and I know which ones they are, I can acquire the others by usucaption. If, however, I do not

know which of them belong to others, I cannot acquire any of them by usucaption.

(2) The time for acquiring by usucaption having expired after the death of a man who purchased a slave, although the heir may not have begun to possess the slave, he will still become his, provided no one else has obtained possession of him in the meantime.

7. *Julianus, Digest, Book XLIV.*

A certain person who possessed a tract of land, as purchaser, died before the time had elapsed for acquiring the land by usucaption, and the slaves who had been left in possession of the property departed with the intention of abandoning it. The question arose whether the time of long possession would, nevertheless, continue to benefit the heir. The answer was, that even if the slaves did leave, the heir could profit by the time.

(1) If I obtain the Cornelian Estate, as purchaser, by virtue of long-continued possession, and I add to it a part of some adjoining land, can I also obtain this portion as purchaser during the remaining time necessary for prescription; or can I acquire it by usucaption during the time prescribed by law? I gave it as my opinion that the adjacent land, which was added to that already purchased, has its own peculiar and distinct condition, and therefore that possession of both tracts must be separately obtained, and must be acquired by long possession in accordance with the time prescribed by law.

(2) My slave directed Titius to purchase a tract of land for him, and Titius transferred the possession of the same to the slave after his manumission. The question arose whether he could obtain it by long possession. The answer was, that if my slave had directed Titius to purchase the land, and Titius had delivered it to him after his manumission, whether he believed that the slave's *peculium* had been given to him, or did not know that it had not, the slave could, nevertheless, obtain the land by long-continued possession, because he either knew that his *peculium* had been given him, or he ought to have known it, and hence he resembles one who pretends to be a creditor.

If, however, Titius knew that his *peculium* had not been given to the slave, he should be understood to have rather bestowed the land as a donation than, to have relinquished it for the discharge of a debt which was not due.

(3) If a guardian should steal the property of his ward and sell it, usucaption will not take place before it has been again placed under the control of the ward; for the guardian is only considered to occupy the place of the owner with reference to the property of his ward when he is administering the affairs of the guardianship, and not when he is despoiling his ward.

(4) Where anyone in good faith purchases land belonging to another and loses possession of the same, and afterwards, when he recovers it, ascertains that it belongs to someone else, he cannot acquire it by lapse of time, for the reason that the beginning of the second possession is defective. Nor does he resemble one who, at the time of the purchase, believed the land to belong to the vendor, but when it was delivered, knew that it belonged to someone else; for, when possession has once been lost, the beginning of the recovered possession must again be taken into consideration. Therefore, if a slave is returned at a time when the purchaser was aware that he belonged to another, usucaption will not take place; even though before he sold him he was in such a position that he could acquire him by usucaption.

The same rule applies to one who has been ejected from land, and, knowing that it belonged to another, recovers possession of it by means of an interdict.

(5) Anyone who knowingly purchases from one whom the Prsetor has forbidden to dispose of the property of an estate, on account of his being suspected of not being the heir, cannot acquire it by usucaption.

(6) If your agent sells a tract of land for only thirty *aurei* which he could have sold for a hundred, in order to cause you injury, and the ipurchaser is not aware of the fact, there is no

doubt that the latter can acquire the land by long-continued possession; for even where anyone knowingly sells land belonging to another to one who is not aware that this is the case, long-continued possession is not interrupted.

If, however, the purchaser should be in collusion with the agent, and, for the sake of a reward, corruptly induces him to sell the property for less than it was worth, the purchaser will not be understood to have acted in good faith, and he cannot acquire the land by prescription. If he avails himself of an exception on the ground that the land was sold with the consent of the owner, and the latter brings an action to recover it, the owner can avail himself of a reply based on fraud.

(7) Stolen property is not understood to be again brought' under the control of the owner, even if he regains possession of the same, if he does not know that it has been stolen from him. Therefore, if I should give in pledge a slave who has been stolen from you, and you are not aware that he is yours, and, after payment of the debt, I should sell him to Titius, Titius cannot acquire him by usucaption.

(8) A freeman who is serving us in good faith as a slave, while managing our property, can acquire other property for us in the same way in which we are accustomed to acquire it by means of our own slaves. Hence, as we obtain the ownership of property either by delivery or by usucaption through the intervention of a person who is free, so, if a contract for a sale is entered into by means of the *peculium* of a slave, to which we are entitled, we can acquire the property by usucaption, even if we are not aware that the purchase has been made.

8. *The Same, On Minicius, Book II.*

Where anyone buys slaves knowing that the vendor will immediately squander the money paid for them, many authorities have held that he will, nevertheless, be a *bona, fide* purchaser in good faith; and this is true. For, how can he be considered to have acted in bad faith, who bought the slaves from their master, unless he bought them from a man of licentious life, who will immediately give the money to a harlot, for then he cannot acquire the slaves by usucaption?

9. *The Same, On Urseius Ferox, Book HI.*

A man who has received from his own slave a female slave in consideration of the grant of his freedom, can, as a purchaser, acquire by usucaption the child of the said female slave.

10. *The Same, On Minicius, Book II.*

A slave, in consideration of his freedom, gave to his master a female slave whom he had stolen. She conceived. The question arose whether her master could acquire her child by usucaption. The answer was that the master could, as purchaser, acquire the child by usucaption, for he gave something for the woman, and a kind of sale was made between the slave and his owner.

11. *Africanus, Questions, Book VII.*

It is usually said that he who thinks that he has bought something and did not do so cannot, as a purchaser, acquire it by usucaption; but this is only true to the extent that the purchaser must have no just cause for entertaining his erroneous opinion. For if a slave or an agent who has been directed to purchase the property should persuade his principal that he has done so, and deliver the property to him, the better opinion is that usucaption will take place.

12. *Papinianus, Opinions, Book X.*

When a legatee has been placed in possession of property, this can be acquired by usucaption by the heir, as purchaser, the right of praetorian pledge being reserved.

13. *Scaevola, Opinions, Book V.*

A certain man purchased, in good faith, a tract of land belonging to another, and began to build a house upon it before the time for acquiring possession of it by prescription had elapsed; and the owner of the land, having notified him before the term fixed by law had expired, continued to retain possession. I ask whether the prescription was interrupted, or, having once begun, continued to run. The answer was that, in accordance with the facts stated, it had not been interrupted.

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

The estate of a sister, who died intestate, passed to her two brothers, one of whom was absent and the other present. The one who was present acted for the absent one, and sold to Lucius Titius, a *bona fide* purchaser, an entire tract of land in his own name and in that of his brother.

The question arose whether the purchaser, knowing that half of the land belonged to the absent heir, could acquire the entire tract by prescription. The answer was that he could do so, if he believed that it had been sold by the authority of the brother who was absent.

TITLE V.

CONCERNING POSSESSION AS HEIR OR AS POSSESSOR.

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

Nothing can be acquired by an heir through usucaption out of the property of a person who is living, even though the possessor thought that it belonged to one who is dead.

2. *Julianus, Digest, Book XLIV.*

When anyone is placed in possession of an estate for the preservation of a legacy, he does not interrupt the possession of him who acquires by usucaption as heir, for he holds the property for safe-keeping. What then results? He will retain the property by the right of pledge, even after the time required for usucaption has elapsed, and he will not relinquish it until his legacy has been paid to him, or his claim to it has been satisfied.

(1) The common opinion that no one can change the title of his own possession must be understood to apply, not only to civil, but also to natural possession. Therefore, it has been held that neither a tenant, nor anyone with whom property has been deposited, or lent, can, as heir, acquire it by usucaption, for the purpose of profiting by it.

(2) Servius denies that a son can, in the capacity of heir, acquire by usucaption property which has been given to him by his father; for he held that natural possession of it was in the hands of the son during the lifetime of his father. The result of this is that, where a son has been appointed heir by his father, he cannot acquire by usucaption any portion of the estate given to him by the former so far as this may affect the shares of his co-heirs.

3. *Pomponius, On Quintus Mucius, Book XXIII.*

Many authorities hold that if I am the heir, and think that certain property belongs to the estate, but which really forms no part of it, I can acquire it by usucaption.

4. *Paulus, On the Lex Julia et Papia, Book V.* It is established that he who has a right to make a will can, in the capacity of heir, acquire property by usucaption.

TITLE VI.

CONCERNING POSSESSION ON THE GROUND OF DONATION.

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

He to whom property has been delivered as a gift acquires it by usucaption, because of the donation. It is not sufficient to think that this was the case, but it is necessary for the donation actually to be made.

(1) If a father makes a donation to his son whom he has under his control, and then dies, the son cannot acquire the property given by usucaption, for the reason that the donation is void.

(2) Where a donation is made between husband and wife, usucaption does not take place. Moreover, Cassius says that if a husband should give property to his wife, and a divorce should then take place, usucaption cannot be acquired because the wife cannot, herself, change the title to possession.

He states that the rule is different, and that she can obtain the property by usucaption after the divorce, if the husband has allowed her to use the property just as if he was understood to have donated it to her. Julianus, however, thinks that a wife is in possession of property donated by her husband.

2. *Marcellus, Digest, Book XXII.*

Where anyone donates property belonging to another, and determines to revoke the donation, even if he has instituted proceedings to recover it, the usucaption will continue to run.

3. *Pomponius, On Quintus Mucius, Book XXIV.*

When a husband makes a donation to his wife, or a wife to her husband, and the property donated belongs to another, the opinion of Trebatius is, if the party who made the donation does not become any poorer by doing so, the possessor can acquire the property by usucaption, is correct.

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

If a father makes a donation to his daughter, who is under his control, and has disinherited her, and the heir ratines the donation, she can begin to acquire it by usucaption from the day when the ratification was made.

5. *Scsevola, Opinions, Book V.*

Where anyone has begun to acquire a slave by usucaption, as a gift, and manumits him, the act of manumission is void, because he has not yet obtained the ownership of the slave. The question arose whether he had ceased to acquire him by usucaption. The answer was that with reference to the person in question, he seemed to have relinquished possession, and hence usucaption was interrupted.

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

When sale has been made which is, in fact, a donation, the property delivered is acquired by usucaption, as a purchase, and not as a gift.

TITLE VII.

CONCERNING POSSESSION ON THE GROUND OF ABANDONMENT.

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

Where property is considered to be abandoned, it immediately ceases to be ours, and belongs to the first occupant, because it ceases to belong to us under the same circumstances that it is acquired by others.

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

We can acquire property on the ground of abandonment, if we know that it is considered as relinquished by its owner.

(1) Proculus holds that the property does not cease to belong to .the owner, unless possession of it is acquired by someone else. Julianus, however, thinks that it ceases to belong to the owner when he abandons it, but that it does not become the property of another, unless he obtains possession of it. This is correct.

3. *Modestinus, Differences, Book VII.*

An inquiry is sometimes made whether a portion of anything can be considered to have been abandoned. And, indeed, if a joint-owner gives up his share of the common property, it ceases to belong to him, so that the same rule is applicable to a portion that is to all. The sole owner of property, however, cannot retain a part of the same and abandon the remainder.

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

We can acquire by usucaption property which is considered to be abandoned, when we think that this is the case, even if we do not know by whom it has been abandoned.

5. Pomponius, On Sabinus, Book XXXII.

If you possess any article which is considered to have been abandoned, and I, knowing this to be the case, purchase it from you, it is established that I can acquire it by usucaption, and the objection that it is not included in your property cannot be raised. For if I knowingly purchase property given to you by your wife, for the reason that you have done this, as it were, with the consent and permission of the owner, the same rule will apply.

(1) Whatever anyone considers to have been abandoned by himself immediately becomes mine, if I take it. Hence, if anyone throws away money, or releases birds, although he intends that they shall belong to anyone who may seize them, they, nevertheless, become the property of him whom chance may favor; for where anyone relinquishes the ownership of property, he is understood to have intended it to belong to anyone else whomsoever.

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

No one can acquire property by usucaption on the ground of abandonment who erroneously thinks that it has been abandoned.

7. *The Same, On Minicius, Book II.*

When anyone finds merchandise which has been thrown overboard from a ship, the question arises whether he cannot acquire it by usucaption, for the reason that it should be considered as abandoned. The better opinion is that he cannot acquire it by usucaption on the ground of abandonment.

8. *Paulus, Opinions, Book XVIII.*

Sempronius attempted to raise a question as to the condition of a certain Thetis, alleging that she was the daughter of one of his female slaves. He, however, having been sued by Procula, the nurse of Thetis, in an action to compel him to reimburse her for Thetis's support, answered that he did not have the means to make payment, but that the nurse should restore the child to her father, Lucius Titius. The nurse then instituted proceedings to prevent any question from being raised afterwards by the said Sempronius. Lucius Titius, after having paid Seia Procula her claim for support, publicly manumitted the child.

I ask whether the freedom granted to Thetis can be revoked. Paulus answered that, as the owner of the female slave to whom Thetis was born was considered to have abandoned the latter, she could obtain her freedom at the hands of Lucius Titius.

TITLE VIII.

CONCERNING POSSESSION ON THE GROUND OF A LEGACY.

1. *Ulpianus, Disputations, Book VI.*

He is considered to be in possession as a legatee to whom the bequest has been left, for possession and usucaption based on the legacy will take place only in favor of the person to whom the property has been bequeathed.

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

If I possess anything which I think was bequeathed to me, and this is not the case, I cannot, in the capacity of legatee, acquire it by usucaption.

3. *Papinianus, Questions, Book XXII.*

No more than where anyone thinks that he has purchased something which he has not purchased.

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

Property can be acquired by usucaption on the ground of its being a legacy, where something belonging to another has been bequeathed, or where it belonged to the testator, and it is not known that it was taken away by a codicil; for, in instances of this kind, a good reason exists for usucaption to take effect.

The same rule can be said to apply where the name of the legatee is in doubt, as, for example, where a bequest is made to Titius, and there are two individuals of that name, so that one of them thinks that he was meant, when this was not the case.

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

Property delivered as a legacy can be acquired by usucaption on this ground, even though the owner of it may be living.

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

If the person to whom the property was delivered thinks that the testator is dead.

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

No one can acquire property by usucaption on account of a legacy, unless he himself had a right to make a will for the benefit of the testator, because possession of this kind depends upon testamentary capacity.

8. *Papinianus, Questions, Book XXIII.*

If the legatee takes possession of the legacy without any question arising to affect his title, even if the bequest has not been delivered to him, he will be entitled to acquire by usucaption the property bequeathed to him.

9. *Hermogenianus, Epitomes of Law, Book V.*

A person to whom a legacy has been legally bequeathed acquires property by usucaption, as a legatee. If, however, it has not been left in conformity to law, or the legacy has been taken away, it has been decided, after much controversy, that the property can be acquired by usucaption on account of the legacy.

TITLE IX.

CONCERNING POSSESSION ON THE GROUND OF A DOWRY.

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

A right to usucaption, and one which is extremely just, is that which is said to exist on account of a dowry, so that anyone who receives property by way of dowry can acquire it by usucaption, after the expiration of the time usually prescribed by law in the case of those who acquire property in this manner as purchasers.

(1) It makes no difference whether certain specified articles, or the entire amount of the property, is given by way of dowry.

(2) In the first place, let us consider the time when anyone can acquire property by usucaption as dowry; and whether this is to begin after the date of the marriage, or before it. A question

commonly discussed is, whether a man who is betrothed (that is to say, one who has not yet been married), can acquire property by usucaption, because of its being a dowry. Julianus says that, if the woman who is betrothed delivers the property to the other party, with the intention that it shall not belong to him until after the marriage has been solemnized, usucaption will not take place. If, however, this was evidently not the intention, it should be held (so Julianus says) that the property immediately becomes his; and if it belongs to someone else, it can be acquired by usucaption. This opinion seems to me to be plausible. But, before the marriage takes place, usucaption becomes operative, not because of the dowry, but on the ground of ownership.

(3) During the existence of the marriage, usucaption takes place between the persons who are married, on account of the dowry. If, however, the marriage does not exist, Cassius says that usucaption cannot occur as there is no dowry.

(4) He also says that if the husband thinks that he is married, when this is not the case, he cannot acquire the property by usucaption, because there is no dowry. This opinion is reasonable.

2. *Paulus, On the Edict, Book L1V.*

If property which has been appraised is delivered before the marriage has been solemnized, it cannot be acquired by usucaption, either on the ground of purchase or on that of ownership.

3. *Scaevola, Digest, Book XXV.*

Two daughters became the heirs of their father who died intestate, and each one of them gave slaves belonging to them in common by way of dowry, and then, some years after the death of their father, they brought suit in partition. As the husbands had for many years held possession of the slaves given by way of dowry as dotal slaves, the question arose whether they could be held to have acquired them by usucaption, if they believed that they belonged to those who had given them as dowry. The answer was that there was nothing in the case stated to prevent them from being acquired by usucaption.

TITLE X.

CONCERNING POSSESSION ON THE GROUND OF OWNERSHIP.

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

Possession on the ground of ownership exists where we think we acquire property for ourselves, and have possession of it under the title by which it was obtained, as well as because of ownership; as, for instance, when, by virtue of a purchase I hold possession both as purchaser and as owner. Moreover, I hold possession both as legatee and donee, and also on the ground of ownership, where property has been donated or bequeathed to me.

(1) Where, however, property has been delivered to me under some good title, for example, by that of purchase, and I acquire it by usucaption, I begin to hold possession of it as mine, even before acquiring it by usucaption. But can any doubt arise as to whether I cease to hold it, as purchaser, after usucaption has taken place? Mauri-cianus says that he thinks that I do not cease to hold it.

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

There is a kind of possession which is said to be based upon ownership. For in this way we possess everything which we acquire from the sea, the land, or the air, or which becomes ours by the action of the alluvium of streams. We also possess any offspring of property which we hold in the name of others; as, for instance, we hold as our own the child of a female slave belonging to an estate, or who has been purchased; and, in like manner, we possess the profits derived from property which has been bought or donated, or which constitutes part of an estate.

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

You delivered to me a slave whom you erroneously thought I was entitled to under the terms of a stipulation. If I knew that you did not owe me anything, I cannot acquire the slave by usucaption; but if I did not know it, the better opinion is that I can acquire him by usucaption, because the delivery, which was made for what I think to be a good consideration, is sufficient to enable me to possess as my own the property which has been delivered to me.

Neratius adopted this opinion, and I think it is correct.

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

If you purchased in good faith a female slave who had been stolen, and you have in your possession the child of said slave, that she conceived while in your hands, and, before the time prescribed for usucaption has elapsed you ascertain that the mother of the said child has been stolen, Trebatius thinks that the child which is possessed in this manner can unquestionably be acquired by prescription. I think that a distinction should be made in this case, for, if within the time prescribed by law for usucaption to take effect ygu-do not ascertain to whom the slave belongs or if you knew this, without being able to notify the owner of the slave, or if you were able to notify him, and did it, you can acquire the slave by usucaption.

If, however, you were aware that the slave had been stolen, and you could have notified the owner, but failed to do so, the contrary rule will apply; for you will be considered to have possessed her clandestinely, as the same person cannot possess property as his own and clandestinely at the same time.

(1) When a father divides his property among his children, and, after his death, they retain it, for the reason that it was agreed among them that this division of his estate should be ratified, usucaption on the ground of ownership will benefit so far as any property belonging to others, which may be found among the effects of the father, is concerned.

(2) Where property has not been bequeathed, but has been delivered as such by the heir through mistake, it is established that it can be acquired through usucaption by the legatee, because he possesses it as owner.

5. *Neratius, Parchments, Book V.*

The usucaption of property which we have obtained for other reasons than because we think that we are entitled to it as our own has been established in order to put an end to litigation.

(1) A person can acquire by usucaption the property of which he has possession, thinking that it belongs to him; even if this opinion is false. This, however, should be understood to mean that a plausible error of the party in possession does not interfere with his right to usucaption; for instance, if I possess some article because I erroneously think that my slave, or the slave of someone whom I have succeeded as heir at law, purchased it, as ignorance of the act of another is an excusable mistake.

THE DIGEST OR PANDECTS.

BOOK XLII.

TITLE I.

CONCERNING RES JUDICATA AND THE EFFECT OF DECISIONS, AND INTERLOCUTORY DECREES.

1. *Modestinus, Pandects, Book VII.*

By *res judicata,* is meant the termination of a controversy by the judgment of a court. This is accomplished either by an adverse decision, or by discharge from liability.

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

The magistrate having jurisdiction of a suit does not always observe the time prescribed by law, for sometimes he shortens, and sometimes he extends it, dependent upon the nature of the case, the amount of property in dispute, or the obedience or obstinacy of the parties; but rarely is the judgment executed within the time fixed by law, as, for example, where the question of support is to be determined, or relief is to be granted to a minor of twenty-five years of age.

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

He who has power to condemn has also power to discharge from liability.

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

If an agent does not appear, an action to enforce judgment against him will be refused, and will be granted against his principal; but if he does appear, it will be granted against him. In this instance, however, he is not held to have appeared in court who has been appointed agent in a case in which he is interested; for there is another reason why he cannot refuse to plead in an action to enforce judgment, and that is because he has become an agent in his own behalf, and not in that of another.

(1) A guardian and a curator are in such a position that they are not considered to have appeared in court, and therefore, an action to enforce judgment should not be granted against them.

(2) The agent of a municipality can avoid execution in a case where judgment has been rendered, for an action to enforce judgment should be granted against the citizens.

(3) The Prsetor says: "I will grant an action to compel the party against whom a decision has been rendered to pay the money." Hence the party who has lost his case is required to make payment. But what should be done, and what shall we say, if he is not prepared to make payment, but is ready to satisfy the claim in some other way ? Labeo says that it should be added, "If the party who had lost his case should not satisfy the claim," for it may happen that he has a solvent person to offer in his stead. The reason, however, for requiring payment is that the Prater was unwilling that a new obligation should be created out of the former one; and therefore he provides that the money shall be paid. The opinion of Labeo should be adopted for good and sufficient reasons.

(4) If, after the decision and by agreement of the litigants, security is furnished by the party who lost his case, the rule will be relaxed with reference to him if a new contract is made; but if this is not done for the purpose of entering into a new contract, the order of execution will stand. If, however, pledges are accepted, or securities are furnished to provide for the execution of the judgment, the result will be that we must hold that the execution will remain just as if something had been added to the decision in the case, and nothing had been withdrawn from it. The same rule should be gbserved in the case of a party whose agent had judgment rendered against him.

(5) When a decision is rendered against anyone requiring him to make payment within a certain time, from what date must we compute the time for the action to enforce judgment? Shall we do so from the day when the decision was rendered, or from the day when the time prescribed in cases of this kind has elapsed? If the judge fixed a shorter time than that prescribed by law, what is lacking through his decision must be supplied by the law. If, however, the judge, in fixing the period, included a greater number of days than those legally allowed, the unsuccessful party will be granted not only the time prescribed by law, but also that which the judge granted in.addition.

(6) We must understand a person who has been condemned to be one who has had a judgment legally rendered against him in such a way that it will stand. If, however, for any reason, the judgment should prove to be of no effect, it must be said that the term "condemnation" will not be applicable.

(7) We should understand a discharge from liability to mean not only that the party pays the claim, but that he is entirely released from the obligation upon which the judgment was founded.

(8) Celsus says that if you had a decision rendered against you in a noxal action, and by way of reparation you gave up a slave in whom another had the usufruct, you will still be liable to the action to enforce judgment; but if the usufruct should be extinguished, he states that you will be released.

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

The Pra?tor says, "The decision with reference to the property was rendered by the magistrate having jurisdiction." It would be better if he had said, "By him who had cognizance of the matter," for the word "cognizance" also has reference to judges who have no jurisdiction of these questions, but who have the right to examine certain other cases.

(1) If a judge should decide against anyone as follows, "Let So-and-So deliver to Titius what he has received under the will or codicil of Msevius," we must understand this to mean the same as if he had expressly mentioned the amount which had been left by the will or the codicil.

The same rule will apply if he had decided that a verbal trust should be executed.

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

Where a decision is rendered against a soldier, who has completed his term of military service, he is only compelled to pay what his resources will permit.

(1) Where a party to a suit has been condemned to pay ten *aurei,* or to surrender the cause of the damage by way of reparation, he will be compelled, by the action to enforce judgment, to pay the sum of ten *aurei,* because he obtains from the law the power of surrendering the animal which caused the damage. He, however, who stipulated for either the payment of ten *aurei* or the surrender of the animal, or slave, by way of reparation, cannot claim the ten *aurei,* because each of these things is included in the agreement and we were able to stipulate for them separately. A decision calling for the surrender of the slave or animal by way of reparation will be void, but it follows a judgment requiring the payment of the money, and therefore proceedings to collect the ten *aurei* should be instituted under the judgment, for it has reference to them alone, and the surrender of the animal or the slave by way of reparation is granted by the law.

(2) He who, by his own authority, sells the property of anyone whom, he has defeated in a lawsuit, will be liable to an action of theft, as well as one of robbery with violence.

(3) The action to enforce the execution of a judgment is a perpetual one, includes the pursuit of the property, and lies both for and against an heir.

7. *Gaius, On the Edict of the Urban Prsetor, Title: On Res Judicata.*

There is, at present, no doubt that he against whom judgment has been rendered can be released in many ways within the time prescribed for execution; although, during that time, proceedings in execution can not be instituted against him, because, where a case has been decided, the time fixed by law has been established in favor of the party who lost his case, and not against him.

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

If a slave who is claimed under the terms of a stipulation dies after issue has been joined in a case, the defendant will not be released from liability, and it has been decided that he must render an account of the profits.

9. *Pomponius, On Plautius, Book V.*

Judgment cannot be rendered by a magistrate or an arbiter against a person who is insane.

10. *Marcellus, Digest, Book II.*

A man who falsely represents himself to be the head of a household, who borrows money, and who has been disinherited by his father, should have judgment rendered against him, even though he cannot make payment.

11. *Celsus, Digest, Book V.*

If I have stipulated for something to be done on the *Kalends* of a certain month, and judgment has been rendered some time after the *Kalends* of that month, the amount of damages must be estimated in proportion to my interest in having the work done on the date above mentioned; for if the estimate is made from that time, I would have no further interest than in what could be paid later.

12. *Marcellus, Digest, Book IV.* In decisions having reference to deposits or loans for use, although the property may have been lost through the fraud of the defendant, it is customary to grant him relief by compelling the owner to transfer to him his rights of action.

13. *Celsus, Digest, Book VI.*

Where anyone stipulated for ten *aurei* to be paid by one person and security to be given by another, the amount of damages should be estimated in proportion to the interest of the stipulator in having security furnished him. This interest can amount to as much as what is due, or to less, or sometimes even to nothing; for no estimate can be made of groundless fear. If, however, the debt should be paid, there will be no remaining interest to be estimated, and if a certain amount of it has been paid, the value of the interest will decrease in proportion.

(1) When anyone promises that he will prevent the stipulator from sustaining any loss, and he does so, and the stipulator does not suffer any damage, he is considered to have done what he agreed to. If he fails to do this, judgment will be rendered against him for a certain sum of money, for the reason that he did not do what he promised, as happens in all kinds of obligations which relate to the performance of certain acts.

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

Whatever the Praetor ordered or forbade to be done he can annul by a contrary decision, or renew; but this does not apply to final decrees.

15. *Ulpianus, On the Duties of Consul, Book HI.*

It was stated by the Divine Pius in a Rescript addressed to the magistrates of the Roman people, that those who appoint judges or arbitrators must authorize the execution of the judgments rendered by them.

(1) Our Emperor and his Father stated in a Rescript that even the governor of a province could execute a judgment pronounced at Rome, if he was directed to do so.

(2) Hence, in the judicial sale of anything which has been taken in execution, movable property, such as animals, must first be sold. If the price of this is sufficient to satisfy the claim, well and good; if it is not, then the real property should be ordered to be taken in execution and sold. Where, however, there is no movable property, the land must be levied upon and sold, in the beginning. Courts are accustomed to decide that, if there is no movable property, the land must be taken into execution, for it is not usual in the beginning to take the land. If the land is not sufficient to pay the debt, or the debtor has none, then any credits which he may have are taken in execution and sold. It is thus that the governors of provinces execute judgment.

(3) If property taken in execution does not find a purchaser, it was stated in a Rescript by our Emperor and his Divine Father that it shall be adjudged to him in whose favor the decision against the party who lost the case was rendered.

The property is adjudged to him in proportion to the amount which is due, for if the creditor prefers to accept it in satisfaction of his claim he must be content with it, and the Rescript states that he cannot demand any more than he is entitled to; because, if he is content with the property taken in execution, he is considered as having mad.e an agreement for the satisfaction of his claim; nor can he say that he held the property in pledge for a certain amount and bring an action to recover the balance.

(4) If a controversy arises concerning property taken in execution, it has been decided by our Emperor that those who are executing the judgment shall make an examination of it, and if they ascertain that it belongs to the party who was defeated, they must execute the judgment. It must, however, be noted that they are obliged to make this examination summarily; nor can their decision prejudice the debtor, if they think that the property should be released as belonging to the party who raised the controversy, and not to him in whose name it was taken in execution; nor should he to whom it is delivered be immediately entitled to it by virtue of the decree, if the property is such that it can be recovered from him in the ordinary course of law. Hence, the result is that the matter will remain in its original condition and the property affected by the judgment can only benefit the aforesaid party by usucaption. It must, however, be said that where a dispute arises with reference to what has been taken in execution it should be relinquished, and other property be taken with respect to which no controversy exists.

(5) Let us see, if the property taken in execution has been pledged, whether it can be sold, so that the creditor having been satisfied, any remainder can be applied to the judgment. And, although a creditor cannot be compelled to sell property which he received by way of pledge, it can, however, be kept until execution on the judgment is issued, and if the property seized should find a purchaser, who, after the creditor has been satisfied, is ready to pay any balance remaining, the sale of this property also may be allowed.

It is not held that the condition of the creditor becomes any worse, as he has obtained that to which he was entitled, nor should his right of pledge be released before his claim has been satisfied.

(6) If, after the property taken in execution has been adjudged, any controversy arises with reference to the purchaser, let us see whether the magistrate who executed the judgment will have jurisdiction of the matter. I do not think that there is any ground for further inquiry, as, when the purchase has once been perfected, he who bought the property must assume the risk; and certainly, after the purchaser has been given possession, the duty of the judge is at an end.

The same rule will apply, if the property is adjudged to him in favor of whom the decision was rendered.

(7) If the purchaser to whom the property was adjudged by the court does not pay the price, let us see whether the magistrates, whose duty it is to execute the judgment, should call him to account. I do not think that they can go any farther, otherwise the proceedings would become interminable.

But what can we say in a case .of this kind? Shall they render judgment against the purchaser, and issue execution against him? Or shall they immediately consider the case as decided? And what must be done if the purchaser denies that he bought the property, or alleges that he has paid for it? The better opinion will be for the judge not to interfere, and especially since the party in whose favor the judgment was rendered has no right of action against him who obtains the property, and besides suffers no wrong; as it is necessary for property taken in execution and sold to be paid for in cash, and not that the money shall be paid after a certain time. And, indeed, if the court should interfere, it ought only to do so to the extent of taking and selling the property which had been adjudged, just as if it had not been released from the lien of the judgment.

(8) Magistrates can also execute a judgment by taking the claims of the debtor, if there is nothing else subject to execution, for our Emperor stated in a Rescript that a promissory note could be taken in execution.

(9) But let us see whether only a credit which is acknowledged by the debtor can be levied on, or whether this can be done if he denies his liability. The better opinion is, that only that should be levied on which he admits to be due. If, however, he should deny that he owes the claim, it would be perfectly proper not to include it; unless someone, following the example of the seizure of movable property, should proceed still farther, and say that the judges themselves ought to make an investigation of the claim, as they do in the case of other personal effects, but it is stated differently in a rescript.

(10) Again, what shall we say where the judges themselves take action with reference to the claim, and require the amount of the debt to be paid on the judgment; or if they should sell the claim, as they are accustomed to do, where other personal property is taken in execution? It is necessary that they should do whatever seems to them best in order to execute the judgment.

(11) If the party against whom the judgment is rendered has money deposited with bankers, it can also be taken into execution. And further, if there is any money in the hands of anyone else, which should be paid to the party who lost the case, it is customary to levy on it, and apply it to the payment of the judgment.

(12) Moreover, money which has been deposited with anyone for safe-keeping, or placed in a chest for the same purpose, can be levied on for the purpose of satisfying a judgment. Again, where money belonging to a ward has been placed in a chest for the purchase of land, it can be taken by the judge charged with the execution of the judgment, without the permission of the Praetor, and employed for the payment of the claim.

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

There are persons who can only be sued for amounts which they are able to pay; that is to say, without deducting their debts. Such persons are those against whom suit is brought on account of some partnership, for a partnership is understood to include all property.

The same rule applies to ascendants,

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

As well as to a patron, a patroness, their children and their ascendants. Likewise a husband, when sued for a dowry, is only liable for what he can pay.

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

A soldier also, who has had judgment rendered against him, is after his discharge only

compelled to pay to the extent of his means.

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

Where there are several persons to whom money is due for the same reason, the position of the most diligent is preferable; and no deduction is made of what is due to persons of equal rank, as is the case in an action *De peculio;* for, in this instance, the position of the one who first proceeds is the most advantageous. The indebtedness should not, however, be deducted where suit is brought against a father or a patron, especially where the debt is due to persons of the same condition, as to other children or other freedmen.

(1) He, also, against whom an action is brought on account of a donation, can only have judgment rendered against me for the amount which he is able to pay; and he, in fact, is the only one with reference to whom the indebtedness should be deducted. So far as those to whom money is due for the same reason is concerned, the position of the most diligent is preferable. And, indeed, I do not think that everything that he has should be extorted from him, but that care should be taken not to reduce him to poverty.

20. *Modestinus, Differences, Book II.*

A husband can have judgment rendered against him in the case of a dowry, to the amount that he is able to pay; but, when he is sued by his wife on account of some other contract, by a Constitution of the Divine Pius he can also have judgment rendered against him to the extent of his means.

Equity also suggests that this same rule should apply where a wife is sued by her husband.

21. *Paulus, On Plautius, Book VI.*

Moreover, just as in the case of a husband, so also a father-in-law cannot have judgment rendered against him beyond his ability to pay. If, however, an action based on his promise of a dowry is brought against the father-in-law, can judgment be rendered against him to the extent of his means? This seems to be equitable, but it is not our practice, as Neratius states.

22. *Pomponius, On Quintus Mucius, Book XXI.*

This, however, is understood to mean where an action is brought against a father-in-law, to recover a dowry which has been promised after the marriage has been dissolved. But if suit is brought to recover the dowry, during the continuance of the marriage, relief should be granted him, in order that he may not have judgment rendered against him for more than he is able to pay.

(1) With reference to what has been stated as to the case of partners, namely, that they can have judgment rendered against them to the extent of their pecuniary resources, the Prsetor says in his Edict

that he will act if proper cause is shown. This will take place to prevent relief being granted to anyone who denies that he is a partner, or who is liable on account of fraud.

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

If an action to recover a dowry is brought against an agent of the husband, and judgment is rendered during the lifetime of the latter, it can only be for the amount which he is able to pay, for the defender of the husband can only have judgment rendered against him for that amount; but if the husband should be dead, the judgment will include the entire dowry.

24. *Pomponius, On Plautius, Book IV.*

If a surety has been accepted for the payment of the debt or the judgment, it will be no advantage to him if the person for whom he bound himself has judgment rendered against him for the amount which he is able to pay.

(1) If the husband should not be solvent, he can take advantage of the fact that he is not able to make payment; for this privilege is granted to him personally, and will not profit his heir.

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

It must be noted that the heirs of such persons are not liable to the extent of their ability to make payment, but for the entire amount.

26. *Ulpianus, On the Edict, Book LXXVII.*

If litigants should agree as to the amount for which judgment shall be rendered, it will not be improper for the judge to decide accordingly.

27. *Modestinus, Opinions, Book 1.*

The Governor of a province rendered a decision that a party should pay compound interest, contrary to the laws and the Imperial Constitutions, and, on this ground, Lucius Titius took an appeal from the unjust decision of the Governor. As Titius did not take his appeal in accordance with law, I ask whether the money can be collected under the judgment. Modestinus answered that if the judgment was for a specified sum, there was nothing in the case stated why execution could not be issued.

28.' *The Same, Opinions, Book II.*

Two judges rendered two different decisions. Modestinus gave it as his opinion that they should remain in suspense until a competent magistrate had confirmed one of them.

29. *The Same, Pandects, Book VII.*

The time granted to a party to satisfy a judgment rendered against him is also granted to his heirs and other successors, at least the time that has not expired, because the privilege is conceded rather to the case than to the person.

30. *Pomponius, Various Passages, Book VII.*

Where a certain sum of money is promised as a donation, and it is probable that the resources of the donor will be exhausted to such an extent that he will have almost nothing left, an action should be granted against him for what he is able to pay, so that enough may remain in his hands to enable him to live.

This rule ought, by all means, to be observed between children and parents.

31. *Callistratus, Judicial Inquiries, Book II.*

Time for payment should not only be granted to debtors who request it, but it should also be prolonged, if circumstances demand it. Where, however, anyone defers payment, rather through obstinacy than because he cannot obtain the money, he should be compelled to pay by taking his property in execution to satisfy the claim, according to the following rule which the Divine Pius prescribed to the Proconsul Cassius, namely, "Time for payment should be granted to those who admit that they owe a debt, or who are required to pay by a judgment, and the time should be such as appears to be sufficient in accordance with their means. If they do not make payment within the time granted in the beginning, or after it has been prolonged, their property an be levied on and sold, if they do not satisfy the claim or the judgment within two months; and if anything remains out of the price, it shall be returned to him whose property was taken in execution."

32. *The Same, Judicial Inquiries, Book III.*

Where a judge rules against constitutions which are cited, for the reason that he does not think them to be applicable to the case in question, he is not considered to have ruled against them improperly, and therefore an appeal can be taken from his decision; otherwise the matter will be held to have been finally determined.

33. *The Same, Judicial Inquiries, Book V.*

The Divine Hadrian, having been presented with a petition by Julius Tarentinus, in which he alleged that a decision had been rendered against him through the judge having been deceived by forged evidence, and by a conspiracy of his adversaries, wh'o had corrupted witnesses with money, the Emperor stated in a Rescript that he was entitled to complete restitution, as follows: "I have ordered a copy of the petition which was presented to me by Julius Tarentinus to be sent to you. If he proves that he has been oppressed by a conspiracy of his adversaries, and that their witnesses have been corrupted with money, you will inflict severe punishment; and if the decision of the judge was induced by false representations, you will grant complete restitution."

34. *Licinius Rufinus, Rules, Book XIII.*

If anyone objects to a party against whom judgment has been rendered retaining any provisions, or his bed, a penal praetorian action should be granted against him; or, as some authorities hold, he can be sued for injury sustained.

35. *Papirius Justus, Constitutions, Book II.*

The Emperors Antoninus and Verus stated in a Rescript that, although it is not necessary to again begin proceedings on the ground of new documentary evidence having been discovered, they will, nevertheless, in matters relating to public business, permit such evidence to be used, if proper cause is shown.

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

Pomponius, in the Thirty-seventh Book on the Edict, says that where there are several judges investigating a matter involving freedom, and one of them is not sufficiently informed to render a decision, and the others agree; if the former swears that he is not sufficiently informed, and does not take further part in the proceedings, the others, who have agreed, can render judgment; because, even though the judge aforesaid may dissent, the decision of the majority will stand.

37. *Marcellus, Digest, Book V.*

All the judges are understood to have rendered a decision when they are all present.

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

When the number of judges is equal, and different opinions are given in a case involving freedom, judgment shall be rendered in favor of freedom (in accordance with the Constitution of the Divine Pius), but, in all other cases, judgment shall be rendered in favor of the defendant.

This rule must also be observed in criminal cases.

(1) If judges render decisions for different amounts, Julianus says that that for the smallest one must be adopted.

39. *Celsus, Digest, Book HI.*

Where three judges are appointed to hear a case, two of them cannot decide it, if one is absent, as all three have been ordered to hear it. If, however, the third is present, and does not concur with the others, the judgment of the two shall stand. For it is certainly true that all of them have rendered a decision.

40. *Papinianus, Opinions, Book X.*

It has been established that a party against whom a judgment has been rendered shall be deprived of the advantages attaching to the rewards given on account of the sacred crowns won in public contests, and that this money can be taken in execution for the satisfaction of

the judgment.

41. *Paulus, Questions, Book XIV.*

Nesehnius Appollinaris: If you are about to make a donation to me, and I delegate you to pay my creditor, can an action be brought against you for the entire amount? And if you are sued for the entire amount, do you think that it will be different, if I should not appoint you to pay my creditor, but someone to whom I desire to give an equal sum? And what must be done in the case of one who, desiring to give a donation to a woman, promises a dowry to her husband?

The answer was that the creditor cannot be barred by an exception, although the person who was delegated can avail himself of one against him in whose name he made the promise. The case of the husband is the same; and especially so, if he brings an action during the existence of the marriage. And, as the heir of the donor can have judgment rendered against him in full, so the surety, who rendered himself liable for the donation, can also be sued for the entire amount, as well as anyone else to whom the donation was not given.

(1) A certain person donated a tract of land. If he did not deliver it, he can have judgment rendered against him just like any other possessor. If, however, he delivered the land, judgment may be rendered against him for the entire crop, if he has not consumed it, and he cannot be released from liability, even if he surrenders it immediately. If he has ceased to hold possession through fraud, the donee shall be sworn in court, and judgment shall be rendered in accordance with the sum to which he makes oath.

(2) A donor, against whom judgment has been rendered for the full amount of the donation, is not liable to a sum beyond his ability to pay, which is an advantage conferred by the constitutions.

42. *The Same, Opinions, Book HI.*

Paulus gave it as his opinion that the Prsetor could not set aside a judgment which he had already rendered, but that he could, even on the same day when it was rendered, supply anything which had been omitted in the judgment, either for or against the defendant, and which had reference to matters contained therein.

43. *The Same, Opinions, Book XVI.*

Paulus also gave it as his opinion that where a number of parties had had judgment rendered against them for a certain sum of money, they could not by the same decision be compelled to pay any more than their respective shares. If judgment was rendered against three parties, and Titius paid his share, an action could Hot be brought against him under the same judgment to compel him to pay the shares of the others.

44. *Scasvola, Opinions, Book V.*

Suit was brought against a female ward on a contract agreed to by her father and authorized by her guardian, and she lost her case. Her guardians afterwards caused her to reject her father's estate, and hence it passed into the hands of the substitute, or her co-heirs.

The question arose whether or not they would be liable by virtue of the decision. It was held that an action should be granted against them, unless judgment had been rendered against the ward through the fault of her guardians.

45. *Paulus, Decisions, Book I.*

Proceedings which have begun can be dismissed on the day of trial, if the parties consent, and the judge permits this to be done; provided that the matter or the suit has not been judicially terminated.

(1) Nothing can be done to increase or diminish penal damages after judgment has been

rendered, unless this is authorized by the Emperor.

(2) No judgment can be rendered against minors who are not defended, and have no guardian or curator.

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

It is not forbidden to amend the pleadings, provided the tenor of the decision remains unchanged.

47. *Paulus, Decisions, Book V.*

In every case judgment must be rendered in the presence of all the parties interested, otherwise it will only take effect with reference to those who are present.

(1) Where parties who have been repeatedly summoned neglect to defend their cause before the Treasury, they are liable to an action on judgment. This is understood to be the case where, having been notified several times, they refused to appear.

48. *Tryphoninus, Disputations, Book II.*

Decisions must be rendered by the Praetor in Latin.

49. *Paulus, Manuals, Book II.*

A son who has been disinherited, or who has rejected the estate of his father, cannot have judgment rendered against him, on a contract of his own, for more than he is able to pay. Let us see to what extent he shall be considered solvent, whether this relates to what remains after all his debts have been paid, as in the case of one who is sued on account of a donation, or does it apply to a husband and a patron, whose indebtedness is not deducted? It is unquestionably the law that payment should be made as in the case of a husband or a patron, for we should be more indulgent to a donor than to one who is obliged to discharge an actual debt,

50. *Tryphoninus, Disputations, Book XII.*

In order to prevent a donor from becoming impoverished by his own liberality.

51. *Paulus, Manuals, Book II.*

If anyone should cause his property to be fraudulently sold, he will be liable in full.

(1) -Where anyone refuses to admit a creditor to take possession of his property, which has been granted to him for its preservation, and the vendor pays the creditor all that he is entitled to, the question arises whether the debtor will be released. I think that he would act dishonorably who wishes to obtain a second time what he has already received.

52. *Tryphoninus, Disputations, Book XII.*

If suit is brought against a husband for having appropriated the property of his wife, although this proceeding is said to have its origin in the partnership existing between husband and wife, the husband should have judgment rendered against him for the entire amount, as in this instance, it is based on an illegal act and a crime.

53. *Hermogenianus, Epitomes of Law, Book I.* The contumacy of those who refused to obey the summons of the court is punished by the loss of the case.

(1) He is considered to be contumacious who, after having been served with notice three times, or with the one which is ordinarily called peremptory instead of three, refuses to appear.

(2) He is not liable to the penalty for contumacy whom bad health, or business of great importance prevents from appearing.

(3) Persons are not held to be contumacious, unless being obliged to obey they decline to do so; that is to say, if they refuse to obey those who have jurisdiction over them.

54. *Paulus, Decisions, Book I.*

A peremptory summons issued against a warfl who is undefended, a person who is absent on business for the State, or a minor of twenty-five years of age, is of no force or effect.

(1) He who is summoned before a higher tribunal is not considered contumacious if he leaves the case unfinished in the lower court.

55. *Ulpianus, On Sabinus, Book LI.*

After a judge has once rendered his decision, he ceases to be judge so far as this case is concerned. It is our practice that a magistrate who has once rendered judgment for a larger or a smaller sum than was claimed cannot amend it, because he has performed the duty of his office well or ill, once for all.

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

According to a Rescript of the Divine Marcus, nothing can be demanded after a decision has been rendered, or a case has been decided by oath, or the defendant has confessed judgment in court, for the reason that a confession of judgment made in court is considered the same as a judgment.

57. *The Same, Disputations, Book II.*

Advice was taken whether a decision rendered by a judge, who is under twenty-five years of age, is valid. It is perfectly correct to hold that such a decision is valid, unless he was less than eighteen years of age. If a minor holds the office of a magistrate, it must certainly be said that his jurisdiction ought not to be questioned. If a judge, who is a minor, should be appointed with the consent of the parties, and they know his age, and agree that he shall preside in the case, it is most properly held that his decision will be valid. Hence, if a Praetor or a Consul, who is a minor, expounds the law and gives an opinion, his act will be valid; for the Emperor who appointed him a magistrate by his decree conferred upon him authority to transact all the business of his office.

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

Property which has been taken in execution and sold can be recovered, if this was done without a judgment having been previously rendered.

59. *The Same, On All Tribunals, Book IV.*

In rendering judgment, it is sufficient if the judge mentions the amount, and orders it to be paid or furnished, or makes use of any other term which has this signification.

(1) It is, moreover, set forth in a rescript, that even if the amount is not stated in the decision, but the party who brought suit mentioned it, and the judge says, "Pay what is claimed," or "As much as is claimed," the decision will be yalid.

(2) When magistrates render a judgment for the principal, and with reference to the interest add, "If any interest is due, let it be paid," "Or let what interest is due be paid," their judgment is not valid; for they ought to ascertain the amount of interest and establish it by their decision.

(3) If anyone, having received a peremptory summons, has judgment rendered against him after his death, it will not be valid, because a peremptory summons is of no effect after the death of the defendant; and hence the judge must take cognizance of the case, just as if matters remained unchanged, and decide as seems to him best.

60. *Julianus, Digest, Book V.*

The following question has been raised. One of several litigants who was attacked by fever withdrew from the case; if the judge renders a decision in his absence, will he be considered to have acted according to law? The answer was, that dangerous illness demands delay, even if the parties and the judge are unwilling to grant it. Moreover, an illness is considered to be dangerous which offers an impediment to the transaction of business by anyone. What, however, can be a greater impediment to a lawsuit than that revolt of the body against nature which is designated fever ? Hence, if one of the parties has a fever at the time when the decision is rendered, it is considered as not rendered at all. Still, it can be said that there is a considerable difference in fevers, for if a person is otherwise healthy and robust, and at the time when the decision was rendered has a slight attack of fever, or if he has a chronic or a quartan fever, and, nevertheless, is able to attend to his affairs, it may be said that his illness is not serious.

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

In the action to enforce judgment, the plaintiff in favor of whom a decision was first rendered against the defendant is not entitled to preference.

62. *Alfenus Varus, Epitomes of the Digest of Paulus, Book VI.*

The question was raised whether a judge who had rendered an improper decision could render another on the same day. The answer was that he could not do so.

63. *Macer, On Appeals, Book II.*

It has often been stated in the Imperial Constitutions that judgments obtained by certain persons do not prejudice the rights of others. This, however, admits of a certain distinction, for in some instances a judgment rendered against certain persons does prejudice others who have knowledge of it, but, in other cases, does not injure even those against whom it was rendered.

A judgment is of no disadvantage to those who have knowledge of it, as where one of two heirs of a debtor has judgment rendered against him; for the right of the other to defend himself remains unimpaired, even if he knew that he was sued with his co-heir. Moreover, where one of two plaintiffs, having lost his case, acquiesces in the decision, the claim of the other is not prejudiced. This has been stated in a rescript. A decision rendered against certain parties injures others who are aware of it, when anyone who has a right to bring or defend an action before another suffers someone else to do so; as, for instance, where a creditor permits his debtor to bring suit involving the right to a pledge; or a husband allows his father-in-law, or his wife to institute proceedings to determine the ownership of property received by way of dowry; or a possessor permits the vendor to bring an action to establish the title to property which he has purchased. These points are understood to have been settled by many constitutions. For why should knowledge injure these parties, when it does not injure those previously mentioned? The reason for this is, that when anyone knows that his co-heir brings suit, he cannot prevent him from using any means which he may be able to employ in bringing or defending an action in which he is interested.

He, however, who suffers a former owner of the property in dispute to defend an action is, on account of his knowledge, barred by an exception, even though the suit was decided with reference to others; because the decision was rendered with his consent, so far as any right derived from the party appearing in the case was concerned. For if, through my intervention, my freedman is decided to be the slave or the freedman of another, my rights will be prejudiced.

A distinction, however, arises where Titius brings suit against you to recover a tract of land, which I allege belongs to me directly, and not through Titius; for even though judgment has been rendered against Titius with my knowledge, I still do not suffer any prejudice to my

rights, as I do not claim the land by the same title under which Titius was defeated; and I cannot interfere to prevent him from availing himself of his alleged right, just as was the case with the co-heir above mentioned.

64. *Scssvola, Digest, Book XXV.*

A certain man employed in transacting the business of others having had judgment rendered against him, appealed, and the case was not disposed of for a long time. The appeal, having been held to have been taken on insufficient grounds, and the execution of the judgment prolonged, the question arose whether interest should be calculated for the time of the original judgment until the appeal was decided. The answer was that, according to the facts stated, a praetorian action should be granted.

TITLE II.

CONCERNING CONFESSIONS.

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

He who confesses in court is held to have had judgment rendered against him, for he himself is, as it were, condemned by his own sentence.

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

He who makes a mistake does not confess unless he is ignorant of the law.

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

Julianus says that he who confesses that he owes a legacy should by all means be compelled to pay it, even if the property had never been in existence, or had ceased to exist. He, however, can be adjudged to pay the appraised value of the property for the reason that he who confesses is considered as having had judgment rendered against him.

4. *The Same, On Plautius, Book XV.*

If he against whom proceedings have been instituted under the Aquilian Law confesses that he has killed a slave, even though he may not have done so, and the slave is found to have been killed, he will be liable on account of his confession.

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

Where anyone confesses that he owes Stichus, judgment should be rendered" against him; even if Stichus is already dead, or died after issue was joined in the case.

6. *The Same, On All Tribunals, Book V.*

He who confesses that he owes a specified sum of money is considered as having had judgment rendered against him; but this rule does not apply where the amount is uncertain.

(1) When anyone admits that he owes an uncertain amount of money, or something which is not specifically designated, as, for instance, if he says that he is obliged to deliver either Stichus or a tract of land, he must be urged to make his allegations more definite.

The same rule applies to him who admits that he owes some property, to compel him to state the amount.

(2) If I bring an action to recover a tract of land which is mine, and you admit that it is mine, you will occtipy the same position as if a judgment had been rendered declaring the land to belong to me. And, in any other kind of civil or honorary actions, and in all interdicts for the production of property, or its restitution, including prohibitory interdicts, if the party who is sued admits the indebtedness, it may be said that the Praetor must follow the provision of the Rescript of the Divine Marcus, and everything which he confesses to be due is held to have been judicially decided. Therefore, in actions in which time is granted for the restitution of

property, it will also be granted for restitution to the party who confesses judgment; and if restitution should not be made, the value of the property shall be appraised in court.

(3) If anyone admits that a claim is valid in the absence of his adversary, let us see whether he should not be considered to have had judgment rendered against him; because he who makes oath with reference to his services is not liable, and it is not customary to condemn anyone in his absence. It is certain that it is sufficient for the confession to be made in the presence of an agent, a guardian, or a curator.

(4) Let us see whether it will be sufficient for an agent, a guardian, or a curator, to make the confession. I do not think that it will be sufficient.

(5) In the case of a confession by a ward, we require the authority of his guardian, we grant complete restitution to a minor against his confession.

(6) Those who have confessed judgment are entitled to time for payment after making their confession, just as parties are after judgment has been rendered.

7. *Africanus, Questions, Book V.*

Where suit was brought to compel the execution of a trust, the heir having admitted that he owed it, an arbiter was appointed to see that the property was delivered, who ascertained that nothing was due. The question arose whether the heir could be released from liability. I answered that it was important to learn why nothing was due, for if the reason was that the trust was void, the heir would not be released. But if it was because the testator was not solvent, or the heir had alleged before the Praetor that everything was paid, and as a controversy had arisen, and a computation was difficult, a condition of affairs had caused the appointment of an arbiter, he could release the heir without exceeding his authority. For it is duty to discharge the heir, if, after the computation has been made, nothing is found with which to execute the trust; but, in the first instance, he should send the heir before the Prsetor in order that he may be discharged.

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

A party who confesses judgment should not have a decision absolutely rendered against him, when he acknowledged that he owes property the existence of which is uncertain.

TITLE III.

CONCERNING ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

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

The privilege of collecting money loaned for the repair of buildings is granted to a creditor.

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

In personal actions, those Who have subsequently made contracts, and whose money has been paid to former creditors, are subrogated to them.

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

He who has made an assignment of his property is not deprived of it before the sale; and therefore, if he is ready to set up a defence, his property will not be sold.

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

If he who makes an assignment afterwards acquires any property, he can be sued to the extent of his ability to pay.

(1) Sabinus and Cassius think that he who has made an assignment cannot any longer be annoyed, even by others to whom he is indebted.

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

He who repents of having made an assignment can, by setting up a defence, prevent it from being sold.

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

If a man who has made an assignment acquires anything else of trifling value, after the sale has taken place, his property cannot be sold a second time. But, in what way can we make an estimate of this, in order to determine its value? Must it be determined by the quantity of the property which has been acquired, or by its quality? I think that the question should be decided with reference to the quantity, provided we know that something has been left with him through compassion, as, for instance, a sum to be paid monthly or annually for his support; and in such a case, it is not necessary for his property to be sold a second time, for he should not be deprived of his daily subsistence.

The same rule will apply if the usufruct of property from which he only receives a sum sufficient for his support has been either granted or bequeathed to him.

7. *Modestinus, Pandects, Book II.*

When the property of a debtor is sold; upon the demand of creditors, a second sale of his property is allowed to be made until his entire indebtedness is discharged, provided the debtor has made acquisitions sufficient to justify the Prsetor in taking action.

8. *Ulpianus, Book XXVI.*

He who makes an assignment before he acknowledges his indebtedness, and before judgment is rendered against him, or he confesses in court, should not be heard.

9. *Marcianus, Institutes, Book V.*

An assignment can not only be made in court, but out of it. It is sufficient for it to be established by means of a messenger or a letter.

TITLE IV.

CONCERNING THE REASONS FOR POSSESSION BEING GRANTED.

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

There are about three causes for which it is customary to place a creditor in possession of the property of his debtor: first, in order to protect it; second, to preserve a legacy; and third, in behalf of an unborn child. When possession is granted for the prevention of threatened injury, if security is not furnished, alj the property is not included, but only that from whose fall damage is expected to result.

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

The Prsetor says: "I will order possession to be taken of the property of him who gave a surety for his appearance in court, if he does not permit access to himself, and is not defended."

(1) He does not give access to himself who acts in such a way as to prevent his adversary from approaching him. Hence, if the Praetor orders possession to be taken of the property of a person who conceals himself.

(2) But what if he does not conceal himself, but, being absent, is not defended? Can it be held that he does not permit access to himself?

(3) He is considered to be in a position to defend himself who does not render the condition of his adversary any worse by his absence.

(4) The words, "If he is not defended," are capable of a broader and more extensive interpretation, so that it is not sufficient if the party has begun to defend himself, and his defence does not continue; and it is no disadvantage to him if, at present, he offers to defend

himself for the first time.

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

The following question is raised by Julianus. If the father of a minor holds property in joint ownership with Titius, and an action in partition is brought against the minor, but is not defended, there will be no reason, on this account, for judgment to be rendered against the father; but must the property of the father be sold, or can it be taken possession of for its preservation, in behalf of the plaintiff?

Julianus says that if the father has collected any of the crops, or caused the property in question to deteriorate, his own property can be sold. If, however, there is no reason why the property of the father should be sold, possession of that of the minor can be taken.

Marcellus, however, observes that it would be unjust for him who had not made any contract with the minor to be compelled to wait till he arrives at puberty; which opinion is reasonable. Therefore, as the contract is derived from the father, it must be held that it is not necessary to wait until the minor reaches the age of puberty.

(1) It can be said that there is a contract with a minor, where one has been entered into with a slave, for, in this case an action *De peculio* will lie against him; hence the rule should be adopted that an action must be granted in every case where one can be brought against the ward; and there is much more reason for doing this in the case of a slave, who was acting for the benefit of his master, or by his order, or has been appointed to represent him in some transaction.

(2) I think that where a contract has been made with his guardian, on account of which an action is granted against the ward, the better opinion is that there will be ground for the application of the Edict, just as if the contract had been made directly with the ward.

(3) If a minor becomes the heir of anyone, and, for this reason, is charged with the payment of a legacy, let us see whether there is ground for the application of this Edict. The better opinion is, as Marcellus says, that possession can be taken of the property of a minor, and that the creditors of the estate have the right to choose what course they prefer to adopt; for a minor under the age of puberty is held to make a contract when he accepts an estate.

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

He, likewise, who interferes with matters connected with the estate, is considered to enter into a contract.

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

These things also occur whenever a minor is not defended by anyone, nor by a guardian or a curator, whether he has a guardian or not. If, however, someone appears who is ready to defend him, possession for the purpose of preserving the property will not take place.

(1) It should be known that the minor is not defended, and the Pra?tor must ascertain this fact, in order to permit possession to be taken of the property. This can be effected in the following manner. The guardians of the ward should be summoned before the Praetor, in order to undertake his defence. If he has no guardian, his relatives, or those connected with him by affijiity, or any other whom it is probable will not fail to conduct the defence of the male or female minor, either on account of their near relationship, or because of the affection they may entertain towards him, or her, or for any other reason, shall be called upon for this purpose. Even freedmen, if they "are qualified, can be summoned and required to conduct the defence. Where, however, they refuse to do so, or while not absolutely refusing, keep silent, the Praetor shall then grant possession, so long as the minor is not defended. As soon, however, as the defence of the minor is undertaken, the property will cease to be possessed under the order of the Praetor.

The same rule applies in the case of insane persons.

(2) The Praetor says: "If the male or female minor should reach the age of puberty and is properly defended, I shall order those who are in the possession of his or her property to relinquish it."

(3) Let us see what the words, "Properly defended," mean: whether it is sufficient for the party to appear and be ready to comply with the judgment, or whether security must be given under all circumstances. The terms of the Edict do not merely refer to the persons of the parties desiring to defend themselves, but it also has reference to the property itself. And the words, "Properly defended," mean to be defended by themselves, or by any other person whomsoever. If the defence is undertaken by another, security must be furnished, but if the minor defends himself, I do not think that this is requisite; therefore, if a defence is offered, the Praetor can eject the party in possession by means of an interdict.

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

A creditor is usually placed in possession, even where the money is promised conditionally. '

(1) Where it is stated, "And let his property which is in possession of the creditors be sold, unless he is a minor, or absent on public business, without fraud," we must understand that the property of anyone who is absent with fraudulent intent can be sold.

(2) When anyone is captured by the enemy, his creditors should be placed in possession of his property, in such a way, however, that it shall not be sold immediately, but that, in the meantime, a curator-may be appointed.

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

Fulcinius thinks that creditors placed in possession of property for its preservation should not be supported by means of the said property.

(1) The Praetor says: "I will order the property of anyone who fraudulently conceals himself to be taken possession of and sold, if he is not defended in such a way as to be approved by a good citizen."

(2) For this Edict to become applicable, it will not be sufficient for the party to conceal himself, but this must be done with fraudulent intent. Nor in order to authorize possession and sale of the property, will it be sufficient for him to be guilty of fraud without concealment, but he must conceal himself for the purpose of committing fraud. This is the most frequent cause for granting possession, as it is customary for the property of debtors who conceal themselves to be seized.

(3) If anyone should obtain possession of the property of another on the ground that he is concealing himself, when in fact he has not done so, and sells it, the result will be that the sale will be held to be of no force or effect.

(4) But let us see what is understood by concealment. Concealment is not (as Cicero defines it) a dishonorable seclusion of one's self, for anyone can conceal himself for some reason which is not dishonorable; as for instance, if he fears the cruelty of a tyrant, the violence of enemies, or domestic sedition.

(5) He, however, who conceals himself fraudulently, but not on account of his creditors (although concealment of this kind defrauds his creditors), is still not in such a position that possession can be taken of his property on this ground, because he does not conceal himself with a view to defraud his creditors. Hence, the intention of the person in concealing himself must be ascertained, whether it is for the purpose of defrauding his creditors, or for some other reason.

(6) But what if he had two or more motives for concealment, and among them that of

defrauding his creditors; could the sale of his property legally take place? I think the opinion should be adopted that, if there were several reasons for his concealment, and the intent to defraud his creditors was one of them, this would be prejudicial, and his property could be sold on this account.

(7) If, however, he intended to conceal himself from some of his creditors, and not from others; what shall we say in this instance? Pomponius very properly holds that it is not necessary to require that the debtor should conceal himself from all his creditors, but that, if he only conceals himself from one of them, with the intention of deceiving and defrauding him by means of his seclusion, this will be sufficient.

Then will all his creditors have a right to take and sell his property, because he remains concealed, that is to say, even those from whom he does not hide, merely because it is a fact that he is concealed; or can only that creditor whom he is avoiding do so? And indeed, it is a fact that he is hidden for the sake of committing fraud, even though he may not hide himself from me.

If he is only concealing himself from me, Pomponius thinks that it should be considered whether I alone will have the right to sell his property for this reason.

(8) The term "conceal himself" refers to concealment during a considerable time; just as the word *factitare* signifies to do anything frequently.

(9) Moreover, to such an extent does concealment demand the existence of fraudulent intent and desire of the party secluding himself, that it has been very properly held that an insane person cannot render himself liable to have his property sold on this ground, because a man who is not of sound mind cannot conceal himself.

(10) If it is evident that an insane person is not defended, a curator should be appointed for him, or permission to take possession of his property should expressly be granted. Moreover, Labeo says that if no curator or defender can be found for an insane person, or if the curator who has been appointed does not undertake his defence, he should then be removed, and the Praetor must appoint another curator, in order that no more property of the said insane person may be sold than is necessary.

Labeo holds that the same formalities should be observed as where an unborn child is placed in possession.

(11) It is clear that sometimes his property should be sold, after proper cause is shown, if the payment of his debts is urgent, and delay may injure his creditors. The sale, however, should be made in such a way that any surplus may be returned to the insane person; because the condition of a man of this kind does not differ greatly from that of a minor. This opinion is not unreasonable.

(12) The same rule must be said to apply to the case of a spendthrift, and to others who require the services of a guardian, but no one can properly say that they are trying to conceal themselves.

(13) It should be noted that anyone can stay in the same city and remain concealed, or in another city, and not be concealed. For, let us see whether one who is in another city, and shows himself in public, and appears everywhere, can be considered as lying concealed. Our practice at present is, that a person is held to conceal himself if he avoids meeting his creditors in any place where he may be, whether in the same town where they are, or in another, or in a distant country. In short, the ancient authorities were of the opinion that a person was to be considered as concealing himself, even if he was in the Public Forum, and hid behind columns of buildings, for the purpose of avoiding his creditors. Anyone can conceal himself from one creditor and not from another. Moreover, it was established that the creditor from whom the debtor conceals himself is the one who can sell his property.

(14) If a man who owes a debt payable after a certain time, or under some condition, conceals himself, his property cannot be sold before the time arrives, or the condition is complied with. For what difference is there between a person who is not a debtor, and one who cannot yet be sued ? The same rule must be adopted if there is no debtor; and it also applies where a creditor is entitled to an action which can be barred by an exception.

(15) If anyone who is liable to an action *De peculia,* on account of his son or his slave, conceals himself, it is our practice to permit his property to be seized and sold, even though nothing may be found in the *peculium,* because something might eventually be found there; and, at the time that the judgment is rendered, we ascertain whether there is anything in the *peculium* or not, for the reason that the action will lie even when there is nothing in the *peculium.*

(16) Let us see whether the property of a man who conceals himself to avoid appearing in a real action can be taken in execution and sold. An opinion of Neratius is extant in which he says that his property can be sold. This is also stated in a Rescript of Hadrian, and is our practice at present.

(17) Celsus, in reply to Sextus, gave it as his opinion that, if Titius is in possession of a tract of land which I intend to bring suit to recover and he, being absent, is not defended, it would be better for me to be placed in possession of the said land than to levy on all his property.

It must, however, be noted that Celsus was consulted with reference to a person who was absent, and not with reference to one who purposely concealed himself.

(18) Celsus also thinks that if a person from whom I intend to claim an estate conceals himself, the best plan would be to place me in possession of the property, which is held in the capacity of either heir or possessor. If, however, he was guilty of fraud in order to avoid remaining in possession, all his property should be levied on and sold.

(19) The Divine Pius stated in a Rescript, with reference to a man who, being in possession of an estate, secluded himself, that his adversary should be placed in possession of the property of the estate. In the same Rescript he also directed that he who is placed in possession of the property of an estate on account of the contumacy of a former possessor of the same shall be entitled to the income from said property.

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

If it remains uncertain for a long time whether there is any heir to an estate or not, after proper cause has been shown, permission should be granted for possession to be taken of the property for the purpose of preserving it. If the matter is urgent, or a condition must be complied with, it would, be well to obtain permission to appoint a curator.

9. *Paulus, On the Edict, Book LVII.* He shall be one of the creditors.

(1) If one of two heirs deliberates as to whether he will accept an estate within the time prescribed by law, and the other refuses

to accept it, let us see what step should be taken by the creditors. It is established that, in the meantime, they shall be placed in possession of the estate, for the purpose of taking care of it, until the heir who is deliberating determines whether he will accept or reject his share.

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

If a ward is present, but has no guardian, he should be considered as being absent.

11. *Paulus, On Plautius, Book Vill.*

Where a legacy or a trust has been conditionally bequeathed to a son under paternal control, it must be said.that he himself, as well as his father, ought to be placed in possession, for the reason that both of them anticipate a benefit.

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

When, for the purpose of preserving a legacy or a trust, or because security is not furnished us against threatened injury, we are permitted by the Praetor to take possession of property or he places us in possession in the name of an unborn child, we do not actually hold possession, but he merely grants us power to guard and watch over the property.

13. *Papinianus, Opinions, Book XIV.*

A man who is sent by the Governor of a province before the Tribunal of the Emperor is not compelled to defend any other action at Rome, and he still should be defended in the province; for the property of a person who is punished by temporary exile can be sold if a defender does not appear for him in court.

14. *Paulus, Questions, Book II.*

If anyone should prevent a creditor from obtaining possession of the property of his debtor, an action for the amount of the value of the property shall be granted against him in favor of the creditor.

(1) Where anyone is placed in possession of property for the purpose of preserving his legacy, he will not be permitted to take possession, if the condition on which the legacy is dependent is in suspense; and although it may fail to be fulfilled, still, the property bequeathed should be appraised, because it is to the interest of the legatee to have security.

(2) Moreover, a creditor, the payment of whose claim is conditional, is not placed in possession; because he only is given possession who has a right to sell the property under the Edict.

15. *Ulpianus, Trusts, Book VI.*

He who has received property in exchange resembles a purchaser, and he also who receives property in payment, and one who accepts the amount of its appraisement in court, as well as he who acquires anything by virtue of a stipulation, and not through liberality, occupy the same legal position.

TITLE V.

CONCERNING THE POSSESSION AND SALE OF PROPERTY BY JUDICIAL AUTHORITY.

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

The property of a debtor must be sold in the place where he should defend the action; that is to say.

2. *Paulus, On the Edict, Book LIV.* Where he has his domicile.

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

Or where he made the contract. The contract, however, is understood not to have been made in the place where the transaction was concluded, but where the money should be paid.

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

If a slave has been appointed heir under a condition, or if there is a doubt whether he will become free, and the heir, it is not unjust for a decree to be issued, provided the creditors request it; but if he does not become the heir before a specified time, everything shall proceed just as if he had not been appointed at all. This happens very frequently where a slave is appointed heir under the condition of paying a certain person a sum' of money, and no date was fixed for doing so.

This rule shall be observed with reference to the property of the estate, but as the slave will, at

some time or other, obtain his freedom, the Praetor must preserve it for him, even if it is certain that he will never be the heir, or acquire praetorian possession of the estate.

(1) If, however, anyone appears to defend the deceased, either by promising that he will be the heir, or by permitting actions to be brought against him, the property of the decedent cannot be sold.

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

A minor of twenty-five years of age, who has curators, but is not defended by them, and can find no one else to appear for him, must suffer the sale of his property, even if he does not conceal himself; although he who is not capable of protecting his own interests is not considered to have fraudulently hidden himself.

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

If it is not advisable for a minor to keep the estate of his father, the Praetor will permit the property of the deceased to be sold, in order that anything which remains may be delivered to the minor.

(1) If the minor, before he rejects the estate, should transact any business relating to it, what he did should be considered valid, provided he.acted in good faith.

(2) But what if, after having paid some of his creditors, his property should afterwards be sold by others? If inquiry is made as to whether there can be any recovery, Julianus says that, if proper cause is shown, the matter should be decided in such a way as to prevent the rights of a diligent creditor from being prejudiced by either the negligence or cupidity of another. But if both creditors pressed their claims for payment at the same time, and the guardian only paid you, it is but just that I should either obtain as much, or that you should contribute out of what you had received. This is what Julianus says. It is evident, however, that he refers to the case of a ward, where payment was made out of the property of the estate of his father. What course then should be pursued, if the ward had obtained the money for payment from some other source? Would he be required to return it or not? And should it be refunded by the creditor, or taken from the estate? Our Scsevola says that if there is anything in the estate, it should be entirely deducted; just as in the case of a person who transacts the business of another. If, however, nothing remains in the estate, it would not be inequitable to grant an action for recovery against the creditor, for money which was paid without being due.

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

The indebtedness of an estate is also understood to be that for which suit can not be brought against the deceased, as, for instance, where he promised to pay at the time of his death; as well as where someone who had become surety for the deceased paid the debt after he died.

8. *Ulpianus,-On the Edict, Book LXI.*

The usufruct of property is also included in the sale, because an usufructuary is embraced in the term "owner."

(1) If anyone has a right to take the crops from the land of his debtor, a creditor, who has been placed in possession of the land, can either sell or lease the said crops. This, however, can only be done where they have not been sold or leased beforehand; for if the debtor did this, the Praetor will sustain the sale or the lease made by him, even though the crops may have been disposed of for less than they were worth; unless this was done for the purpose of defrauding the creditors, for then the Praetor can authorize the creditors to make a new lease or sale.

(2) The same rule will apply to the income from other things, so that if they can be leased, this should be done; as for example, the wages of slaves, or the hire of beasts of burden, qr the revenue from other property which can be rented.

(3) The Praetor does not say anything about the time that the lease is to run. Therefore, free power is held to have been granted to creditors to lease the property as long as they may deem it advisable; just as they have the right to sell or lease according to their judgment, of course, where no fraud exists. They, however, are not responsible for negligence.

(4) If one of the creditors is in possession of the property, the-question of leasing it will be easily disposed of. But where there is not only one, but several creditors, it may be asked which of them should sell or lease the property? This will be readily decided if they are agreed, for all of them can lease it, or appoint one of their number to do so. If, however, they do not agree, then it must be said that the Przetor after proper cause is shown must select one of them to lease or sell it.

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

The Praetor says: "I will grant an action *in factum,* where anyone is in possession of property, and for this reason has gathered the crops, and refuses to return them to the person to whom the property belongs, or is unwilling to refund to him any expenses which he may have incurred without fraud, or where the condition of the property has become worse through the fraudulent acts of the possessor."

(1) What the Praetor says with reference to the income must also be understood to refer to everything else which is obtained from the property of the debtor. And, indeed, this ought to be the case, for what would happen if the party in possession should obtain a penalty either through a submission to arbitration, or in some other way? He would be obliged to refund the penalty which he had obtained.

(2) When the Praetor says, "If he is unwilling to refund to him any expenses which he may have incurred without fraud," this means that, if the creditor himself has incurred any expenses, he should be reimbursed for them, provided he did not incur them fraudulently. Hence, it is sufficient for the expenses to have been incurred without fraud, even if their payment did not, in any way, benefit the property of the debtor.

(3) In the words, "To the person to whom the property belongs," the curator appointed for the sale of the property and the debtor himself are included, if the sale should not take place. An action is also granted to the creditor against the parties whom we have mentioned, if he incurred any expense in gathering the crops, or in supporting and caring for the slaves, or in keeping up and repairing the land, or in indemnifying a neighbor for threatened injury, or in defending a slave in a noxal action, provided it was not more advantageous to surrender the slave than to keep him. For if it is better to surrender him, the result will be that he cannot recover the expense of defending him.

(4) Generally speaking, it must be said that the party in possession can recover anything which he has expended upon the property, provided this was not done fraudulently. For he can no more bring the action based on voluntary agency than if, as a joint-owner, he had repaired a building held in common, because the creditor also is considered to have transacted the business in which he himself was jointly interested, and not that of another.

(5) Moreover, the question has been asked if, where lands have deteriorated without any bad faith on the part of the creditor; or rights attaching to them have been lost; or buildings have been demolished, or burned; or proper care has not been taken of the slaves or cattle; or possession delivered to another without fraudulent intent; whether the possessor will be liable. It is evident that he will not be liable, because he is not guilty of fraud. His position will be better than that of a creditor when a pledge is concerned, for he is responsible not only for fraud, but also for negligence.

The same rule applies to the curator of property, for he also is liable as creditors are.

(6) The Praetor also grants an action *in factum* against him who neither leased nor sold the

crops on the land, and judgment will be rendered against him for what he has collected, because he neither sold nor leased it.

If, however, he has only collected as npteh as he would have done if the crop had been leased, or sold, he will- not be liable for anything. He must, however, be responsible for the time In which either he himself, or someone else by his direction was in possession, until he relinquished it. For the creditor should not be considered responsible for not taking possession, or for relinquishing it, as he transacts the business voluntarily as his own. The appraisement should be made in proportion to the interest of the party who brings suit.

(7) These actions are not temporary ones, and they are granted for and against heirs and other successors. If the condition of the property is said to have become deteriorated through the fraud of the party placed in possession, an action on the ground of bad faith should be granted against him; but this will not be granted either against the heirs or other successors, after the expiration of a year, because it is derived from a criminal offence and involves a penalty:

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

Unless it is brought for the amount which came into his hands.

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

This action is also granted to the heir, because it includes the pursuit of the property.

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

When one of several creditors asks to be placed in possession of the property of a debtor, the question arises whether he alone who makes the request, can take -possession. Or whether, where only one makes the request, and the Praetor grants it, all the creditors will be permitted to enter upon the property. It is more convenient to hold that when the Praetor places a party in possession he is considered to have granted permission not only to him who makes the request, but to ^all the creditors as well. This opinion is also held by Labeo. In this case, it is not considered that possession is acquired by a free person, because he whom the Praetor permits to take possession does not acquire anything for himself, but performs an act which is customary and therefore the others profit by it.

It is clear that if anyone who is not a creditor should ask for. possession, it can, by no means, be held that a creditor can acquire possession, because a demand of this kind is of no effect. It is otherwise, however, if a creditor, to whom permission has been given to take possession, afterwards receives payment of his debt, for the other creditors can follow up the sale of the property.

(1) He who is ordered to take possession is understood to be directed to do so in some place which is subject to the jurisdiction of the court.

(2) If possession cannot be taken on account of the nature of the property, or because land has been inundated, or is in the power of robbers, it is very properly held that there is nothing of which to take possession.

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

Although there may not be actual possession of the property, for the reason that there is nothing of which possession can be obtained, or because it cannot be acquired without a controversy, the creditor who has been placed in possession will be considered to be in the same position as if it had been obtained by him.

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

Where a creditor is placed in possession of the property of a debtor, a curator should be appointed, if there is any danger of rights of action being extinguished.

(1) An action is granted against a creditor who has been placed in possession, with reference to any property of the debtor which may have come into his hands. If he has not yet obtained anything, he must assign his rights of action. An action *in factum* will be granted against him, and everything included in one for voluntary agency must be surrendered by the creditor, if this action can be brought under the circumstances.

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

When several creditors are placed in possession of the property of a debtor, one of their number should be selected by the majority to see that his accounts are not tampered with. I think that a list of the documents in the hands of the debtor should be made by the creditors; not that they ought to copy the documents themselves, but that they should take notes for their own benefit, and, make, as it were, an inventory, showing the number of the said documents, and to what matters they relate; a course of proceeding which they should be allowed to follow with reference to all other property. Moreover, the Praetor should sometimes, where proper cause is shown, permit the creditors to make extracts.from the said documents, if any good reason exists for doing so.

(1) Let us see whether the creditors should be permitted to review and examine the papers of the debtor only once, or several times. Labeo says that this privilege should not be granted more than once. He, however, holds that if anyone swears that he is not requesting this for the purpose of annoyance, and that he no longer has the extracts which he tabulated, he should be granted the power to make a second examination, but that this should not be done more than twice.

TITLE VI.

CONCERNING THE PRIVILEGES OF CREDITORS.

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

When the property of a debtor is sold, a creditor who is a blood-relative is preferred to a stranger. Where there are several creditors, and all of them are not relations of the debtor, he to whom the largest sum of money is due shall be preferred.

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

The question arose whether the funeral/expenses were only privileged, where the person whose property was sold was buried, or whether this was also the case where they were incurred for the interment of another. The present rule is that there will be ground for the privilege when anyone is buried (that is to say where it is necessary for an action for the funeral expenses to be brought, whether this is done for one whose property is about to be sold, or for someone who was indebted to another, and against whom such an action could have been brought, if he had lived).

We hold that it makes very little difference by what kind of a proceeding expense of this kind is recovered, whether it be one to collect funeral expenses, or a suit in partition, or any other, provided that the expenses were actually incurred on account of the burial. Therefore, no matter what action is brought for this purpose, the party will also be entitled to one based on funeral expenses. Hence, if, by reason of a stipulation, the expenses of the funeral were deducted, it must be said that there is ground for the privilege, provided no one entered into the stipulation for the purpose of renouncing the privilege.

(1) If a betrothed woman gives a dowry, and the marriage does not take place, although she can recover her dowry by an action, still it is only just that she should be allowed to enjoy this privilege, even though the marriage was not solemnized.

I think that the same rule will apply even if a minor under the age of twelve years is married, although she cannot yet be considered a wife.

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

It is to the interest of the public for her to recover her entire dowry, in order that she may be able to marry when her age permits her to do so.

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

In cases of this kind we also grant the privilege to the woman.

(1) If any person, at a time when he was not a guardian, transacts business as one, it is clear that there will be ground for the privilege. Nor does it make any difference whether he who transacts the business owes anything himself, or whether his heirs or other successors are debtors. Moreover, the ward himself is entitled to the privilege, but his heirs are not. It is, however, perfectly just that others to whom curators are given, as, for instance, those who are under age, or are spendthrifts,

5. *Paulus, On the Edict, Book XC,* Or who are deaf or dumb,

6. *Gaius, On the Provincial Edict, Book XIV*. Or idiotic,

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

Should enjoy the same privilege.

(1) Where, however, a curator is appointed for the property of a person who is absent, or has been captured by the enemy, or while the appointed heirs are deliberating as to the acceptance of the estate, it is not necessary for the privilege to be granted, for the same reason does not exist.

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

Where anyone, through motives of friendship, transacts the business of a minor under the age of puberty, he must preserve for him the privilege to which he is entitled, when his property is sold. This opinion I have accepted.

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

When a curator is appointed for an unborn child, and the child has not yet been brought forth, the privilege will not take effect.

(1) The Divine Marcus issued an Edict as follows, "If a creditor should lend money for the repair of buildings, will he be preferred to other creditors to the extent of his loan?" This only applies to him who, by the direction of the owner of the property, furnished the money to the person who made the repairs.

(2) In selling the property of a banker, it has been established that those will come after the preferred creditors who, in accordance with the public faith, have deposited their money in the bank. Those, however, who have received interest on their deposits from the banker, will not be distinguished from the ordinary creditors; and this is reasonable, for it is one thing to lend money, and another to deposit it.

If, however, the money is still in existence, I think that it can be recovered by those who have deposited it, and that he who claims it will be preferred to the privileged creditors.

(3) Those creditors are given the preference whose money has come into the hands of the privileged creditors. But how shall we understand this to have been done ? Is it as if the money immediately passed from the other creditors to those who are privileged, or shall we hold that it passed through the person of the debtor, that is to say, that it was paid to a privileged creditor before it was counted, and thus became the property of the debtor? Without being too exacting, this can be held to be the rule, provided payment was not made after a long interval.

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

The Praetor says: "Any contract which is made after the party whose property is sold has made up his mind to commit fraud, if he who made the contract is aware of this, will not admit of an action being granted on this ground."

11. *Paulus, On the Short Edict, Book XVI.*

Anyone who has lent money for the purpose of building, equipping, or even purchasing a ship, is entitled to this privilege.

12. *Ulpianus, On the Duties of Consul, Book I.*

If magistrates have placed anyone in possession for the purpose of executing a trust, they can appoint an arbiter for the purpose of selling any property which will become deteriorated by delay; in order that the price obtained for said property may be left in the hands of the beneficiary, by way of deposit, until it is ascertained what is due to him under the terms of the trust.

13. *Javolenus, Epistles, Book I.*

The head of a household substituted an heir for his son, who was under the age of puberty, in case the latter should die before reaching that age. The son rejected the estate of his father, and therefore the property of the deceased was sold by the creditors. An estate subsequently came to the son, who died after having accepted it. I ask whether the Praetor should not grant an action to the creditors of the father against the said minor, although he obtained the estate afterwards, or should an action be granted to the creditors of the father against the substitute, who obtained nothing from the father's estate which, of course, went into the hands of the creditors, and as the latter had no right to the property of the minor, it was no concern of the heirs whether his estate was entered upon or not, as the property found by the substitute in the estate of the son did not belong to his father's creditors.

This opinion perplexes me exceedingly, because it was decided by your preceptors that there was only one will. The answer was that the Praetor benefited the son, who did not accept the estate of his father, by not allowing an action to be granted against him, after the sale of his father's property (although he subsequently obtained an estate), to compel him to pay the creditors; but the same rule should not be observed with reference to the heir who was substituted for the son, as allowance was made for the honor of the latter, by causing the property of his father to be sold, rather than his own.

Therefore an action will be refused the creditors, as far as the property Which was afterwards acquired by the son is concerned, for the reason that it came to him from another than his father. But if the substitute for the son had entered upon the father's estate, after the minor had taken some action with reference to it, then the estates of the father and the son became identical, and the heir, even if unwilling, would be liable for all debts incurred by either the father or the son; and, as, after an obligation had been contracted, he could, by no means, prevent his own property from being sold, if no defence was made; so in like manner, the indebtedness of the father and the son could not be separated, in which case the result would be that an action must be granted to the creditors against him.

If, however, the substituted heir should not enter upon the estate, an action ought not to be granted to the creditors of the father with reference to the estate left by the minor, as neither the property of the latter should be sold to discharge the debts of the father, nor should the estate which the minor acquired be included in that of his father.

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

Aufidius says that statues erected in public places for the purpose of honoring anyone whose property has been sold by his creditors cannot be acquired by a purchaser, but are public,

whether they have been donated for the purpose of ornamenting the city, or remain the property of him in whose honor they have been raised, and that, under no circumstances, can they be removed.

15. *Papirius Justus, On the Constitutions, Book I.*

The Emperors Antoninus and Verus stated in a Rescript that those who deny that their property has been legally sold should bring an action, and that they will vainly apply to the Emperor to set aside the sale.

16. *Ulpianus, On All Tribunals, Book II.*

If the creditors of an estate consider the heir to be suspicious, they can require him to give security for the payment of what is due to them, and the Praetor should take cognizance of the case. He ought not, however, without proper examination, to subject the heir to the necessity of furnishing security, unless after proper cause has been shown, he should decide to protect the interests of those who consider the heir as liable to suspicion.

(1) An heir is not considered suspicious in the same sense that a guardian is; for fraudulent acts or deceitful conduct with reference to the affairs of his ward render a guardian liable to suspicion, and not his want of means, while the latter alone will render an heir suspicious.

(2) It is- clear that those who accuse an heir- of being suspicious should only be heard within a short time after his acceptance of the estate. If, however, it is proved that they suffered him to remain in possession of the estate for a considerable period, and can accuse him of nothing criminal, as, for example, that he has been guilty of some fraudulent act, he should not, after a long time has elapsed, be reduced to the necessity of giving security.

(3) If the heir who is ordered to furnish security on the ground of being liable to suspicion does not obey the decree of the Praetor, the latter shall then order possession to be taken of the property of the estate, and permit it to be sold in conformity with the Edict.

(4) It is evident that if it should be ascertained that nothing belonging to the estate has been sold, and that no other objection can justly be raised against the heir except his poverty, the Praetor must be content to order him to take nothing from the estate.

(5) If the creditors cannot prove that the heir is suffering from poverty, they will be liable to him in an action on the ground of injury sustained.

17. *Paulus, Opinions.*

The privileges of creditors are not estimated by the time, but by the nature of the debt; and if several of them hold under the same title they will share alike, although their claims'may be of different dates.

18. *Ulpianus, Rules, Book HI.*

Where a minor is sued on a contract, and offers no defence, and, fqr this reason, his creditors obtain possession of his property, an amount should be deducted from it for his maintenance.

(1) As it is permitted to defend a debtor before his creditors have obtained possession of his property, this can also be done after possession of it has been obtained; and, whether he himself undertakes his defence, or someone else does so for him, security must be given that the decision of the court will be complied with, and possession relinquished.

19. *Marcianus, Rules, Book V.*

Anyone is entitled to be a privileged creditor, after the Treasury, if he has lent money for the purpose of building, repairing, arming, or equipping a ship, as well as where he brings suit to collect the price of a ship which has been sold.

20. *The Same, On the Hypothecary Formula.*

It is established that anyone placed in possession of the property of a debtor who is absent on public business can legally hold it until the debt is paid in full, if it appears that the debtor is fraudulently absent, under the pretense of attending to business for the State. Where, however, he is absent on public business, in good faith, and a creditor is placed in possession under a writ of execution, the proceeding is void, and hence he must relinquish possession of the property.

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

It is settled that anyone who hides behind columns, in order to avoid his creditor, conceals himself. It is also held that he is concealing himself who goes into seclusion, that is to say, who secretes himself to avoid an action being brought against him. Such a person is he who leaves the city for the purpose of defrauding his creditors; for there is no difference, so far as concealing one's self is concerned, whether a man leaves the city, or, remaining at Rome, does not appear in public.

22. *Papinianus, Opinions, Book X.*

It has been decided that the City of Antioch, in Syria, retained the privilege conferred upon it by a special law, with reference to the pursuit of the property of a deceased debtor that had been taken in execution.

23. *Paulus, Decisions, Book I.*

A concubine and her natural children are excepted from property which can be sold by creditors.

(1) Where the public is the creditor, it is preferred to all others whose claims are evidenced by written instruments.

24. *The Same, Decisions, Book V.*

If no defence is made for a minor, his creditors are placed in possession of his property, but provision for his maintenance until he arrives at the age of puberty should be made out of said property.

(1) The property of anyone who has been captured by the enemy cannot be sold for the payment of his debts until he returns.

TITLE VII.

CONCERNING THE SEPARATION OF THE PROPERTY OF AN ESTATE.

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

It must be noted that a separation of the property of an estate is generally obtained by a decree of the Praetor.

(1) A separation is ordinarily granted to creditors for the following reasons, for instance, where a creditor has Seius for his debtor, and the latter dies, leaving Titius his heir; and Titius not being solvent, his property is offered for sale. The creditors of Seius allege that his estate is sufficient to satisfy their claims; and that the creditors of Titius should be content with the estate of the latter, and hence there is, as it were, a sale of the property of two different debtors. It may, however, happen that Seius was solvent, and would have been able to satisfy his creditors, if not for the entire indebtedness, at least for a portion of it. If, however, their obligations are merged with those of the creditors of Titius, they will not receive so much, because Titius was insolvent, and they will receive still less, because there are more of them. It is, therefore, perfectly just that the creditors of Seius who desire a separation of property should be heard, and obtain from the Praetor permission for the payment of each class of creditors separately.

(2) On the other hand, however, the creditors of Titius cannot obtain a separation of property, although anyone by obtaining another

creditor may make the condition of his former creditor worse. Therefore, he who accepts the estate of my debtor will not, by doing so, make my condition any worse, because I have the right to obtain a separation of property. He, however, will render the condition of his creditors worse, if he enters upon an estate which is not solvent, for the creditors cannot demand a separation of property.

(3) Moreover, it should be noted that even if it is suggested that the estate had been encumbered by the heir, by means of a pledge, or an hypothecation, still, if the property belonged to the estate, he who obtained a separation of it would, for this reason, be preferred to a creditor to whom the property had been hypothecated. This was stated by Severus and Antoninus in a Rescript.

(4) A separation of property can also be obtained against the Treasury, or any municipality.

(5) The question arose whether the creditors of the heir could sometimes obtain a separation of property, if he had committed fraud against them when he entered upon the estate. No remedy is, however, afforded, for they must blame themselves if they entered into a contract with such a man, unless we hold that the Praetor can make use of an extraordinary proceeding for relief against the deceit of him who has contrived such a fraud.

It is, however, difficult to adopt such an opinion.

(6) If, however, an heir, even though he may allege that he thinks the estate is insolvent, should be compelled to accept and transfer it, and there is no one to whom he can deliver it, for this happens under some circumstances, we must come to his relief (if he asks it), against the creditors of the estate. This the Divine Pius stated in a Rescript, which enabled the property of the testator to be sold, just as if the estate had not been accepted. I think that this relief should also be granted to the creditors of the heir, if they request it, even if the heir himself did not ask for it, just as any separation of the claims is granted.

(7) Let us see if, in the case where a minor under the age of puberty becomes the heir of his father, and dies before reaching that age, and property in the hands of the substitute, who had accepted the estate of the minor, is sold, the creditors of the father can demand a separation of property." I think that they can do so, and I go still further, and hold that the creditors of the minor can also demand a separation as against the creditors of his heir.

(8) In accordance with this, let us see if Primus should appoint Secundus his heir, and Secundus appoint Tertius his own heir, and the property of Tertius is sold by his creditors, what creditors can claim a separation of property. I think that if the creditors of Primus request this, they should be heard, against both the creditors of Secundus and Tertius; if the creditors of Secundus ask for a separation, they can obtain it against the heirs of Tertius, but not against those of Primus. In a word, the creditors of Primus can obtain a separation of property against all the other creditors; the creditors of Secundus can obtain one against the creditors of Tertius, but not against those of Primus.

(9) Where the property of a son under paternal control is sold by his creditors, and he has a *castrense peculium,* can a distinction be made between the creditors of the *castrense peculium* and the other creditors? They should all be admitted together, unless the claims of those who made the contract before the son entered the military service ought, perhaps, to be separated. I think that this opinion should be adopted. Therefore, if the creditors, who made contracts before the son entered the service, should sell the castrensian property, they cannot come in with the subsequent creditors. Moreover, if any of the property has been employed for the benefit of the father, the creditor may perhaps be prevented from touching the *castrense peculium,* as he has a right to bring a special action against the father.

(10) It should be noted that only those creditors can obtain a separation of property who have not stipulated with the heir with the intention of entering into a new obligation. If, however, they have approached him with this intention, they will lose the benefit of a separation of property, because, having obtained the claim of the heir, they cannot now separate themselves from him whom, to a certain extent, they have chosen as their debtor. But if, in selecting the heir as their debtor, they have required interest from him in that capacity, the same rule should be adopted.

(11) It is also asked whether they can obtain a separation of property, if they have received security from the heir. I do not think that they can do so, for they have followed him who have induced them to change. But what if they accepted insufficient security? They themselves are to blame for not having received sureties who were solvent.

(12) It must also be remembered that after the property of the estate is merged with that of the heir, a separation of property cannot be obtained, for where property is united and mingled together, a separation cannot be demanded. But what if it consisted of distinct tracts of land, slaves, cattle, or anything else which can be divided? Under these circumstances, a separation can be demanded, nor will anyone who maintains that the property is merged be heard, as tracts of land cannot be merged, unless the possession of different persons is so joined and mingled that a separation cannot be effected, which very rarely occurs.

(13) When we have stated that a separation of property cannot be obtained after a long period of time, this must be understood to mean that it cannot be demanded after five years from the time when the estate was accepted have elapsed.

(14) In all these cases, in order to determine whether a separation of property should take place or not, the opinion of the Praetor or the Governor, and that of no one else must be obtained, that is to say, the opinion of him who can grant the separation.

(15) If a creditor should take a pledge from the heir, a separation of property should not be conceded to him, because he looks to the heir for payment. For he should not be heard who asserts that the heir is liable, having with that intention accepted him as his debtor in any manner whatsoever.

(16) Where there are several creditors, some of whom have claims against the heir as their debtor, and others have not, and the latter obtain a separation, the question arose whether they can admit the former to share with them. I think that this will not profit them, for they should be included among the creditors of the heir himself.

(17) It should also be noted that it is commonly held that the creditors of an heir can have anything of the residue of the property of the testator applied to the payment of their claims, but that the creditors of the testator can obtain nothing from the^ property of the heir. The reason for this is, that they who obtained the separation can only blame themselves, if, when the property of the heir was sufficient to pay them, they preferred that the estate of the deceased should be separated for their benefit, but the creditors of the heir are not to blame for anything of this kind.

If, however, the creditors of the deceased petition to share in the property of the heir, they should not be heard; for the separation which they themselves demand removes them from all participation in the said property. But where the creditors of the deceased carelessly demand a separation of property, they are excusable, because their ignorance of the condition of the estate may be alleged as a just cause for their doing so.

(18) It must be remembered that a slave who has been appointed a necessary heir, with the grant of his freedom, can obtain a separation of property; so that if he does not meddle with the estate of his patron, he will be in a position to have whatever he may hereafter acquire separately together with anything which is due to him from the testator.

2. *Papinianus, Questions, Book XXV.*

Where the estate has been sold by the heir, a separation of it cannot legally be demanded, if there is no suspicion of fraud; for any acts performed by the heir in good faith, in the meantime, are usually considered to be legal.

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

A debtor became the heir of his surety, and the creditors of the latter sold his property. Although the liability of the security was extinguished, still, a separation of property will be granted on the demand of him to whom the surety was liable, whether he was the only creditor of the estate or whether there were several. For the rule of law which excludes the obligation of the security on account of the principal obligation, which is the greater, should not prejudice the rights of the creditor who has diligently provided for his own interest. (1) But what if, after the separation of the property of the surety, the stipulator should be unable to collect his entire claim from the estate? Can his share be demanded along with those of the other creditors of the heir, or must he remain content with the property which he preferred to be separated? *As,* however, this stipulator could have shared with the creditors of the debtor in any balance which remained, if the estate of the surety had not been accepted by the creditor of the principal debtor, after the sale of the property of the surety, reason does not permit that he should be excluded in the case proposed. (2) But with reference to every other creditor who has obtained a separation of property, it is more advantageous to hold that if he can not collect his entire debt from the estate, he can still recover something from the property of the heir, if the personal creditors of the heir have been satisfied, because there is no doubt that he should be admitted to share with the creditors of the heir, after those of the estate have been satisfied.

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

A separation of property shall also be granted to creditors where the debt is due after a certain time, or under some condition, on account of which they have not yet been able to bring suit to recover the money, since provision has also been made for them by double security.

(1) It is established that legatees are considered to have a lien only upon that part of an estate which remains after the debts are paid.

5. *Paulus, Questions, Book XIII.*

If the creditors of an estate obtain a separation of property and the estate is found to be insolvent, but the heir is solvent, they cannot have recourse to the latter, but must adhere to the separation which they have already demanded. If, however, the heir should acquire property after the separation has been obtained, and any of it is derived from the estate, they who obtained the separation must, along with the personal creditors of the heir, be admitted to share in what had been acquired. But where their claims have been satisfied, any residue shall be paid to the creditors of the heir; but if the latter acquires any property from some other source, the creditors of the estate will not be permitted to take it. If, however, the personal creditors of the heir are paid in full, some authorities think that anything which remains should be turned over to the creditors of the estate; but I do not accept this opinion, for when they demanded a separation of property they no longer looked to the heir personally for payment, but had recourse to the estate, and, as it were, sold the property of the estate, which was not capable of augmentation.

I thinks that the same rule should be held to apply, even if the creditors were deceived with reference to the separation of the property, and obtained less than the personal creditors of the heir. The latter, however, have, as their security, his property and his person, which they can obtain during his lifetime.

6. *Julianus, Digest, Book XLVI.*

Whenever an heir is insolvent, it is equitable that not only the creditors of the testator, but also

those to whom bequests have been made, should obtain a separation of property, so that, after the claims of the creditors have been fully satisfied, the legatees may obtain their legacies entirely, or in part.

(1) If a freedwoman, who has been appointed heir, demands praetorian possession in accordance with the provisions of the will of the testator, who was not solvent, the question arises whether her own property should be separated from that of the estate. The answer is that relief should be granted to her patron, to prevent him from being oppressed by the indebtedness which his freedwoman contracted by retaining possession of the estate in accordance with the provisions of the will.

7. *Marcianus, Rules, Book II.*

The creditors of an estate who have filed-claims against the heir can, nevertheless, obtain a separation of property, because they took this step from necessity.

TITLE VIII.

CONCERNING THE APPOINTMENT OF A CURATOR OF PROPERTY.

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

Where an heir is appointed under a condition, he should be forced to comply with it, if he can do so; but if he says that he will not accept the estate, even if the condition is fulfilled, the property of the deceased must be sold by his creditors.

(1) If, however, the heir can do nothing, a curator of the estate should be appointed, or the property sold.

(2) If there is a considerable amount of indebtedness due from the estate, which may be increased by the addition of a penalty, the debts should be paid by the curator; just as is usually done when a pregnant woman is placed in possession in the name of her unborn child, or the heir is a minor who has no guardian.

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

In the appointment of a curator, it is our practice to apply to the Prsetor, in order that he may appoint one or more curators with the consent of the majority of the creditors, or to the Governor of the province, if the property is to be sold therein.

(1) Anything which may have been done or performed by the curator or curators appointed, that is, any acts or deeds, or any business which has been transacted, should be ratified. They are entitled to actions against others, and praetorian actions will lie against them. If the curators appoint anyone to bring a suit, or defend one, as the case may be, the security exacted from him with reference to the ratification of his acts, or the payment of the judgment, shall not be taken in the name of him whose property is sold, but in that of the curator himself, who appointed him.

(2) But where several curators are appointed, Celsus says that-they must sue and be sued together, and not separately. If, however, the said curators are appointed for different districts, one, for instance, for property in Italy, and another for property in a province, I think that they will have control over their respective districts.

(3) The question arises whether a curator can be appointed against his will. Cassius says that no one can be compelled to become a curator of property against his consent, which is correct. Therefore, one must be found who is willing, unless imperative necessity exists; and the authority of the Emperor must be invoked for a curator to be appointed against his will.

(4) It is not absolutely essential that the person appointed curator should be a creditor; but those who are not creditors can be appointed.

(5) If there are three curators, and one of them did not transact any business relating to his office, can an action be granted against him? Cassius thinks that no restriction should be imposed upon a plaintiff under such circumstances, and that any one creditor, who desires to do so, can institute proceedings against him. I think that the opinion of Cassius is perfectly correct, and that what has been obtained from the estate, and not what has come into the hands of one of the curators, should be taken into consideration.

This is our practice, unless the curator was appointed against his consent; for, if this is the case, it must be held that an action should not be brought against him.

3. *Celsus, Digest, Book XXIV.*

Where several curators are appointed for the property of the same person, an action to recover the entire amount will be granted against any one of them that the plaintiff may select; just as each one of them can sue a debtor of the estate for the entire amount he owes.

4. *Papirius Justus, On the Constitutions, Book I.*

The Emperors Antoninus and Verus stated in a Rescript that where property has been sold by a curator under the Decree of the Senate, no action would lie against a fraudulent debtor for any act committed before that time.

5. *Julianus, Digest, Book XLVII.*

If a debtor fails in business, and his creditors assemble and select one by whom his property may be sold, the amount due to each one of them to be paid from the proceeds of the sale, and another person afterwards appears, who alleges that he also is a creditor, he will not be entitled to an action against the curator, but he, along with the curator, can sell the property of the debtor, so that whatever is realized from the sale of .the property by the curator and the said creditor may be paid to all the creditors in proportion to their claims.

TITLE IX.

CONCERNING RESTITUTION WHERE FRAUDULENT ACTS HAVE BEEN COMMITTED AGAINST CREDITORS.

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

The Praetor says: "I will grant an action to the curator of property, or to anyone else to whom it is necessary to grant one, in a case of this kind, within the year in which he has a right to institute such a proceeding, where any act has been committed for the purpose of fraud with anyone who was not ignorant of said fraud, and I will also maintain this right of action against ^£he party himself who committed it."

(1) The Praetor was compelled to introduce this Edict in order to protect the rights of creditors, by revoking any alienations of property which had been made for the purpose of defrauding them.

(2) The Praetor says, "where any act has been committed for the purpose of fraud." These words have a general application, and include every kind of fraud which is committed, as well as every alienation, and every contract. Therefore, everything that is done for the purpose of committing fraud, no matter what it may be, is considered to be revoked by these words, for they have a broad application. If, therefore, the debtor should alienate any property, or give a release from liability for a debt to anyone or release anyone from an agreement;

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

The same rule should be adopted. And if he releases a pledge, or pays any person for the purpose of defrauding his creditors:

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

Or if he provides one who owes him with an exception, or obligates himself for the purpose of defrauding his creditors; or pays money; or commits any other act to cheat them; it is obvious that the Edict will become operative.

(1) We should understand as fraudulent acts not only such as the debtor performs while making a contract, but also where he intentionally fails to appear in court, or permits an action to come to an end, or does not bring suit against a debtor, in order that he may be released by lapse of time, or intentionally loses an usufruct or a servitude.

(2) This Edict also applies to a person who commits any act for the purpose of parting with property which he has in his hands.

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

A debtor is understood to intend to defraud his creditors who does not do what he ought to do, for instance, if he does not make use of servitudes to which he is entitled.

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

Or if he should abandon some of his own property, in order that anyone may obtain it.

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

This Edict, however, is not applicable to a person who does not take means to acquire property which he can obtain, for it only has reference to such as diminish their patrimony, and not to those who act in such a way as not to become more wealthy.

(1) Therefore he who fails to comply with the condition imposed, in order that a stipulation may not become operative, does not, by doing so, cause this Edict to take effect.

(2) Hence, if anyone rejects an estate whether it conies to him by law or by the terms of a will, he will not give cause for the application of the Edict, for while he refuses to acquire property, he does not diminish his own patrimony.

(3) In like manner, it must be said that, if a debtor emancipates his son, in order to enable him to accept an estate according to his own judgment, this Edict will not apply.

(4) The opinion also stated by Julianus should be adopted; that is, if a debtor refuses to accept a legacy, the Edict will not apply.

(5) If a debtor should sell his slave, who had been appointed an heir, in order that he might enter upon the estate by the direction of the purchaser, and not the sale, but only what related to the acceptance of the estate was fraudulent, the Edict will not apply, because he has a right to reject the estate. If, however, any fraud attached to the sale of the slave, it shall be revoked; just as if the debtor had fraudulently manumitted him.

(6) It was stated by Labeo that anyone who receives what belongs to him should not be considered to have committed fraud, that is to say, where anyone receives a debt to which he is entitled; for it would be unjust to hold that a debtor whom a Governor forces to make payment against his will can refuse to do so with impunity.

This entire Edict has reference to contracts in which the Praetor does not intervene, as, for example, those involving pledges and sales.

(7) It should be noted that Julianus has said (and this is also our practice) that where anyone receives money that is due to him, before possession is taken of the property of the debtor, even though he is perfectly aware that the latter is insolvent, he does not come within the terms of this Edict, for he has only provided for his own interest.

Any creditor, however, who receives what is due to him after the property of the debtor has been levied on, can be compelled to contribute his share, and be placed on the same footing as the other creditors; for he ought not to deprive them of anything after the property has been

taken in execution, as, for this reason, the position of all the creditors becomes the same.

(8) This Edict punishes him who, knowing that a debtor has the intention of cheating his creditors, receives from him the property of

which they have been defrauded. Hence, if any act is done for the purpose of defrauding creditors, and he who received the property was ignorant of the fact, the provisions of the Edict are not considered to apply.

(9) Moreover, it must be noted that where anyone either purchases or stipulates for any property belonging to a debtor, who has the intention of cheating his creditors (even though the latter may give their consent), or makes any other contract, he will not be held to have done anything to defraud his creditors; for no one is considered to defraud those who are aware of the fact, and give their consent.

(10) Where any business is done with: a minor for the purpose of defrauding his creditors, Labeo says that it must, by all means, be annulled, if the creditors are defrauded; for the reason that the ignorance of a minor, which results from his age, should not be injurious to his creditors, and profitable to himself. This is our practice.

(11) In like manner, we say where a donation is fraudulently made to anyone, there should be no inquiry as to whether the person to whom the article was given was aware of the nature of the transaction or not, but only whether the creditors were defrauded. He who was ignorant of the fraud is not understood to have been injured by it, as he only loses a source of gain, and no loss is inflicted upon him. Against those, however, who have experienced the generosity of one whom they did not know to be insolvent, an action should only be granted to the extent to which they have become pecuniarily benefited, and no farther.

(12) In like manner, if a slave receives an article from a person whom he himself knows to be insolvent, but his master is not aware of the fact, the question arises, will the master be liable? Labeo says that he will be liable to the extent of being compelled to return what came into his hands; or an action *De peculio* can be brought against him, or one *De in rem verso,* if he has profited by the transaction.

The same rule should be adopted in the case of a son under paternal control. If, however, the owner of the slave was aware that the debtor was insolvent, he can be sued in his own name.

(13) Again, if the necessary heir has paid the legacies, and afterwards his property is sold, Proculus says that, even if the legatees were ignorant of his insolvency, an equitable action should, nevertheless, be granted. There is no doubt as to this.

(14) The available days of the year, during which suit can be brought from the date of the sale, should be computed by us in this action.

7. Paulus, On the Edict, Book LXH.

Where a debtor, with the intention of defrauding his creditors, sells a tract of land for less than its value to a purchaser who is aware of the fact, and then the creditors, to whom an action to set aside the sale was granted, claim the land, the question arises whether they should refund the price. Proculus thinks that the land must by all means be returned, even if the price is not refunded. The opinion of Proculus is confirmed by a rescript.

8. *Venuleius Saturninus, Interdicts, Book VI.*

From this it may be gathered that not even a part of the price paid by the purchaser should be returned to him. It can, however, be said that the matter ought to be investigated by an arbiter, to the end that he may order the money to be refunded, if it still is among the effects of the debtor; because, in this way, no one will be defrauded.

9. *Paulm, On the Edict, Book LXII.*

A certain man knowingly purchased an article from a debtor whose property had been taken in execution, and then sold it to a *bona fide* purchaser. The question arose whether an action could be brought against the second purchaser. The opinion of Sabinus, that a *bona, fide* purchaser is not liable, is the better one; because fraud should only injure him who commits it, just as we hold that a purchaser will not be liable if, being ignorant of the facts, he bought the property from the debtor himself. But he who bought it fraudulently, and afterwards sold it to a *bona fide* purchaser, will be liable for the entire sum which he received for the property.

10. *Ulpianus, On the Edict, Book LXX1II.*

The Prastor says: "Where Lucius Titius, with your privity and to your advantage, has disposed of any property for the purpose of defrauding his creditors, so that an action under my Edict will lie against him for the property in question, when no more than a year 'has elapsed, as an action with reference to said property can be brought, you must grant restitution, after proper cause has been shown; and even if you were not aware of the fact, I will grant an action *in factum."*

(1) When anything is done for the purpose of defrauding creditors, it is only set aside where fraud actually results, that is to say, where the creditors whom the person intended to defraud have sold his property. If, however, he has satisfied the claims of those whom he intended to defraud, and has obligated himself to other creditors, or if he has simply paid those whom he intended to defraud, and afterwards become indebted to others, annulment will not take place; but if he satisfied the claims of the first ones whom he intended to defraud by paying them the money of the others whom he had no intention of defrauding, Marcellus says that there will be ground for the annulment of the transaction.

This distinction is mentioned in a Rescript of the Emperors Severus and Antoninus, and is recognized in our present practice.

(2) Where the Praetor says, "aware of the fact," we must understand this to mean that I know that you are committing a fraud; for if I merely know that you have creditors, it will not be sufficient to render me liable to an action *in factum,* for I must have participated in the fraud.

(3) If anyone is not a participant in a fraud, and still, at the time of the sale of the debtor's property, should be summoned by the creditors and notified by them in the presence of witnesses not to purchase the property, will he be liable to an action *in factum* if he should do so? The better opinion is that he will be liable, for anyone who is notified not to purchase in the presence of witnesses, and does so, is not free from fraud.

(4) It is, however, otherwise where anyone knows that another has creditors, and makes an absolute contract with him, without being aware of the fraud; for he is not considered to be liable to this action.

(5) The Praetor says, "aware of the fact," that is to say, he is meant against whom this action can be brought. But what if the guardian of a ward was aware of the fraud, and his ward was not? Let us see whether there will be ground for an action based upon the knowledge of the guardian, and whether the same rule will apply to the curator of an insane person, or a minor? I think that the knowledge of the guardian or the curator will only injure the ward or the minor to the amount of property which comes into their hands.

(6) It should also be noted that, where it is alleged that a sale of property made for the purpose of defrauding creditors can be set aside, if the creditors are the same, even if one of them is of the number of those who have been defrauded (whether he is the only one remaining, or the claims of the others along with his have been satisfied), it must be held that there will still be ground for this action.

(7) It is certain that it can be brought, even if the contracting party knew that one of the creditors had been defrauded, although he was not aware that this was also the case with the

others.

(8) But what if he who was supposed to have been defrauded has been paid; will he be liable to an action for the reason that the remaining creditors have not been the victims of fraud ? I think that this opinion should be adopted. And if anyone, for the purpose of avoiding an action, should say, "I tender what is due to him whom I know to be *a* creditor," he should not be heard.

(9) If the person intending to commit fraud has an heir, and the property of the latter is sold by his creditors, as this has no reference to the property in question, this action will not lie.

(10) If a son, who" has the right to reject an estate, should commit some act for the purpose of defrauding the creditors, and obtain complete restitution because he interfered in the affairs of the estate, or if even a voluntary heir should commit a fraudulent act for the same purpose, and is entitled to complete restitution on account of his age, or for any other good reason, it must be said that an equitable action can" be brought against him. The same rule applies to a slave who is a necessary heir.

Labeo, however, says that this rule should be adopted with an exception, for if the creditors sell the property of an estate, and the necessary heirs commit any act with reference to it during the absence,. or with the consent of the creditors, the fraudulent act of both parties,

that is to say, of the testator and his slaves, will be revoked. If, however, the creditors permitted the necessary heir to act, and had faith in him, or, tempted by the prospect of a high rate of interest, or for some other reason, were induced to trust him, it must be held that any sale of the property made by the testator ought not to be set aside.

(11) If a minor, under the age of puberty, becomes the heir of his father, and dies, and his property is sold by his creditors after a separation has been obtained, any fraudulent sale made by the ward, or by his guardian or curator can be set aside.

(12) When a debt is due to me within a certain time, and the person intending to commit a fraud pays it before it is due, it must be said that the benefit which I have obtained from being paid in advance will afford ground for an action *in factum,* for the Praetor understands that the fraud was committed with reference to the time.

(13) Where a creditor has not been paid, but has received a pledge as security for an old claim, he will be liable to this action; as has been frequently set forth in constitutions.

(14) If a woman, with a view to defrauding her creditors, marries one of her debtors, and releases him from his obligation for the purpose of obtaining the amount as dowry, in fraud of her creditors, this action will lie; and, by means of it, all the money which her husband owed can be collected. The woman will not be entitled to bring suit to recover her dowry, for the dowry was constituted in fraud of her creditors; and this is absolutely certain, and has been frequently promulgated in constitutions. The effect of the action will be to reestablish unimpaired the stipulation from which her husband had been released.

(15) By means of this action an usufruct, as well as a stipulation in the following terms, "Do you promise to pay ten *aurei* every year ?" can be enforced.

(16) If I pursue and arrest a debtor of mine who has several creditors, and had absconded, and I recover the money which he has stolen, and take from him what belongs to me, it was the opinion of Julianus that it made a great deal of difference whether this was done before the creditors of the debtor were placed in possession of his property, or afterwards. If it was done before, an action *in factum* will not lie; if it was done afterwards, there will be ground for the action.

(17) If the property of a deceased person has been adjudged to anyone, by the Constitution of the Divine Marcus, it must be held that for the purpose of preserving freedom this action will

not lie; for he to whom it was adjudged succeeds to the estate with the understanding that whatever was done by the deceased was valid.

(18) The year during which the action *in factum* must be brought is reckoned from the day of the sale of the property.

(19) "By means of this action, the property must be restored, but, of course, with any charges imposed upon it.

(20) The income derived from the property, not only that which has been collected, but also what could have been collected by the person guilty of fraud, is included. This rule, however, is capable of modification, for any expenses which have been incurred should be deducted, as he cannot be compelled by the decision of the court to restore the property, before he has been reimbursed for his necessary expenses.

This rule should also be adopted where any other person has incurred expense with the consent of the sureties and the creditors.

(21) I think that the better opinion is that the offspring of a slave is included in this action.

(22) Moreover, generally speaking, it should be noted that by this action everything should be restored to its former condition, whether it consists of property or of obligations, so that whatever may have been done is set aside, just as if no release had been made. In consequence of this, any profit which would have been obtained in the meantime by the debtor, if no release had been given, must be returned; or if interest, which was not included in the stipulation, was not paid; or if the contract was of such a nature that interest could be collected under it, even if it was not agreed upon.

(23) If the obligation was conditional or had reference to a certain time, it must be re-established with the condition or the time. If, however, it was of such a character that the time upon which it was dependent had elapsed, it can be said that restitution could be asked for within the time which remains, for the discharge of the obligation, without waiting until the year had expired.

(24) This action can be brought after the year has elapsed, where any property which has come into the hands of him who is the object of it is involved; for the Praetor thought that it would be unjust to permit him to have any benefit who had profited by the fraud, and therefore he decided that he should be deprived of all gain. Therefore, whether the party in question himself committed the fraud, or someone else profited by it, the action can be brought with reference to. whatever has come into his hands, or if he has acted fraudulently to avoid acquiring it.

(25) This action is granted in favor of the heir and other successors, and against the heir and persons of this kind.

11. *Venuleius Saturninus, Interdicts, Book VI.* Cassius introduced an action having reference to property which comes into the hands of an heir.

12. *Marcellus, Digest, Book XVIII.*

If a father grants the free administration of his *peculium* to a son under his control, he is not held to have done so for the purpose of alienating it to defraud his creditors, for he himself has not the power to make an alienation of this kind. If, however, the father should grant the *peculium,* to his son with a view to defrauding his creditors, he will be held to have done this himself, and there will be sufficient ground for actions to be brought against him. For the creditors of the son are also the creditors of the father, as they will be entitled to an action of this kind in case it is necessary for money to be paid to them out of the *peculium.*

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

It is established that anyone who holds a pledge is not liable under this action, for he is in possession of it in his own right, and does not hold it for the purpose of preserving the property.

14. *Ulpianus, Disputations, Book VI.*

By this action *in factum,* not only the ownership of the property, but also the rights of action of the debtor are restored. Therefore, it will lie to compel those who are not in possession of the property to restore it, and also against those who have a right of action to compel them to assign it. Hence, if he who is guilty of fraud has introduced Titius, in order that he may transfer the property to him, he should be compelled to assign his right by an action on mandate. Therefore, if the fraudulent debtor gives a dowry for his daughter to anyone, knowing that his creditors are defrauded thereby, the daughter will be liable, and will be forced to assign the right of action to recover the dowry, to which she is entitled against her husband.

15. *Julianus, Digest, Book XLIX.*

If anyone who has Titius as his creditor, being well aware that he is not solvent, makes a testamentary grant of freedom, and then, after having paid Titius in full, has Sempronius as his creditor, and dies, without making any change in his will, the grants of freedom should be confirmed, even if the estate is not insolvent; because, for grants of freedom to be rescinded, we require two conditions to exist, namely, the intention to commit fraud, and the perpetration of the same.

And if the creditor, whom it was the intention to defraud in the beginning, was not cheated, there was originally no intention to deceive him who was actually defrauded. Therefore grants of freedom are confirmed :

16. *Paulus, Opinions of Papinianus, Book V.*

Unless the creditors having prior claims are paid with the money of subsequent ones.

17. *Julianus, Digest, Book XLIX.*

All debtors who are released for the purpose of defrauding creditors are, by this action, restored to their former liabilities.

(1) Lucius Titius, having creditors, transferred all his property to his freedmen, who were also his natural children. The opinion was given that, although it was not suggested that Titius proposed to commit fraud, still, as he knew that he had creditors, and alienated all his property, he should be understood to have had the intention

of defrauding them; and, therefore, although his children were not aware that this was the intention of their father, they would be liable under this action.

(2) If a husband, intending to defraud his creditors, after the dissolution of his marriage, returns his wife's dowry before the time prescribed by law for him to return it, the wife will be liable under this action for the amount of the interest of the creditors in having her dowry returned at the proper time; for the Praetor understands that payment made before the designated time is fraudulent.

18. *Papinianus, Questions, Book XXVI.*

If a husband returns a pledge given him by his wife, or a wife returns one given to her by her husband", the better opinion is that of those who think that no donation was made. There is, however, no doubt if this was done for the purpose of defrauding creditors that the transfer can be set aside by a praetorian action.

The same rule applies where anyone relinquishes a pledge for the purpose of defrauding the creditors of his debtor.

19. *The Same, Opinions, Book XL*

I gave it as my opinion that a father had not defrauded his creditors who, without waiting for his death, transferred the estate of his wife which had been left in trust to their son, after having released him from his control, without taking any account of the Falcidian portion; and I held that the father had fully executed his trust, and had perfectly discharged the duty required of him.

20. *Callistratus, Questions, Book II.*

It is settled that a debtor who has transferred an entire estate, in accordance with the Trebellian Decree of the Senate, is not considered to have defrauded his creditors, if he also transfers the portion which he was entitled to retain by law, but that he has, with the greatest fidelity, complied with the wishes of the deceased.

21. *ScsRVola, Opinions, Book I.*

A debtor, with the intention of defrauding his creditor, entered into an agreement with a neighbor with reference to the boundaries of a tract of land which he had hypothecated. The question arose whether he who purchased the land from the creditor could bring an action to establish the boundaries. The answer was that, according to the facts stated, he would not be any the less entitled to bring the action, because the debtor made the agreement without the knowledge of his creditor.

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

Where a creditor receives a pledge to secure an old claim, I ask whether his act is of no effect, as having been performed for the purpose of defrauding the other creditors. The answer was that the creditor should not be prevented from pursuing the pledge, because he had agreed that it should be given as security for an old debt, unless this was done for the purpose of defrauding other creditors, and legal proceedings should be taken by which acts defrauding creditors are usually rescinded.

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

When certain heirs, appointed in the first degree, ascertained that the estate of the deceased was scarcely sufficient to satisfy the fourth part of his indebtedness, for the purpose of preserving his reputation with the consent of the creditors, and by the authority of the Governor of the province entered upon the estate on condition of only paying a portion of their claims to the creditors; the question arose whether the slaves manumitted by the will could obtain their freedom and the means of support which had been bequeathed to them. The answer was that the grants of freedom would take effect, provided they had not been left for the purpose of defrauding the creditors, but that the legacies would not be due if the estate was insolvent.

24. *The Same, Questions Discussed in Public.*

A minor became the heir of his father, paid one of the creditors, and afterwards rejected his father's estate. The property of his father was sold. Should what the creditor received be returned, to prevent him from enjoying a greater advantage than the other creditors; or shall we make a distinction if he received this as a favor, so that if he was treated with partiality by the guardians, his share may be reduced in proportion to those of the other creditors? If, however, he collected his claim legally, and the other creditors neglected to collect theirs, and, in the meantime, the property became deteriorated either by death, by the theft of chattels, or by the depreciation in value of the land; that which the said creditor received can, by no means, be recovered, as the other creditors should pay the penalty for their negligence.

But what if matters were in such a condition that the property of my debtor being about to be sold, he should pay me my debt; can the money be recovered from me by an action? Should a

distinction be made where he tendered me the money, and where I compelled him to pay me against his consent? And if I forced him to make payment involuntarily, can it be recovered, but if not, will this be done? But I have watched over my interests; I have improved my condition; the Civil Law was made for those who are diligent in protecting their own rights; and hence what I received cannot be recovered.

25. *Venuleius, Interdicts, Book VI.*

When a fraudulent debtor gives a release to someone who owes him, with the knowledge of the surety of the latter, and the principal debtor was not ignorant of the fact, both parties will be liable, or at least the one who was familiar with the circumstances. Where, however, he who was released was not solvent, let us see whether the action should be granted against the principal debtor, even if he was ignorant of the facts, because he received the debt as a donation.

On the other hand, if the release was given to the principal debtor and he was aware of the fraud, his surety will also be liable, if he also was aware of it; but if he did not know of it, why should not an action also be granted against him, as he does not sustain any more damage than he obtains benefit?

Where there are two principal debtors, the case of both is the same.

(1) Where a son-in-law accepts a dowry from his father-in-law, knowing that he intends to defraud his creditors, he will be liable under this action. If he returns the property, he will cease to have the dowry, and Labeo says that nothing should be returned to an emancipated daughter, after a divorce has taken place, because this action is granted for the purpose of recoyering the property and not to inflict a penalty; and hence the defendant, by making restitution, is discharged from liability.

If, however, before the creditors have brought suit against the father-in-law, the son-in-law should return the dowry to the daughter, he can be sued in an action on dowry; and Labeo holds that he will still be liable under this action, without having any recourse against the woman.

But let us see whether he will have a right to claim anything without instituting judicial proceedings. If he was ignorant of the fraudulent intent of the father-in-law, but the daughter knew it, she will be liable; and if both of them knew it, they will both be liable. If neither of them knew it, some authorities hold that an action against the daughter ought, nevertheless, to be granted, because it is understood that something in the form of a donation has come into her hands; or, at all events, she should give security to return whatever she may obtain. An action, however, should not be granted against the husband, if he was ignorant of the intended fraud, as he would not have married a wife who had no dowry; any more than it should be granted against a creditor who receives what is due to him from a debtor intending to commit a fraudulent act.

(2) Likewise, if a stranger, for the purpose of defrauding his creditors, gives a dowry to a girl under paternal control, her husband will be liable if he was aware of his intent, and the woman also, as well as her father, if he was not ignorant of it; so that the husband must give security to return the dowry if it should come into his hands.

(3) If an agent, without the knowledge of his principal, orders a slave to receive property from a debtor who has the intention of defrauding his creditors, and he is aware of this, he himself, and not his principal, will be liable to this action.

(4) Not only must the property which has been alienated be returned, but also any crops which have taken root in the earth at the time of the alienation,' because they constitute part of the property of the fraudulent debtor, as well as those which were gathered after the suit was begun. Any crops gathered in the meantime will not, however, be included in the restitution.

In like manner, the offspring of a female slave who has been fraudulently alienated, which was born in the meantime, will not be included in the restitution, because it did not form part of the property of the debtor.

(5) Proculus says that, if a female slave conceives after the alienation took place, and has a child before suit is brought, there is no doubt that the child should not be returned. If, however, she was pregnant at the time she was sold, it may be said that the child must also be returned.

(6) With reference to crops attached to the soil, Labeo says that by this expression it is not clear whether the Praetor meant the crops which were ripe, or also those which had not yet matured. Moreover, if he referred to those which were ripe, possession need not be restored on that account, for when a tract of land is alienated, the land and everything attached to it are held to constitute but one thing, that is to say, the crops are included in an alienation of any kind; nor should he be understood to have two different things, who, during the winter, has a tract of land which is worth a hundred *aurei,* and at the time of harvest or vintage, can sell the crops for ten *aurei,* that is to say, the land is worth a hundred *aurei,* and the crops are worth ten; but as he has but one thing, that is, the tract of land worth a hundred *aurei,* so also he has but one thing who can sell his house separate from the land.

(7) This action is also granted against a fraudulent debtor, although Mela does not think that it ought to be done, because none is granted against him for anything which took place before the sale of his property, and it would be unjust for an action to be granted against one who had been deprived of all his possessions.

If, however, he should lose some of them and they cannot be recovered in any way, an action will, nevertheless, be granted against him. The Praetor is not considered to take into account the benefit of this proceeding in the case of one who had been deprived of his property by way of penalty.

THE DIGEST OR PANDECTS.

BOOK XLIII.

TITLE I.

CONCERNING INTERDICTS OR THE EXTRAORDINARY PROCEEDINGS TO WHICH THEY GIVE RISE.

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

Let us see in what cases interdicts are available. It should be noted that they are applicable to both Divine or human affairs; to Divine affairs, where sacred or religious places are concerned. Interdicts are granted with reference to human affairs, where property has an 6wner, or where it belongs to no one. Free persons are included in that which belongs to no one, and interdicts will lie where they must be produced in court, or conducted anywhere. Things which have an owner are the property of the public, or of individuals. Public property consists of public places, highways, and rivers; property belonging to individuals is such as relates to property in its entirety, as in the case of an interdict *Quorum, bonorum,* and that which is separated, as in the case of the interdict *Uti possidetis* or *De itinere actuque.*

(1) There are three kinds of interdicts, exhibitory, prohibitory, and restitutory. There are also certain interdicts which are of a mixed nature, and which are both prohibitory and exhibitory.

(2) Some interdicts have reference to the present time, and others to future time. The interdict *Uti possidetis* has reference to the present time, and the one *De itinere actuque de aqua sestiva* has reference to future time.

(3) All interdicts are personal in their application, although they appear to relate to property.

(4) Some interdicts only last a year, and others are perpetual.

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

There are double and single interdicts. The interdict *Uti possidetis* is an instance of a double one. Exhibitory and restitutory interdicts are single, and there are also prohibitory interdicts, as for instance, those *De arboribus csedendis* and *De itinere actuque.*

(1) Moreover, interdicts will lie in favor either of persons, or for the purpose of upholding the Divine Law, and protecting places which are religious; for example, to prevent any act being committed in a sacred place, or to compel matters to be restored to their former condition, where anything has been done; which includes the interdict having reference to burials and the construction of tombs.

Those which have been established in favor of persons either have reference to the common welfare, the maintenance of the rights of individuals, the discharge of official duty, or the preservation of private property. The interdict granting the use of public highways and public rivers, and prohibiting any obstruction from being placed upon a highway is an instance of one instituted for the common welfare; the interdicts to compel the production of children and freedmen in court are examples of those established for the protection of private rights. The interdict requiring the production of a freeman in court is an example of one to compel the performance of an official duty. Other interdicts are granted for the protection of property.

(2) Some interdicts include the pursuit of property, as, for instance, the one which has reference to private rights of way, for by proceedings under this interdict the title to property is involved. Interdicts which refer to sacred and religious places also embrace, to a certain extent, the title to property. That which has reference to the production of children in court, and which we have stated has for its object the maintenance of private rights, is also of this description, so that it is not strange that interdicts relating to private property include the title to it and not the right to its mere possession.

(3) Those interdicts which have reference to private property are instituted either for the purpose of acquiring, recovering, or retaining possession. Interdicts to obtain possession are such as are available by parties who have not hitherto acquired it; and an example of these is the interdict *Quorum bonorum.* The Salvian Edict which relates to pledges is one of this kind, and is as follows: "I forbid violence to be employed to prevent the purchaser from using a right of way which was used by the vendor."

Interdicts for the recovery of possession are mentioned under the title, *"Unde vi,"* for there are certain interdicts which are classed under this head. The interdict, *"Uti possidetis,"* is an instance of one of those issued for the purpose of retaining possession. As we have previously stated there are also interdicts which are double; these are for the purpose of both recovering and retaining possession.

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

In interdicts issued to compel the return of crops, the date when they were issued is taken into consideration, and not any previous time.

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

In cases where the interdicts are only in force for a year, Sabinus is of the opinion that an action should be granted after the year has elapsed, if the party who is sued has obtained any of said crops.

5. *The Same, On Sabinus, Book XIII. '"*

Noxal interdicts are those which are granted on account of some crime committed by persons under our control; as, for instance, where they have forcibly ejected anyone, or have erected a new work either by violence, or clandestinely. It is, however, the duty of the judge to release the' owner, if he places the property in its former condition at his own expense; or if he permits the work to be removed, and directs a slave to be surrendered by way of reparation. If he does not surrender the slave, judgment must be rendered against him for the amount of expense incurred in removing the work; and if he neither suffers it to be removed, nor removes it himself, if he can do so, he shall have judgment rendered against him for an amount which the court may determine, just as if he himself has constructed the work in question.

TITLE II.

CONCERNING THE INTERDICT QUORUM BONORUM.

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

The Praetor says: "Whenever possession of the property of an estate is granted to anyone under my Edict, you will restore to him everything belonging to said estate which you hold, either as heir, or merely as possessor, if there is no usucaption, or if he did not act in bad faith in order to avoid retaining possession."

(1) This interdict is restitutory, and applies to all property, and not to certain specific things. It is styled *Quorum bonorum,* and has for its object the obtaining possession of the entire property in dispute.

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

The debtors of an estate are not liable under the interdict *Quorum bonorum,* but only those who have possession of any property.

TITLE III.

CONCERNING THE INTERDICT QUOD LEGATORUM.

1. *Ulpianus, On the Edict, Book LXVII.* This interdict is commonly called *Quod legatorum.* .

(1) It is also for the purpose of obtaining possession.

(2) It has for its object the restoration to the heir of everything belonging to the estate of which a legatee, against the consent of the heir, has taken possession. For it seemed perfectly just to the Praetor that anyone should not define his rights himself, by taking possession of the legacy, but should first apply to the heir. Therefore the Praetor, by means of this interdict, places in the hands of the heir property which is in the possession of others as legacies, so that the legatees can sue the heir.

(3) This interdict, on the ground of public convenience, is said to extend to the heir of the heir, both civil and praetorian, as well as to other successors.

(4) But as it is sometimes uncertain whether anyone has possession of property as legatee, as heir, or as possessor under the Praetorian Edict, Arrian very properly says that proceedings should, be instituted to claim the estate, and that this interdict ought to be granted whether anyone in possession is liable under it as an heir, a possessor, or a legatee; just as we are accustomed to do when it is doubtful which of two actions should be brought; for we propose two actions, alleging that we can obtain what we are entitled to by one or the other of them.

(5) When anyone has possession of property through a donation *mortis causa,* this interdict will not apply; because, of course, the Falcidian portion will remain in possession of the heir by operation of law, even though all the property has been actually transferred.

(6) Anyone who has received a preferred legacy is liable under this interdict, but only for what he is legally entitled to as a bequest, and not for that part of the estate which he holds in the capacity of heir.

The same rule will apply to a legacy bequeathed to an heir in any other way, for, in this case, it must be decided that the interdict will not be applicable to that part of the estate to which he is entitled as heir.

(7) Where the Praetor says, "or has ceased to hold possession by fraud," we must understand this to mean if he has ceased to have the power to make restitution.

(8) Hence the question arises, if the right of usufruct or use is bequeathed to anyone, and he takes possession of it, can he be compelled to restore it by the provisions of this interdict? The difficulty is that neither the usufruct nor the use can be actually possessed, but they are rather held. It can, however, be maintained that an interdict will lie. The same rule applies to the bequest of a servitude.

(9) The question arises, where anyone is placed in possession of an estate for the preservation of legacies, whether he can be compelled by this interdict to make restitution. The difficulty in the first place, is, that he who is placed in possession of the property for the purpose of insuring the payment of the legacies is not actually in possession, but rather has charge of the property; and in the second place, because this has been authorized by the Praetor. It will be safer to hold, however, that this interdict will lie; especially if security has already been given for the legacies, and the legatee does not withdraw, for then he is considered to have possession.

(10) We can not only say the legatee possesses the property by virtue of the legacies, but also that his heir and other successors can possess the same.

(11) Where the Praetor says, "with the consent of him to whom the property belongs," this must be understood to signify that, if permission to take possession had been granted to the legatee after the estate has been entered. upon, or praetorian possession has been obtained, the interdict will not lie; because if this is done before the estate has been entered upon, or the consent to praetorian possession has been secured, it may properly be held that this will not prejudice him, if he desires to avail himself of the interdict.

(12) Where two articles are bequeathed, and one of them is taken with the consent of the heir, and the other without it, the result will be that one of them can be recovered, and the other cannot. The same rule should be adopted with reference to a single article, a part of which is taken with the consent of the heir, and a part without it, for he can only be deprived of a portion of the same by means of an interdict.

(13) It must be held that there will be ground for this interdict, if possession has begun to be taken by you, or by someone to whose place you have succeeded. We understand one person to have succeeded to the place of another when he succeeds to the entire property, or merely to part of it.

(14) Possession is always a benefit when it has been begun with the consent of him to whom the property belongs. If, however, the consent of the owner is not obtained until afterwards, it will still benefit the possessor. Therefore, if anyone begins to hold possession with the consent of him who has an interest in the property, and his consent is afterwards withdrawn, this will not prejudice him, because he began to hold possession with the consent of the party interested.

(15) If one of two heirs, or any other persons who have an interest in the property, gives his consent to possession of the same by the legatee, and the other does not, it is evident that an interdict will only lie against the one who refused his consent.

(16) Where the Praetor says, "unless security is furnished," we should understand this to mean if the security continues to exist; for if it does not, the legatee will be placed in possession of the property of the estate for the purpose of insuring the payment of the legacies.

(17) I think that proper security should be furnished to the legatee either directly by operation of law, or in such a way that he can obtain it by an action on mandate, and then there will be ground for the interdict.

(18) If security is given for certain property, and not for some other, there will be no difficulty in instituting proceedings under the Edict with reference to the property for which security has been furnished, but this cannot be done to compel the return of the other.

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

The case is different if anything has afterwards been added to the legacy, for, in this case, the sureties will be liable for the entire amount.

(1) Where the Praetor says, "if the praetorian possessor of the estate is not required to give security," we must understand this to mean, if he is ready to give it. Hence, he should not offer to furnish security, but should not delay to do so if the legatee demands it.

(2) When anyone does not make restitution, judgment to the amount of his interest should be rendered against him under this interdict.

(3) If the legatee is satisfied with a mere promise, the interdict should be granted. The same must be said, if the legatee refused to be secured by pledges.

(4) If the legatee was to blame for security not having been given,-even though none was furnished, he will be liable under the interdict.

If, however, he was to blame for security not having been given, but, at the time that the interdict was issued, he was ready to accept security, the interdict will not lie, unless security was given. But if the possessor under the Praetorian Edict was responsible for security not having been given, but was afterwards ready to furnish it, the interdict will lie; for the time when it was issued is taken into consideration.

TITLE IV.

CONCERNING THE INTERDICT WHICH PROHIBITS VIOLENCE BEING EMPLOYED AGAINST A PERSON PLACED IN POSSESSION.

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

The Praetor says: "I will grant an action *in factum,* for the amount of the value of the property of which a person was placed in possession, against anyone who acts fraudulently to prevent him from obtaining control of said property by my permission, or by that of any other magistrate having jurisdiction."

(1) It was with the greatest wisdom that the Praetor introduced this interdict; for it would be useless for him to place anyone in possession of property for the purpose of preserving it, unless he protected him, and punished those who prevented him from occupying it.

(2) Moreover, this Edict is of general application, for it has reference to all persons placed in possession of property by the Praetor, as it seemed proper to him that all those whom he placed in possession should be protected. Where persons are placed in possession, either for the purpose of preserving the property, or to insure the payment of their legacies, or to protect the rights of an unborn child, they will be entitled to an action *in factum* under this Edict, if a master or anyone else should prevent them from doing so.

(3) This action will not only lie against anyone who prevents another from taking possession, but also against a person who drives him away, after he has already obtained possession. It is not required that he who prevents him from taking possession should use force.

(4) Therefore, where if anyone hinders another from taking possession, because he thinks that the property belongs to him, or is encumbered to him, or, in fact, does not belong to the debtor, the result will be that he will not be liable under this Edict.

(5) The following words, "for the amount of the value of the property of which he was placed in possession," include the entire interest of the creditor, so that the defendant shall have judgment rendered against him to the extent of the interest he had in not being prevented from obtaining possession. Hence, if he was placed in possession by virtue of a false claim or demand which was groundless, or if he should have been barred by an exception, this Edict will be of no advantage to him, because there was no reason why he should have been placed in possession.

(6) It is established that neither a minor nor an insane person is liable under this Edict, because they are destitute of will power. We should understand a minor to be one who is incapable of committing fraud, but if he is already capable of doing so, the opposite opinion must be held; therefore, if a guardian should commit a fraudulent act, we will grant an action against his ward, provided the guardian is solvent. Julianus says that the guardian himself can be sued.

(7) If anyone is prevented from obtaining possession with the consent of a master or a father, an action will be granted against them, just as if they committed the act by the agency of others.

(8) This action can only be brought within a year, except where anyone is placed in possession to insure the payment of a legacy; and it must be noted that it cannot be brought after the year has expired, as it is a penal one; nor will it be granted against heirs and other persons of this kind, unless with reference to property which has come into their hands. It will, however, be granted to the heir and other successors. For when anyone is prevented from obtaining possession on account of the preservation of legacies or trusts, the action is perpetual and is granted against the heir, because it is in the power of successors to avoid the operation of the interdict by offering to give security.

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

It makes no difference whether anyone is prevented from taking possession in his own name, or in that of another, for the words, "For the amount of the value of the property," have reference to the owner personally.

(1) He also is liable who, either in his own name or in that of another, prevents possession from being taken.

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

Where anyone is awarded possession for the protection of a trust, and is not admitted, he should be placed in possession by the authority of him who granted it to him. If he wishes to avail himself of the interdict, it must be said that it will be applicable. It would, however, be better for the judge to have his decree executed by extraordinary process, derived from the power of his office, and sometimes even to accomplish this by armed force.

(1) It was decided by Antoninus that a person may, under certain circumstances, be permitted to take possession of the property of the heir himself. Therefore, if anyone is not permitted to take possession of such property, it must be held that this equitable proceeding will lie.. He can also make use of extraordinary execution.

(2) The Praetor places an unborn child in possession. This interdict is both prohibitory and restitutory. If the mother prefers to bring an action *in factum,* it must be remembered that she can do so (as in the case of creditors), rather than avail herself of the interdict.

(3) If the woman is alleged to have obtained possession for the purpose of causing annoyance, or because she is not pregnant, or is not pregnant by the man whose property is in question, or where anything is alleged with reference to her status, the Praetor promises possession to the unborn child, under a Rescript of the Divine Hadrian, in conformity with the presumption of the Carbonian Edict.

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

The Praetor, by means of this Edict, conies to the relief of a person who has been placed in possession by him for the prevention of threatened injury, in order to prevent violence being employed against him.

(1) Moreover, the penalty imposed upon him who does not promise security or furnish it is that his adversary shall be placed in possession. Therefore, if he promises to give security, or if he was not required to do so, the interdict will not apply, and the plaintiff can be barred by an exception.

(2) The Praetor promises an action against a party who neither gave security, nor suffered him who had been placed in possession to enter upon the premises, for the amount which he must have paid if he had furnished security.

(3) The Praetor introduced this action for another reason, namely, so that, if when a person desired to be placed in possession he was unable to appear in court, and in the meantime while his inability continued, he sustained any injury he might be entitled to bring the action.

(4) It was also added that if anyone who was placed in possession was alleged to have been prevented for some other reason, he would have a right to an action *in factum.*

TITLE V.

CONCERNING THE PRODUCTION OF PAPERS RELATING TO A WILL.

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

The Praetor says: "If you have in your possession any documents which Lucius Titius is alleged to have left, and which have reference to his will; or if you have committed some

fraudulent act to avoid having them in your possession, you must produce them for So-and-So. I shall include in my decree all memoranda, or anything else which he is said to have left."

(1) If anyone acknowledges that the will is in his possession, he should be ordered to produce it, and time should be granted him to do so, if he cannot produce it immediately. If he states that he cannot produce it, or denies that this ought to be done, the interdict will lie.

(2) This interdict not only has reference to the will itself, but also to everything relating to it, as, for instance, a codicil.

(3) It must be said that the interdict will be applicable whether the will is valid or not (whether it was void originally, or has been broken, or is defective in any other respect, or even if it is alleged to be forged, or to have been made by one who did not have testamentary capacity to make a will).

(4) It must be held that this interdict will apply whether the will in question was the last or the first one executed.

(5) Therefore, it should be said that this interdict has reference to every written will, whether it is perfect or imperfect.

(6) Hence, if there are several wills, made at different times, it must be held that this interdict will apply; for all instruments having reference to the will which have been drawn" up at different times should be produced.

(7) If a discussion arises with reference to the condition of the testator, and a son under paternal control, or a slave is alleged to have drawn up the will, it shall be produced.

(8) Moreover, there will be ground for this interdict where a son under paternal control makes a will disposing of his *castrense peculium.*

(9) The same rule will apply if he who executed the will dies while in the hands of the enemy.

(10) This interdict does not refer to the will of a person who is living, because the Praetor employs the term "left."

(11) If the will has been erased without fraudulent intent,

2. *Paulus, On the Edict, Book LXIV.* Either entirely, or partially,

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

This interdict will be applicable.

(1) If the will is written upon several sheets, they are all included under this interdict, because they constitute but a single will.

(2) If the will is deposited with anyone by Titius, proceedings can be instituted by virtue of this interdict, both against the person who has the will, and against him who deposited it with him.

(3) Hence, if the guardian of a temple or a notary has the will as a depositary, it must be said that he will be liable under this interdict.

(4) When the will is in the hands of a slave, his master will be liable under the interdict.

(5) If the testator himself says that the will is his, and wishes it to be produced, this interdict will not lie; but an action for its production must be brought to enable him to claim the will after it has been produced.

This rule should be adopted in all cases where persons claim the ownership of documents.

(6) If anyone commits fraud in order to avoid having a will in his possession, he will still be

liable under this interdict. Proceedings under the Cornelian Law relating to testaments will not, however, be prevented; as, for instance, if the party in question is alleged to have fraudulently suppressed the will. For no one can retain a will with impunity under the pretext that he has committed a more serious crime, and by the production of it, the crime, which is admitted, will be the more readily proved.

Anyone may be guilty of fraud and yet not come within the provisions of this law, as for example, if he did not steal or hide the will, but delivered it to another to avoid being compelled to produce it for the inspection of the party making use of the interdict; that is to say, if he did this, not with the intention of suppressing the will, but in order to avoid producing it.

(7) This interdict'is exhibitory.

(8) Let us see what it is to produce anything. It is to place it in such a position as to afford an opportunity for it to be taken hold of.

(9) Production must be made before the magistrate in such a way that by his authority the witnesses may be notified to appear and acknowledge their seals. If they do not obey, Labeo says that they should be compelled to do so by the magistrate.

(10) All persons to whom anything has been left by a will can demand its production.

(11) In a case of this kind the amount of the judgment should be in proportion to the interest of him for whose inspection the person having the will in his possession refuses to produce it.

(12) Therefore, if the appointed heir makes use of this interdict, the estimate of the damages must be in proportion to the value of the estate.

(13) If a legacy is in dispute, the amount of the damages must be in proportion to the value of the legacy.

(14) If the legacy was bequeathed under a condition, the estimate will be made just as if the condition had been complied with; nor shall the legatee be compelled to give security to restore whatever he obtains, if the condition should not be fulfilled; because the decree imposes the penalty for contumacy incurred by the heir for not producing the will.

(15) Hence, if the legatee, having received the value of his legacy in this way, afterwards claims the legacy itself, the question arises whether he should be heard. I think that if the heir paid the amount, the legatee will be barred by an exception on the ground of fraud; but if anyone else paid it, he will not be barred. Therefore, the same distinction should be made if the heir obtained the value of the legacy, after having availed himself of the interdict.

(16) It is established that this interdict can be employed even after the year has elapsed.

(17) It will lie in favor of the heir and other successors.

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

If the will is in the possession of a ward, and he has been deprived of it by the fraudulent act of his guardian, the interdict will lie against the guardian himself; for it is only just that he should be liable for his own crime and not his ward.

5. *Javolenus, On Cassius, Book XIII.*

The interdict, requiring a person to produce a will, will not lie where any controversy with reference to the estate is pending, or any public question is involved. Therefore the will should in the meantime be deposited either in a temple or in the hands of some responsible person.

TITLE VI.

CONCERNING THE INTERDICT FOR THE PURPOSE OF PREVENTING ANYTHING BEING DONE IN A SACRED PLACE.

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

The Praetor says: "I forbid any labor to be performed in a sacred place, or anything to be carried there."

(1) This interdict has reference to sacred places, and not to one where holy objects are kept.

(2) Where the Praetor says that no labor shall be performed in a sacred place, this does not refer to anything which is done to adorn it, but to acts committed for the purpose of defacing it, or rendering it inconvenient.

(3) The care of temples and of other sacred places is entrusted to those who have charge of them.

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

It is not permitted to do anything to the walls or doors or any other parts of sacred edifices, from which injury or inconvenience may result.

3. *Paulus, Decisions, Book V.*

Neither the walls nor the doors can be utilized for habitation, without the permission of the Emperor, on account of the danger of fire.

TITLE VII.

CONCERNING THE INTERDICT RELATING TO PUBLIC PLACES AND HIGHWAYS.

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

Anyone shall be permitted to avail himself of the benefit of public property intended for the use of all, as, for instance, the public highways and roads; and therefore, on the demand of any person whomsoever, interference with them may be forbidden.

2. *Ulpianus, Digest, Book XLVIII.*

No one is allowed to erect a monument on a public highway.

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

Roads existing in any particular neighborhood, which have been derived from the contribution of land owned by private individuals, and date from time immemorial, are included in the number of public highways.

(1) A difference exists between roads of this kind and military highways, namely, military highways terminate at the seashore, or in cities, or at public streams, or at some other military highway, but this is not the case with roads through a neighborhood, for some of them terminate at military highways, and others end without any exit.

TITLE VIII.

CONCERNING THE INTERDICT FORBIDDING ANYTHING TO BE DONE IN A PUBLIC PLACE OR ON A HIGHWAY.

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

The Praetor forbids any building to be erected in a public place, and issues an interdict to that effect.

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

The Praetor says: "Nothing shall be done in a public place, or brought there, which will cause any damage to it; except what is permitted by some law, decree of the Senate, Edict, or Rescript of the Emperors, and if anything of this kind is done, I will grant an interdict."

(1) This interdict is prohibitory.

(2) By means of it, the public as well as the private welfare is protected. For public places are intended for the use of private persons, that is to say, as the property of the State, and not as belonging to any individual; and we have only as much right to their enjoyment as anyone of the people has to prevent their being interfered with. For which reason, if any work is done in a public place which tends to the injury of a private individual, the person responsible for it can be proceeded against under the prohibitory interdict which has been introduced for this purpose.

(3) Labeo defines the term, "public place," as applying to such localities, houses, fields, highways, and roads as belong to the community at large.

(4) I do not think that this interdict has reference to places which belong to the Treasury, for no one can do anything in such places, nor can any private person prevent anything from being done there. Property of the Treasury, to a certain extent, belongs to the Emperor as his own. Therefore, if anyone builds anything on said property, there will be no ground for the application of this interdict. If any controversy arises on this point, the Imperial Prefects will be the judges.

(5) Hence, this interdict relates to places which are intended for the use of the public, and if anything is done there which may injure a private'individual, the Praetor can intervene by means of this interdict.

(6) If anyone has an awning suspended over his portico, which shuts off the light from his neighbor, the interdict will be issued in the following terms: "Do not place anything in the public street which may interfere with the light of Gaius Seius."

(7) If anyone wishes to repair anything in a public place, Aristo says that there will be ground for the application of this interdict, in order to prevent him from doing so.

(8) This interdict is available against anyone who builds a foundation in the sea, by a person who may be injured by it; but if no one sustains any damage, he who builds upon the shore, or constructs a foundation in the sea, should be protected.

(9) Where anyone is prevented from fishing in, or sailing upon the sea, he will not be entitled to this interdict, just as in the case of a person who is prevented from taking part in games in a public field, or bathing in a public bath, or being present in a theater; but in all these cases an action for reparation of injury must be employed.

(10) The Praetor very properly says, "where any injury is sustained by the party on this account." For where anything is allowed to be done in a public place permission should be granted, for it to be done without causing injury to anyone, and the Emperor is accustomed to grant permission when a request is made for the construction of any new work.

(11) Moreover, injury is considered to be sustained when any benefit of any description whatever, which is derived from a public place, is lost.

(12) Hence, if the view enjoyed by anyone, or his approach to a public place is interfered with, and diminished, or restricted, this interdict should be employed.

(13) Labeo thinks if I erect a building in a public place, so as to prevent the water from flowing from my premises upon yours, which they formerly did without any right enjoyed by me, that I will not be liable under the interdict.

(14) It is clear that if the building which I erected should intercept the light of your house, this

interdict will lie.

(15) He also says that if I erect a building in a public place, and it interferes with one which you have already erected in the same place, this interdict will not apply, as you also have built contrary to law, unless you have done so by virtue of some special privilege which has been granted to you.

(16) If anyone obtains from the Emperor general permission to build in a public place, it must not be believed that he can erect the building in such a way as to cause inconvenience to anyone; for such a concession is not understood to be granted unless this was expressly stated.

(17) If anyone constructs a house in a public place without anyone preventing it, he cannot be compelled to remove it, for fear that the city may be marred by its demolition; and because the interdict is prohibitory and not restitutory. If, however, the said building interferes with public use, it should be demolished on the application of the officer in charge of public works; but if it does not interfere with anything, a land tax can be imposed upon it, for the tax receives this name because it is paid on account of the ground.

(18) But if no work has yet been done, it is the duty of the judge having jurisdiction to require security that it will not be done, and the bond must be drawn up in such a way as to render the heir and other successors liable.

(19) The rule with reference to sacred places is different, for we not only forbid any work to be done in a sacred place, but where any has been done, we order everything to be restored to its former condition. This rule has been adopted for the sake of religion.

(20) The Praetor says: "I forbid anything to be built on a public highway or road, or to be placed there, by which the said highway or road is, or may be damaged."

(21) By a public highway we mean one whose soil belongs to the people, for we do not understand a private road to mean the same as a public one. In the case of a private road, the soil belongs to another, and we have only the right of walking and driving over it; but the soil of a public highway is owned by the community, and has been established with reference to direction, and within certain limits, by him who had the right to render it public, in order that everyone might travel upon it, and traverse it.

(22) Some roads are public, some are private, and others are local, belonging to the neighborhood. We call roads public which the Greeks designated as royal, and we name praetorian or consular roads. Private roads are such as some persons style agrarian. Local, or neighborhood roads are those which are situated in villages, or lead to towns; certain authorities also call these public roads. This, however, is only true where they have not been established by the contribution of land by private persons; but it is otherwise if they are repaired at the expense of individuals, for a road is not private on this account. The repairs of the same are common, because such a road is for the common use and benefit.

(23) Private roads are understood to be of two kinds, some of them are through land upon which a servitude to furnish a right of way to the land of another has been imposed, others give access to certain tracts of land, and anyone can make use of them, after leaving a consular road, when a lane; a path, or a road for driving is found leading to a farm. I think that roads which lead from a consular highway to farms or villages are also public.

(24) This interdict only applies to roads in the country and not to those in cities, for the magistrates are charged with the care of the latter.

(25) If traffic is intercepted on a public highway, or it is closed, the magistrates shall intervene.

(26) If anyone conducts a sewer across a public highway, and, for that reason, it becomes less fit for use, Labeo says that he who placed it there will be liable.

(27) Hence, if anyone digs a ditch on his own land, and the water collected by it runs over the highway, he will be liable under this interdict, for he will be considered to have obstructed it.

(28) Labeo also says that if anyone builds a house on his own ground, and the water then collects upon the highway, he will not be liable under the interdict, because he did not cause the water to flow upon the highway, but he merely did not take care of it.

Nerva, however, says, more properly, that he will be liable in both instances, as it is clear that if the land adjoins the public highway, the water flowing from it injures the latter; for if the water flows from the land of a neighbor upon yours, and you are compelled to take care of that water, there will be ground for an interdict against your neighbor. If, however, it is not necessary for you to take care of it, your neighbor will not be liable, but you will be; for he who had the use of the water is considered to have committed the act which damaged the highway.

Nerva also says that if proceedings under the interdict are instituted against you, you will not be obliged to do anything more, or bring an action against your neighbor to force him to do what will satisfy the person who has sued you. If it should be decided otherwise, you will be considered responsible, even if you have brought a *bona fide* action against your neighbor, and it is not your fault that the person who sued you is not content with what you have done.

(29) He also says that if the place where the road is situated becomes unhealthy on account of a bad odor, an interdict cannot be employed on this account.

(30) This interdict also applies where animals are pastured on a public highway, or road, and injured.

(31) The Praetor also says, "by which the said highway or road is, or may be damaged." Therefore this applies, whether the road is immediately damaged, or whether this takes place afterwards, for this is the meaning of the words, "is, or may be." For there are certain things which injure a road immediately, and others which do not do so at once, but will in the future.

(32) Moreover, a road is understood to be damaged if it is rendered less available for travel, that is to say, for walking or driving; as, for instance, if, having been level, it becomes hilly; or, having been smooth, it becomes rough; or, having been wide, it becomes narrow; or, having been dry, it becomes muddy.

(33) I know that the point has been discussed whether an arch or a bridge can be constructed across a public highway. Many authorities hold that the person who does this will be liable under the interdict, because a highway must not be rendered less available for use.

(34) This interdict is perpetual, and popular, and judgment should be rendered to the extent of the interest of the plaintiff.

(35) The Praetor says: "You shall restore everything to its former condition, if you have done any work, or placed anything upon the public highway by means of which the said highway or road is, or may be damaged."

(36) This interdict is founded upon the same reason as the former one, and the only difference between them is that this is restitu-tory, and the other prohibitory.

(37) He is not liable under this interdict who builds anything on the public highway, but he who is in possession of what has been built. Hence, if one person should erect something, and another should hold it, the latter will be liable; and this is more fitting, for he who has control of the obstruction can restore the highway to its original condition.

(38) We consider him to have possession of the building who holds or enjoys it by the right of possession, whether he himself constructed it or acquired it by purchase, lease, bequest, inheritance, or in any other way.

(39) Hence Ofilius thinks that if anyone abandons an obstruction which he has raised upon the highway, by which it is injured, he will not be liable under this interdict; for he does not have possession of what he constructed. But let us see whether an action can be granted against him. I think that an interdict will be available to compel him to remove whatever he built upon the public highway, and restore the latter to its former condition.

(40) If a tree falls from your land upon the public highway, in such a way as to obstruct it, and you consider the tree as abandoned, Labeo says that you will not be liable. He adds that if the complainant is ready to remove the tree at his own expense, he can properly proceed against you under the interdict relating to the repair of highways. If, however, you do not consider the tree as abandoned, he can properly proceed against you under this interdict.

(41) Labeo also says that if my neighbor obstructs the public highway by some work which he does, that is as advantageous to me as to himself, but did this only for the benefit of his own land, I can not be sued under the interdict; but if we caused this work to be performed in common, both of us will be liable.

(42) This interdict also applies against a person who has fraudulently avoided having possession of, or holding the structure which injures the highway; for he who is in possession of, or holds it, and he who has acted fraudulently to avoid doing so, must be subject to the same restrictions.

The opinion of Labeo seems to me to be correct.

(43) When the Praetor says, "you shall restore it to its former condition," he is understood to mean that it shall be placed in its original state, which is accomplished either by removing what has been built, or by replacing what has been taken away, and this sometimes at his own expense. For if the party who is sued under the interdict did the work, or someone else did it by his order, or he ratified what the latter had done, he must restore everything to its original condition at his own expense. If, however, nothing of this kind took place, but he merely holds possession of what has been constructed, we, in this instance, say that he must only suffer the work to be removed.

(44) It must be remembered that this interdict is not a temporary one, for it has reference to the public welfare. Judgment is rendered under it to the extent of the interest of the plaintiff in having the work which has been constructed demolished.

(45) The Praetor says: "I forbid violence to be employed to prevent anyone from freely passing and driving over a public highway, or road."

3. *Celsus, Digest, Book XXXIX.*

I think that the shores of the sea over which the Roman people have control belong to them.

(1) The use of the sea as well as that of the air is common to all men, and the piles which are driven into it belong to the person who has placed them there; but this should not be conceded if the shore is damaged, or the future use of the sea is impaired on account of it.

4. *Scaevola, Opinions, Book V.*

"It is allowed by the Law of Nations to build upon the sea-shore, unless the public use of it is interfered with by doing so."

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

If a stream which conducts water through a public place injures a private person, he will be entitled to an action under the Law of the Twelve Tables to compel security to be given for any damage caused by the owner.

6. *Julianus, Digest, Book XLIII.*

He who avails himself of this interdict to prevent any work done in a public place from causing damage to a private individual can employ an attorney, although the proceeding under the interdict has reference to a public place.

7. *The Same, Digest, Book XLVIII.*

Just as a person who builds in a public place without anyone attempting to prevent him is not compelled to demolish what he has constructed in order to prevent the city from being defaced by the ruins, so anyone who builds contrary to the Praetorian Edict should remove what he has erected; otherwise, the authority of the Praetor becomes vain and illusory.

TITLE IX.

CONCERNING THE EDICT RELATING TO THE ENJOYMENT OF A PUBLIC PLACE.

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

The Prastor says: "I forbid force to be employed to prevent anyone who has leased public property, or his partner, from enjoying it in accordance with the terms of the lease."

(1) It is evident that this interdict was established for the general welfare, for it protects the public revenue when it forbids violence to be employed against anyone who has leased public land for the purpose of enjoying it.

(2) If a lessee and his partner both apply to have the interdict issued, the lessee himself will be entitled to the preference.

(3) The Praetor says, "In accordance with the terms of the lease," and this is reasonable, for a tenant who desires to enjoy the property beyond, or contrary to the terms of his lease, should not be heard.

2. *Paulus, Decisions, Book V.*

It is customary to permit pictures and statues, which will be ornamental to a city, to be set up in public places.

TITLE X.

CONCERNING THE EDICT WHICH HAS REFERENCE TO PUBLIC STREETS AND ANYTHING DONE THEREIN.

1. *Papinianus, On the Duties of the Ediles.*

The Ediles should see that the streets of cities are kept in order, that the overflow of water does not injure houses, and that bridges are constructed wherever this is necessary.

(1) They should also see that the walls of the city, as well as those of others, and especially such as face the street, are not in bad condition, but should require the owners of the same to repair and rebuild them. If, however, the latter fail to repair or rebuild them, they should fine them until they do so.

(2) They should also see that no one digs holes in the streets or undermines them, or builds anything in them. If a slave does anything of this kind, he can be beaten by any passerby; if he is proved to be a freeman before the Ediles, they can fine him in accordance with law, and demolish whatever he has built.

(3) Every person must construct the public street in front of his own house, clean the gutters which are exposed, that is to say, open to the sky, and keep the street in such a condition that a vehicle will not be prevented from traversing it. Those who rent the houses must build the street, if the owner does not do so, and they can deduct the expense from the rent.

(4) The Ediles shall also see that nothing is allowed to project in front of the shops, unless where a fuller desires to dry clothing, or a carriage-maker places his work outside; but, in

these instances, whatever they do must not interfere with the passage of vehicles.

(5) The Ediles must not permit any quarreling to take place in the streets, nor any filth, dead animals, or skins to be thrown into them.

TITLE XI.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO REPAIRS OF PUBLIC STREETS AND HIGHWAYS.

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

The Praetor says: "I forbid force to be employed to prevent anyone from opening up or repairing a public street or highway who has the right to do so, unless the condition of the street or highway may be rendered worse thereby."

(1) To open up a street is to restore it to its former height and breadth; and it is a part of the repair of streets to clean them. Properly speaking, however, to clean a street means to reduce it to its proper level by removing whatever has been deposited on it. For he who repairs a street, as well as he who opens up and cleans it, are persons who restore it to its former condition.

(2) If anyone, under the pretext of repairing a street, makes it worse, force can be employed against him with impunity, because he who avails himself of the interdict under the pretext of reparation cannot make the street wider, longer, higher, or lower, nor can he throw sand into it, or pave it with stone, if it is merely composed of earth; or, on the other hand, where it has been paved with stone, can he remove it, leaving only the soil.

(3) This interdict is perpetual, is granted for and against everyone, and judgment is rendered under it to the extent of the interest of the plaintiff.

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

The public cannot lose a highway by failing to make use of it.

3. *Paulus, Decisions, Book I.*

Where anyone throws a public highway on the land of his neighbor, the *Actio vise receptse* will only be granted against him to the extent of the interest of him whose property was injured thereby.

(1) If anyone plows up a highway, he alone shall be compelled to repair it.

TITLE XII.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO RIVERS AND THE PREVENTION OF ANYTHING BEING DONE IN THEM OR ON THEIR BANKS WHICH MAY INTERFERE WITH NAVIGATION.

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

The Praetor says: "Nothing shall be thrown into a public river or deposited on its banks, by means of which the landing of merchandise, traffic, or the movement of shipping may be interfered with."

(1) A river is distinguished from a small stream by its superior' size, or by the opinion of the people who live in the neighborhood.

(2) Some rivers have a continuous flow, and others are torrential. Those which have a continuous flow run always; those which are torrential only flow during the winter. If, however, a river, which at other times continues to flow, should dry up in the summer, it will not, on this account, be removed from the former class.

(3) Some rivers are public, and some are not. Cassius defines a public river to be one which

flows uninterruptedly. This opinion of Cassius, which is approved by Celsus, seems to be plausible.

(4) This interdict has reference to public rivers, but it does not apply to one which is private, because a private river does not differ from other places which belong to individuals.

(5) A bank is properly defined to be what contains a river when it pursues its natural course, for it does not change its banks on account of rain, the tide, or for any other reason. No one says that the Nile, which covers Egypt with its overflow, changes or enlarges its banks; for when it returns to its ordinary dimensions, the sides of its channel should be repaired. If, however, a river should naturally increase in size in such a way as to acquire a permanent enlargement, either through the addition of the water of another stream, or for some other cause, it undoubtedly must be held that it has changed its banks, just as if, having changed its bed, it begins to flow elsewhere.

(6) If an island is formed in a public river, and anything is built upon it, it will not be considered to have been constructed in a public place, for the island becomes the property of the first occupant if the neighboring fields have regular boundaries; or belongs to him to whose bank it is contiguous; or if formed in the middle of the channel, it will belong to those who own land on both banks of the stream.

(7) In like manner, if a river leaves its bed and begins to flow elsewhere, anything which was built in the old bed will not come under the terms of this interdict, for what belongs to the neighbors on both sides is not constructed in a public stream; or, if the land has boundaries, the bed of the river will belong to the first occupant, and it certainly ceases to be public property.

Moreover, although the new bed which the river has made for itself was previously private property, it at once becomes public; because it is impossible for the bed of a public stream not to be public.

(8) A canal, made by human hands, through which a public river flows is, nevertheless, public property to such an extent that if anything is built there, it is considered to have been built in a public stream.

(9) It is otherwise if a river overflows the land of another, and does not make a new bed for itself; for then what the water covered does not become public property.

(10) Again, if a river surrounds land, it must be noted that the land still remains the property of the original owner. Therefore, if anything is built in it, it is not built in a public stream. Whatever is done on private land does not come within the scope of this interdict, any more than what is done in a private stream; for anything which is done in a private stream is just the same as if it was done in any other place belonging to a private individual.

(11) We understand anything to have been built in a public stream where this was done in the water itself; for if anything is built outside of the water, it is not considered to have been done in the stream, so that any structure erected upon the bank is not held to have been built in the stream.

(12) The Praetor does not absolutely prohibit any work being done in a public river, or on the bank of the same, but only whatever may interfere with the landing of goods, or navigation. Therefore, this interdict only applies to public rivers which are navigable, and not to any others.

Labeo, however, says that even if anything is done to a river that is not navigable, which may cause it to dry up, or which obstructs the course of the water, it will not be unjust to grant an available .interdict to prevent any violence from being employed against removing or demolishing a structure which has been built in the bed of the stream, or on its bank, that interferes with the passage or current of the river, and to compel everything to be re-

established in good condition, in accordance with the judgment of a reliable citizen.

(13) The word *statio,* a landing-place for ships, is derived from the verb *statuo.* By it, therefore, the place is indicated where ships can remain in safety.

(14) The Praetor says, "or the movement of shipping may be interfered with." This is used instead of the word navigation, and, indeed, we are accustomed to employ the terms shipping and navigation, instead of the vessel itself. Hence, by the term "shipping" may also be understood the course of the vessel. Boats are also included in this term, for their use is frequently necessary. If the approach for pedestrians is obstructed, the movement of shipping is also interfered with.

(15) The anchorage and the course of navigation are also considered to be interfered with where the use of the same is interrupted, or rendered more difficult, or diminished, or made less frequent, or entirely destroyed. Hence, if the water is drawn away, and the river, having become smaller, is rendered less navigable; or if its width is increased, or the water being more widely distributed becomes shallower; or if, on the other hand, the stream is rendered more narrow, and runs very rapidly; or if anything is done to inconvenience navigation, make it more difficult, or entirely prevent it; there will be cause for the interdict.

(16) Labeo says that an exception on the ground that the work was only performed for the purpose of preserving the bank should not be granted to him who is sued under the interdict; but that it should be on the ground that nothing has been done except what was authorized by law.

(17) Where anything has been built in the sea, Labeo says that the following interdict will lie. "Nothing shall be constructed in the sea, or on the shore of the same, by which a harbor, anchorage, or the-course of navigation may be obstructed."

(18) He also thinks that the same rule will apply to any public stream which is not navigable.

(19) The Praetor further says, "If you have placed anything in a public river or done any work therein, or on the bank thereof, by which the anchorage of vessels or the course of navigation has been, or may be interfered with, you shall restore everything to its former condition."

(20) The interdict above mentioned is prohibitory; the one which has reference to the same case is restitutory.

(21) He who has done any work, or placed anything in a river or upon its bank which may obstruct navigation, is obliged to restore everything to its former condition, if what he has done may interfere with the anchorage of vessels or their movements.

(22) The following words, "has done or placed," indicate that he who built or deposited the obstruction is not liable, but that he who has possession of it after this has been done is liable. Finally, Labeo says that if your agent has diverted the course of the stream, you will be liable under this interdict, if you use the water.

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

There is nothing to prevent anyone from taking water from a public stream unless this is forbidden by the Emperor or the Senate; provided the water is^intended for the use of the public. If the stream is either navigable, or another is rendered navigable by it, this is not permitted to be done.

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

Public rivers which have a regular course, together with their banks, are public property.

(1) The banks of a river are considered to be those that confine it when the water is at its highest point.

(2) The places along the banks of a stream are not all public, as they are accessory to the banks, beginning at the point where the latter begins to incline from the level ground to the water.

4. *Scssvola, Opinions, Book V.*

Inquiry has been made whether he who owns houses on both sides of a public stream has a right to build a bridge which will be his private property. The answer was that he cannot do so.

TITLE XIII.

CONCERNING THE INTERDICT TO PREVENT ANYTHING FROM BEING BUILT IN A PUBLIC RIVER OR ON ITS BANK WHICH MIGHT CAUSE THE WATER TO FLOW IN A DIFFERENT DIRECTION THAN IT DID DURING THE PRECEDING SUMMER.

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

The Praetor says: "I forbid anything to be built in a public river or upon its banks, or anything to be placed in such a river or on its banks, by means of which the water may be caused to flow in a different direction than it did during the previous summer."

(1) By means of this interdict, the Praetor makes provision against the drying up of a river, due to improper concessions for drawing off the water; and to prevent the beds of streams from changing and injuring the neighbors.

(2) This refers to public rivers, whether they are navigable or not.

(3) The Praetor says, "by which the water may be caused to flow in a different direction than it did during the previous summer." Hence, not everyone who built or placed an obstruction in the river will be liable, but only he who, by building or placing it there, caused the water to take a different course than it had done during the previous summer. However, where he says, "a different direction," this does not have reference to the amount of the water, but to the power, manner, and course of its current.

And, generally speaking, it must be said that a person will only be liable under the interdict, if the channel is changed by what he has done, provided it is rendered lower or more narrow, and, in consequence, the current becomes more rapid, and causes inconvenience to those residing in the neighborhood. If the neighbors suffer any annoyance from the act of the party in question, there will be ground for the interdict.

(4) If anyone who formerly conducted water from a river by means of a covered aqueduct now desires to conduct it by an open aqueduct or *vice versa,* it has been settled that he will be liable under the interdict, provided that by doing so he causes any inconvenience to persons living near the river.

(5) In like manner, if he conducts it by means of a ditch, or does so in any other place, or changes the bed of the river, he will be liable under this interdict.

(6) There are some authorities who hold that an exception to this interdict can be pleaded on the ground that the work was only done for the purpose of repairing the banks, so that if anyone causes the water to flow in a different direction for the purpose of repairing the banks, there will be no ground for the interdict.

This opinion is not accepted by other authorities, for the banks should not be repaired if it causes inconvenience to those living in the neighborhood. We are, however, accustomed to have the Praetor decide, after investigation, whether he ought to grant this exception, for very frequently it is advantageous to permit this to be done.

(7) If, however, any other advantage is obtained by the person who did something to a public stream (suppose, for instance, that the water usually caused him a great deal of damage, and

that his land was overflowed), and he raised levees, or took other measures to repair the banks, so as to protect his land, and this, to some extent, altered the course of the river; why should not his interest be consulted? I know that several persons, with a view to the protection of their land, have absolutely diverted the course of streams, and changed their beds, for it is necessary in cases of this kind to take into consideration the benefit and safety of the party interested, if no injury is sustained by other persons in the neighborhood.

(8) He also is liable under this interdict who causes a river to flow in a different direction from that in which it flowed during the previous summer. Therefore, the authorities say, the Praetor included the previous summer, because the natural course of a river is more certain in summer than in winter.

This interdict has reference to the past, and not to the present summer; because the course of the river during the past summer is less subject to doubt. The summer extends to the autumnal equinox. If recourse is had to the interdict, during the summer, the previous season should be considered; and if this is done during the winter, not the summer which will follow the winter, but the past one must be taken into account.

(9) This interdict will lie for the benefit of any of the people, but it cannot be employed against everyone, but only against him who has caused the water to flow in a different direction, when he had no right to do so.

(10) This interdict is also available against heirs.

(11) The Praetor finally says: "You will restore everything to its former condition, if you have anything in your possession which has been built or placed in a public river, or on the bank of the same, by means of which the water is caused to flow in a different direction from that in which it flowed during the previous summer."

(12) The interdict in question is restitutory; the former one is prohibitory and has reference to work not yet performed. Hence, if anything has already been done, restoration to its former condition can be obtained by means of this interdict; and if it is desired that nothing'shall be done, the former interdict must be employed; and if anything is done after the interdict has been granted, the person responsible shall be punished.

(13) It is not unjust, as Labeo says, to include in this restitutory interdict whatever was done to avoid remaining in possession of the structure with reference to which the interdict was issued.

TITLE XIV.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO THE USE OF A PUBLIC RIVER FOR NAVIGATION.

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

The Praetor says: "I forbid violence to be used to prevent anyone from conducting a vessel or a boat upon a public river, or to hinder him from loading or unloading the same, on the bank of said river. I also forbid any interference with navigation on any lake, canal, or public body of water."

(1) It is provided by this interdict that no one shall be prevented from using a public stream for the purpose of navigation. For, just as an interdict was promulgated in the case of a person prevented from making use of the public highways; so, also, the Praetor thought that this interdict should be published.

(2) If the above-mentioned places belong to private individuals, the interdict will not be applicable.

(3) A lake is a body of water which has a perpetual supply.

(4) A pond is a body of water which, for a time, is stagnant, and which ordinarily increases in size during the winter.

(5) A ditch is a receptacle for water made by human hands.

(6) All of these may be public.

(7) Sabinus, as well as Labeo, is of the opinion that an interdict will lie where anyone is forbidden to fish in a lake or pond, which he has leased from a farmer of the revenue. Therefore, if he has leased it from a municipality, it will be perfectly just for his rights to be protected by an interdict on account of the revenue to be obtained.

(8) Where anyone desires to make use of an interdict of this description for the purpose of lowering ground to water his cattle, he should not be heard; and this was stated by Mela. He also says that this interdict will lie to prevent anyone from employing force to keep the cattle of another from approaching a public river, or the bank of the same.

TITLE XV.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO RAISING THE BANKS OF STREAMS.

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

The PraBtor says: "I forbid force to be employed to prevent anyone from doing any work in any public river, or on the bank of the same, which he has a right to do for the purpose of strengthening the said bank, or protecting his land which adjoins it; provided that, by so doing, no interference is made with navigation, and security against threatened injury is furnished for ten years, in accordance with the judgment of a good citizen; or where it is not the fault of the party in question that a bond or sureties have not been given for this purpose."

(1) It is very advantageous to repair and strengthen the banks of public streams. Therefore, as there is an interdict which has reference to the repair of public highways, so also there is one which relates to the strengthening of the banks of rivers.

(2) The Praetor with good reason adds, "provided that, by so doing, no interference is made with navigation," for only such repairs shquld be permitted which offer no impediment to navigation.

(3) He who wishes to repair his bank should provide against threatened injury either by giving a bond, or sureties, dependent upon the rank of the parties interested. It is expressly stated in this interdict that security shall be given, either by bond or surety, for any injury which may be caused within ten years, in accordance with the judgment of a good citizen.

(4) Security should not only be given to the neighbors, but also to persons owning land on the other side of the stream.

(5) Care should be taken that security is furnished to these persons before the work has been performed; for, after this has been done, no one can be proceeded against under this interdict; even if any damage should afterwards result, but suit can be brought under the Aquilian Law.

(6) It should be noted that the Praetor makes no provision for repairing the banks of a lake, a canal, or a pond. The same rule, however, must be observed which applies to the repairs of the banks of a stream.

TITLE XVI.

CONCERNING THE INTERDICT AGAINST VIOLENCE AND ARMED FORCE.

1. *Ulpiamis, On the Edict, Book LXIX.*

The Praetor says: "If you or your slaves have forcibly deprived anyone of property which he

had at that time, I will grant an action, only for a year; but after the year has elapsed, I will grant one with reference to what has come into the hands of him who dispossessed the complainant by force."

(1) This interdict was established for the benefit of a person who has been ejected by force; as it is perfectly just to come to his relief under such circumstances. This interdict was devised to enable him to recover possession.

(2) It is provided by the different *Leges Julia,* having reference to public and private causes, as well as by various Imperial Constitutions, that force shall not be employed.

(3) This interdict does not have reference to all kinds of violence, but only to such as is used against persons who are deprived of possession. It only relates to atrocious violence, and where the parties are deprived of the possession of the soil; as, for instance, to a tract of land, or a building, but to nothing else. If anyone is deprived of the possession of land upon which no buildings are situated, there will undoubtedly be ground for the interdict.

(4) Generally speaking, this interdict has reference to anyone who is dispossessed of property attached to the soil, and no matter what the place may be from which he was forcibly ejected, the interdict will apply.

(5) Hence, if he was ejected from a house, and has no interest in the ground on which it stands, it is evident that there will be ground for the interdict.

(6) Nor does any doubt exist that this interdict has no reference to chattels; for in a case of theft, or where anything is taken by violence, another action will lie. The injured party can also bring suit for the production of the property. There is no doubt whatever that, if there is any personal property on the land, or in the house from which he was ejected, the interdict will also lie with reference to said property.

(7) This interdict is not applicable where anyone is forcibly deprived of the possession of a ship, the proof of which is, that where anyone is deprived of a vehicle in this manner, no one will say that he can avail himself of this proceeding.

(8) No one entertains any doubt that this interdict can be employed if a man is dispossessed of a house built of wood; because no matter what the nature of the property which is attached to the soil may be, the interdict will lie if he is forcibly ejected from the house.

(9) He who possesses the property is said to be forcibly ejected whether he held the same under Civil or Natural Law, as natural possession affords ground for this interdict.

(10) Finally, if a wife is ejected from property which her husband has given her, she can avail herself of the interdict; but a tenant cannot do so if he is dispossessed.

(11) The Praetor says, "if you or your slaves have forcibly ejected him." The slaves are very properly mentioned, for the words, "you have forcibly ejected," have reference to him personally who committed the act of violence, and do not refer to his slaves; for if my slaves should eject anyone, I will not be considered to have done so; and hence it was necessary to add, "or your slaves."

(12) He also is considered to have ejected someone by force who directed or ordered this to be done. For it evidently makes very little difference whether one person dispossesses another with his own hands, or by the agency of someone else. Therefore, if my slaves should eject anyone with my consent, I myself will be held to have ejected him.

(13) Whenever a duly authorized agent has ejected anyone by force, Sabinus says that proceedings can be instituted against both parties, namely, against the principal as well as the agent, and that one of them is discharged from liability by the condemnation of the other; provided, however, that the amount of the appraisement in court has been paid by one of them; for he is not more excusable who ejected a person by the order of another than if he had

killed a man by the direction of someone else. But where the alleged agent falsely represents himself as having authority, proceedings under the interdict should be instituted against him alone. The opinion of Sabinus is correct.

(14) If, however, I should ratify the act of someone who, in my name, has ejected a person by force; some authorities adopt the opinion of Sabinus and Cassius, who hold that the ratification is equal to a mandate, and that I should be considered to have ejected him, and hence I will be liable under this interdict.

This is correct, because, where an offence is committed, it is perfectly just to compare a ratification to a mandate.

(15) Where it is added, "or your slaves," this is very properly stated with reference to cases in which my slaves have forcibly ejected anyone. If, however, the master ordered this to be done, he himself committed the act of dispossession; but if he did not order it, he should not complain if he is liable for the acts of his slaves, even though they did not eject the person by his order; for he is not oppressed on this account, as something has either come into his hands which he must return, or if this is not the case, he will be released from liability if he surrenders his slaves by way of reparation for the offence which they committed. And although he is compelled to surrender his slaves by way of reparation, he should take this into consideration in estimating the damage which he has sustained; as a slave can injure his master in this way.

(16) By the term "slaves" the entire body of slaves is understood.

(17) But the inquiry is made, what number of slaves are included in this term, whether only two or three, or more. In considering the application of this interdict, the better opinion is that if only a single slave should eject anyone by force, the entire body of slaves shall be deemed to have committed the act.

(18) In the term "slaves," it must be said that all of those are included whom we hold as such.

(19) If anyone refuses to defend his slave, or slaves, he should be compelled to submit to this interdict; or at least to the extent of forcing him to return whatever has come into his hands.

(20) If a son under paternal control, or a day laborer, dispossesses anyone by force, an available interdict will lie.

(21) If I make use of the interdict against anyone who, while in a state of freedom, is demanded as a slave, or *vice versa,* after legal proceedings have been instituted, and the man has been decided to be free, and it is proved that I have been forcibly ejected by his slaves, without his knowledge, I must be replaced in possession.

(22) An owner is considered to have possession of property which is held by his slave, his agent, or his tenant. Therefore, if any of these is forcibly deprived of possession, he himself is also considered to be dispossessed, even if he did not know that those by whom he had possession have been ejected. Hence, if anyone else, by whom I held possession, should be ejected, no one can entertain any doubt that I will be entitled to the benefit of the interdict.

(23) This interdict, however, will not lie in favor of anyone, unless he was in possession at the time when he was ejected, for no one is considered to have been ejected unless he was in possession.

(24) It is clear that anyone should be considered to have been ejected by force, where he held the property either corporeally or by intention. Hence, if he should depart from his land or his house, leaving none of his people there, and, on his return, should be prevented from entering upon his premises; or if anyone should stop him in the middle of his journey, and take possession of his property, he will be considered to have been ejected by force; for he has been deprived of possession which he held by intention, but not corporeally.

(25) The common saying that, "Possession of winter and summer resorts is not held by intention," is given by way of an example, of which Proculus availed himself.

The same rule will apply to all real property from which we temporarily withdraw without the intention of relinquishing possession of the same.

(26) The better opinion is to hold that a person is not dispossessed who did not have possession of property either by intention or corporeally, and not he who was prevented from entering upon the same, and taking possession of it; for he is ejected who loses possession, and not he who is not permitted to take it.

(27) Cassius says that one can repel force with force; for this right is conferred by the Law of Nature. Hence he holds that it is clear that armed aggression can be repelled by arms.

(28) To possess by force should be defined to mean where anyone having driven away the former occupant obtains possession by means of violence; or where he comes upon the ground ready and prepared to take possession, and contrary to good morals, has adopted measures 'to avoid being prevented from taking it. Labeo, however, says that he does not possess by violence who retains anything by the exertion of force.

(29) Labeo also says that he who, alarmed by the appearance of a crowd of persons, takes to flight, is held to have been ejected by force. Pomponius, likewise, says that violence does not exist without the exertion of corporeal force. I think that he who fled on account of the approach of a crowd should be considered to have been forcibly ejected, if they take possession of his property.

(30) Anyone who has taken possession of my property by force will be entitled to the benefit of the interdict, if he himself is ejected by another.

(31) Anyone who has been forcibly dispossessed can recover damages for all injury sustained through being ejected; for he must be placed in the same condition in which he would have been if he had not been dispossessed.

(32) If a tract of land of which I have been dispossessed is returned to me, but any other property of which I have been deprived by force is not returned, it must be said that the interdict will still lie; because it is true that I have been forcibly dispossessed.

It is clear that if anyone desires to avail himself of this interdict with reference to the possession of the land, as well as of an action to compel the production of the personal property in court, he can do so, according to his discretion.

This was stated by Julianus, and he adds that anyone has a right to bring suit for property taken by violence, in a case of this kind.

(33) Where the Praetor says, "which he had there," we should understand this to mean all the property, not only that which belonged to him, but also all that was deposited with him, or lent or pledged to him, and of which he had the use or usufruct, or care, or any which was hired to him. For when the Praetor uses the word, "had," property of every description is included in the term.

(34) Moreover, the Praetor very properly adds, "which he had at that time," and we must understand the words, "at that time," to mean when he was dispossessed. Hence, if he ceased to have possession of anything in that place afterwards, it must be said that the interdict will apply. Thus it happens that even if slaves or cattle have died since his dispossession, there will be ground for the interdict. Finally, Julianus says that where anyone has been forcibly deprived of a tract of land on which there were slaves, and the slaves afterwards died without his fault, their appraised value ought to be paid to him by means of the interdict; just as a thief, who had stolen a slave, is liable after the death of the slave.

(35) The result of this is that he will be compelled to refund the price of farm-houses or other

buildings destroyed by fire; for Julianus says, where anyone has been ejected, the other party is always held responsible for preventing him from obtaining restitution.

(36) Therefore he asserts that it is established that anyone who has ejected another by force, and has afterwards lost possession without being guilty of fraud, will be liable under the interdict.

(37) The word "there" is mentioned by the Praetor, in order that no one can include property which he did not have in that place.

(38) But how shall we understand the word "there," which the Praetor makes use of? Is the place from whence he was forcibly ejected meant, or does it refer to the entire place of possession? It is better to hold that it does not refer to a corner or place in which the person may have been, but to the entire property possessed, of which he was deprived when he was ejected.

(39) The year when this interdict is involved is an available one.

(40) In estimating the profits, the calculation is made from the day on which the person was ejected, although, in other interdicts, it is calculated from the day upon which they are issued, and the computation is not made beyond that time.

The same rule applies to movable property which happened to be there, for its profits should be reckoned from the date on which the person was forcibly dispossessed.

(41) Not only an accounting for the profits must be had under this interdict, but that of any other benefits to which the plaintiff might have obtained. For Vivianus says that he who is dispossessed, even if violence was not used, will, under this edict, be entitled to restitution of everything which he would have had or acquired, or the judge must make an appraisement of the same, so that the party may obtain judgment to the extent of his interest in not having been dispossessed.

(42) Under the interdict *Unde vi,* even if the party is not in possession, he will be compelled to make restitution.

(43) As this interdict takes into account the atrocity of the illegal act committed, the question arises whether it will lie in favor of a freedman against his patron, or in favor of children against their parents. The better opinion is that it should not be granted to a freedman against his patron, or to children against their parents; for it will be preferable for them to bring an action *in factum;* unless the patron has employed armed force against his freedman, or the parent has done so against his children; for, under such circumstances, the interdict will lie.

(44) This interdict lies in favor of the heir and other successors.

(45) What is stated by Vivianus proves that the interdict *Unde vi* is only granted to the party in possession; for if anyone has forcibly ejected me, and did not eject my people, I cannot avail myself of the interdict, because I retain possession by those members of my family who have not been ejected.

(46) Vivianus also says that if anyone has driven away your slaves by force, and kept others and chained them, or given them commands, you are understood to have been forcibly ejected, for you cease to hold possession, as your slaves are possessed by another; and what is said with reference to a part of the slaves applies to all, if none of them were driven away, but all were taken possession of by the person who entered upon the property.

(47) Vivianus also discussed the question and asks what shall we say if I should take possession while someone else occupies the property, and I do not eject the possessor, but, having chained him, compel him to work? I think that the better opinion is that he who was placed in chains should be considered to have been forcibly ejected.

(48) An action *in factum* will, under this interdict, lie against the heir and the praetorian possessor of an estate, as well as other possessors, for whatever has come into their hands;

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

Or for anything which they may have acquired through any fraudulent acts committed by them.

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

The same rule will apply where anyone has been ejected by armed force, because an action is granted on account of any illegal act of the deceased for the amount which may have come into the hands of the heir. It is, however, sufficient that the heir should not have obtained any profit, for he must not suffer any loss.

(1) This action, which can be brought against the heir and other successors, is a perpetual one, because it involves the pursuit of property.

(2) What shall we understand the words, "ejected by armed force," to signify? Arms include all missile weapons, that is to say, not only swords, spears, javelins, or darts, but also sticks and stones.

(3) It is clear that if only one or two persons have sticks or swords, the possessor will be considered to have been ejected by armed force.

(4) Moreover, even where the aggressors come unarmed, if, at the time of the quarrel, those who came unarmed should proceed to use sticks or stones, this will be the employment of armed force.

(5) Even if those who came armed did not use their weapons in order to drive away the party in possession, but laid them aside, armed force will be held to have been employed; for the fear of weapons is sufficient to establish the fact of dispossession by armed force.

(6) If anyone, having seen armed men going elsewhere, became so terrified on this account as to take to flight, he is not considered to have been dispossessed; because the men who were armed had no intention of molesting him, but were on their way elsewhere.

(7) Hence, if anyone should hear that armed men are approaching, and relinquishes possession of his property through terror, it must be said that he has not been dispossessed by armed force; whether what he heard was true or false, unless possession is actually taken by the said persons.

(8) If, however, when the owner was about to take possession, armed persons, who have already seized his property, should prevent him from doing so, he is considered to have been ejected by armed force.

(9) Therefore, we can repel by the use of arms anyone who comes armed, but this must be done immediately, and not after some time has elapsed; if we remember that not only resistance can be offered to forcible ejection, but also that he who has been ejected can himself expel the intruder, if he does so at once, and not after any time has passed.

(10) If the person who comes armed is an agent, his principal will be considered to have used armed force in the dispossession, whether he directed this to be done, or, as Julianus says, subsequently ratified it.

(11) This also applies to the case of slaves; for if my slaves come armed without me, I am not considered to have come, but my slaves; unless I directed them to do so, or ratified their act.

(12) This interdict can also be employed against one by whose fraudulent conduct a person has been dispossessed by armed force; and will be granted, after the lapse of a year, for the recovery of whatever has come into the hands of him who was responsible for the act.

(13) It is evident that the interdict *Unde m* will be necessary for an usufructuary, if he is prevented from using and enjoying the usufruct of land.

(14) An usufructuary is understood to have been prevented from using and enjoying his right, when he is forcibly ejected while availing himself of his privilege, or is not allowed to enter upon the land, when he has left it without the intention of relinquishing his usufruct.

If, however, anyone should prevent him from using and enjoying it in the beginning, there will not be ground for this interdict. What, then, should be done? The usufructuary must bring an action for the recovery of his usufruct.

(15) Again, this interdict has reference to him who is prevented from using and enjoying land, as well as to him who is interfered with in the use and enjoyment of a house. Consequently, we hold that it does not apply to movable property, where anyone is hindered from using and enjoying it, unless the said movable property is accessory to the land. Therefore, if the property was on the land, it must be said that this interdict will apply to it.

(16) Likewise, if not the usufruct, but only the use of the property was bequeathed, this interdict will lie; for, no matter in what way the usufruct or use was established, this interdict will be applicable.

(17) Anyone who has obtained possession of property in any way whatsoever, as an usufructuary, can avail himself of this interdict.

If anyone who has been prevented from enjoying his privilege should afterwards forfeit his civil rights, or die, it is very properly held that this interdict will lie in favor of his heirs and successors; not for the purpose of constituting another usufruct, but in order that any damage which has been sustained in the past may be made good.

(18) In like manner, the heir is also liable to an action *in factwn* for anything which has come into Tiis hands.

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

If anyone dispossesses me by force, in the name of a municipality, Pomponius says that I will be entitled to an interdict against the said municipality, provided anything has come into its hands.

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

If I place you in possession of property in compliance with a judicial decree, Pomponius says that the interdict *Unde -m* will not apply, as he is not forcibly ejected who is compelled to place another in possession.

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

When a decision is rendered under the interdict *Unde vi,* it should be for the value of the interest the plaintiff had in remaining in possession of the property.

Pomponius says that this is our practice, that is to say, that the property is considered to be equal in value to the interest of the plaintiff. This may be either less, or more, for often it is more to the interest of the plaintiff to retain a slave than he is worth; for example, where it is to the interest of the owner to have possession of him, either that he may be put to torture, or prove some fact, or accept an estate.

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

If I have been forcibly ejected by you, and Titius has begun to possess the same property, I can institute proceedings under the interdict against no one but yourself.

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

Fulcinius was accustomed to say that possession was acquired by violence, whenever anyone who was not the owner, but who was in possession, was forcibly ejected.

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

Where there are several heirs, each of them is only liable for the amount which has come into his hands. For which reason an heir will sometimes be liable for the entire amount that came into his hands, even though he may only have inherited a portion of the estate.

(1) The Praetor orders anyone who has been forcibly deprived of an usufruct to be restored to his former condition; that is to say, the condition in which he would have been if he had not been ejected. Therefore, if the usufruct should be terminated by lapse of time, after the usufructuary has been deprived of it by the owner, the latter will, nevertheless, be compelled to make restitution, that is to say, to again establish the usufruct.

10. *Gaius, On the Edict of the Urban Prsetor, Title: On Cases Involving Freedom.*

If a trespasser should expel both the owner and the usufructuary from a tract of land, and the usufructuary should lose his right on account of not having used it during the prescribed time, no one doubts that the owner can institute proceedings against the trespasser, either alone or with the usufructuary; or, if he should not do so, he can retain the usufruct after it has been restored to him, and any damages sustained by the usufructuary shall be recovered from him who was responsible for the loss.

11. *Pomponii, On Plautius, Book VI.*

He employs force who does not permit the party in possession to make use of the property in any way that he may desire, whether by sowing seed, or cultivating, or digging, or plowing, or building upon it, or by the commission of any other act which interferes with the free possession of the land by his adversary.

12. *Marcellus, Digest, Book XIX.*

A tenant refused to permit a man to whom the lessor had sold the land and directed to take possession to enter upon it; and this tenant was afterwards forcibly dispossessed by another. The question arose, who would be entitled to the interdict *Unde vi?* I held that it did not make any difference whether the tenant prevented the owner himself, or the purchaser to whom the owner had ordered possession to be given, from entering upon the premises. Hence the interdict *Unde vi* would lie in favor of the tenant, and he himself would be liable to a similar interdict in favor of the lessor, whom he was considered to have ejected, when he refused to give possession to the purchaser, unless he did so for a just and reasonable cause.

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

Neither the interdict *Unde vi* nor any other interdict implies infamy.

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

If, however, you are ejected by armed force, you will be entitled to recover the land, even if you originally obtained possession of it either by violence, or clandestinely, or under a precarious title.

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

If you forcibly ejected me, or if you cause this to be done by violence or clandestinely, even though you may afterwards lose possession without being guilty of fraud or negligence, you will still be liable to have judgment rendered against you for the amount of my interest; because you were to blame in the first place, as you either ejected me by force, or caused this to be done by violence, or clandestinely.

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

It must be said with reference to the interdict *Unde vi* that, in the case of dispossession by a son under paternal control, his father will be liable for anything which has come into his hands.

17. *Julianus, Digest, Book XLVIII.*

Where anyone forcibly recovers possession of property of which he was deprived by violence during the same dispute, he is understood to have been restored to his former position rather than to have regained possession of the property by violence. Therefore if I deprive you of anything by force, and you wrest it from me in the same way, and then I again take it from you, you can avail yourself of the interdict *Unde vi* against me.

18. *Papinianus, Questions, Book XXVI.*

If anyone sells a tract of land which he has leased, and directs the purchaser to take possession of the same, and the tenant prevents him from doing so, and the purchaser afterwards forcibly expels the tenant, the question arises, who will be entitled to the interdict *Unde vi?* It was established that the tenant would be liable to the interdict in favor of the vendor; because it made no difference whether he himself, or another who was sent by him, had prevented him from taking possession. For possession can not be held to have been lost before the property has been delivered to the purchaser, because no one has the intention of losing possession in favor of a purchaser, before the latter himself has obtained it.

The purchaser, also, who afterwards employed force, would himself be liable to the interdict in favor of the tenant; for it was not from him, but from the vendor, who had himself been deprived of it, that forcible possession of the land had been acquired.

The question arose whether relief should be granted to the purchaser, if he had afterwards forcibly expelled the tenant, with the consent of the vendor. I gave it as my opinion that he was not entitled to relief, because he had undertaken the execution by an unlawful mandate.

(1) Where anyone brings suit to recover land against a person who is liable under the interdict *Unde vi,* it has been decided that, while the case is pending, proceedings based upon the interdict can be legally conducted.

19. *Tryphoninus, Disputations, Book XV.*

Julianus very properly held that if you forcibly dispossess me of land, on which there is movable property, you will be obliged, under the interdict *Unde vi,* to restore to me not only the possession of the land, but also that of the movable property which was there at the time; even though I may have been in default in proceeding against you under the interdict; so that if some of the slaves or cattle have died, or any other property has been destroyed by accident, you will, nevertheless, be obliged to make restitution, because you are in default more than a debtor is considered to be.

20. *Labeo, Epitomes of Probabilities by Paulus, Book III.*

If your tenant has been forcibly ejected, you can proceed under the interdict *Unde vi.* The same rule should be adopted if the lessee of your house is forcibly ejected.

Paulus: This also applies to a sub-tenant, or a sub-lessee.

TITLE XVII.

CONCERNING THE INTERDICT UTI POSSIDETIS.

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

The Praetor says: "I forbid force to be employed to prevent one of you from retaining possession of the houses in question against the other, if you did not acquire possession of them either by violence, clandestinely, or under a precarious title. I will not grant this interdict

in cases relating to sewers, or for more than the property is worth; and I will permit proceedings to be instituted within a year from the day on which the party was entitled to do so."

(1) This interdict is framed for the benefit of the possessor of land whom the Praetor admits to such possession, and it is prohibitory, so far as the retaining of possession is concerned.

(2) The reason for the introduction of this interdict is because the possession of property should be distinct from its ownership. For it may happen that someone may be the possessor, but not the owner of the property in dispute, and one may be the owner but not the possessor; and the same person may be both the possessor and the owner.

(3) Therefore, whenever a controversy with reference to property arises between litigants, or they agree that one of them shall be the possessor and the other the claimant, or no such agreement is made; the result will be as follows. If they come to terms, the matter is at once disposed of, and the one who it is agreed shall hold possession will enjoy the advantages of a possessor, and the other will sustain the burdens of a claimant. If there is any dispute between them as to which one is in possession, because each of them declares that he has the best right to it, then, if the object of the dispute is real property, they must have recourse to this interdict.

(4) This interdict, commonly called *Uti possidetis,* is for the purpose of retaining possession; for it is granted to prevent any violence being employed against the party in possession, and hence it is introduced after the interdict *Unde vi,* for the latter restores possession after it has been lost, and this interdict provides against it being lost.

Finally, the Praetor forbids force to be employed against the possessor; hence the former interdict opposes him while the latter one protects him. And, as Pedius says, every controversy having reference to possession either involves the restitution of property to us, of which we are not in possession, or permits us to hold any which we already possess. Proceedings for the recovery of possession are instituted either by means of an interdict, or by another action. Therefore, there are two ways of obtaining possession, that is, by an exception or an interdict. An exception is granted to the party in possession for several reasons.

(5) The following words are always inserted in this interdict: "If you do not deprive the other party of possession either by violence, clandestinely, or under a precarious title."

(6) The interdict called *Uti possidetis* also protects the possessor of land, for no action is granted him, as it was sufficient for him to be in possession.

(7) This interdict can also be employed whether anyone alleges that he is in possession of the entire tract of land or only of a certain part of the same, or an undivided portion.

(8) This interdict is undoubtedly applicable to all cases involving the possession of real property, provided it can be possessed.

(9) When the Praetor says in the interdict, "where one of you has not deprived the other of possession, either by violence, or clandestinely, or under a precarious title," this means that if anyone has acquired possession by force, or clandestinely, or under a precarious title from someone else than his adversary, it will be an advantage to him. If, however, he has deprived his adversary of possession, he should not gain his case, for the reason that he has illegally dispossessed him; for it is clear that possession of this kind should not be advantageous.

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

In the consideration of this interdict, it makes no difference whether the possession is just or unjust, so far as other parties are concerned; for he who is in possession, through this very fact, has a better right than he who does not occupy the property.

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

Where two parties are in possession of the entire property, let us see what opinion must be rendered. Let us examine how this can occur. If anyone should suggest a case where one of them holds possession justly, and the other unjustly; for instance, if I possess the property by a legal title, and you have obtained it by violence, or clandestinely, and you have deprived me of possession, I shall have the preference for the interdict; but if you have not obtained possession from me, neither of us will have the advantage, for both you and I are in possession.

(1) This interdict is twofold, and lies in favor of both plaintiffs and defendants.

(2) This interdict is sufficient for a person who is prevented from building on his own land, for you are held to interfere with my possession, if you prevent me from using it.

(3) If a tenant prevents an owner from repairing his house, it has been decided that the interdict *Uti possidetis* will lie where the owner states, in the presence of witnesses, that he does not intend to hinder the tenant from living in the house, but he does not wish him to be considered in possession of it.

(4) Moreover, let us see what the law is, if the agent of your neighbor transplants vines from your land to his own. Pomponius says that you can serve notice upon him, and cut the vines, and Labeo says the same thing. He also says that you can make use of the interdict *Uti possidetis* with reference to the place where the vines have taken root, since if he should employ violence to hinder you from cutting or removing the vines, he will be considered to have forcibly prevented you from taking possession; for Pomponius holds that anyone who prevents another from cultivating his own land prevents him from retaining possession of the same.

(5) Again, where something is projected by one neighbor over the land of another, and this is alleged to have been done without any right, let us see whether the interdict *Uti possidetis* will be available for one of them against the other. It is stated by Cassius that neither of them can employ it, because one of them possesses the land, and the other the surface with the building upon it.

(6) Labeo also says: "Part of my house projects over yours. Can you make use of the interdict against me if we both possess the place which is covered by the projection? Or can I employ the interdict against you, in order the more readily to obtain possession of the projection, as you now are in possession of the house, a part of which constitutes the said projection?"

(7) But if, above the house of which I am in possession, there is an apartment in which another person resides as the owner, Labeo says that I, and not he who resides in the said apartment, can make use of the interdict *Uti possidetis,* for the reason that whatever is built upon the soil always forms a portion of it.

Labeo says that it is clear that if the apartment has a public entrance, the owner of the lower portion of the house is not in possession of it, but it will be possessed by him who has the entrance from the street. This is true with reference to an apartment with a public entrance. But parties in possession of buildings upon land are entitled to the special interdict and actions granted by the Prsetor. The owner of the ground, however, is preferred in the case of an interdict *Uti possidetis,* not only against the person who has the building, but also against everyone else. Still, the Prsetor will, in accordance with the terms of the lease, protect him who has a right to the building. Pomponius also adopts this opinion.

(8) Creditors who have been placed in possession for the preservation of property cannot avail themselves of the interdict *Uti possidetis;* and this is reasonable, because they are not actually in possession. It must be said that the same rule applies to all others who have been given possession as custodians of the property.

(9) If my neighbor causes his roof to project over my house, I can avail myself of the interdict

Uti possidetis to compel him to remove it.

(10) I am not considered to hold possession by violence if I have obtained a tract of land from a person who acquired the same by taking forcible possession of it.

(11) In this interdict, a judgment is rendered for a sum equal to the appraised value of the property. We must understand the words, ."to the amount that the property is worth," to mean the interest which the party had in retaining possession. It is, however, the opinion of Servius, that the value of the possession should be estimated to be as much as that of the property; but this ought, by no means, to be conceded, for the value of the property is one thing, and that of possession is another.

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

In conclusion, I think that it must be said that this interdict ought to be granted among usufructuaries, even if one of them claims the usufruct, and the other the possession. The same rule should be adopted where anyone alleges that he is in possession of the usufruct. This is also held by Pomponius. Hence this interdict should also be granted where one person claims the use and another the usufruct of the same property.

TITLE XVIII.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO THE SURFACE OF THE LAND.

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

The Prsetor says: "I forbid you to prevent the enjoyment of the surface of the land in question, in accordance with the terms of the lease or the contract, either by the employment of force, or clandestinely, or under a precarious title. If any other action having reference to the surface of the land is applied for, I will grant it where proper cause is shown."

(1) Anyone who has a right to use the surface of land belonging to another is protected by a civil action. For if he has leased it, he can bring suit under the lease; if he has purchased it, he can bring an action on purchase against the owner of the land, and if the latter interferes with him, he can be sued for the amount of the plaintiff's interest.

When his rights are interfered with by another, the owner will be obliged to indemnify him, and assign him his rights of action. It was, however, considered much more advisable to employ this interdict and to promise a kind of real action, because it was uncertain whether the action under the lease could be brought, as it is always better to have possession than to bring a personal action.

(2) In this case a double interdict is proposed, just as in the case of the interdict *Uti possidetis.* Therefore the Praetor protects him who claims the right to the surface of the land by an interdict resembling that of *Uti possidetis,* and he does not require anything else of him, except that he must have a title to possession. He only asks one thing, namely, whether he has obtained possession from his adversary by force, clandestinely, or under a precarious title. All the formalities are observed under this interdict which are applicable to the interdict *Uti possidetis.*

(3) When the Praetor says, "If any other action having reference to the surface of the land is applied for, I will grant it, where proper cause is shown," this must be understood to mean that if anyone has leased the surface of the land for a short time, a real action will be refused him. This action *in rem,* however, will lie in favor of him who has leased the surface of the land for a long time, after proper cause has been shown.

(4) Moreover, he on whose land a building has been erected does not need an equitable action, but he has a real one which is the same as that to which he is entitled for the purpose of recovering the soil. It is clear, if he wishes to bring suit against the person having the right to

the building, that he can make use of an exception *in factum,* for when we grant an action to anyone, it must be said that he is, with much more reason, entitled to an exception.

(5) If the surface of the soil is evicted from the possessor, it will be perfectly just to come to his relief under a stipulation having reference to eviction, or at any rate, by an action on purchase.

(6) Again, for the reason that an action *in rem* is granted to anyone having a right to the surface of the soil, it is also granted against him; and it must be maintained that he is entitled to a sort of usufruct or use, and that his right can be established by means of praetorian actions.

(7) It should be understood that the right to the surface of the soil can be transferred by delivery, as well as bequeathed, and donated.

(8) If this right is held in common by two persons, we will grant them an action in partition.

(9) Servitudes are also established by praetorian law, and proceedings to recover them can be instituted by means of equitable actions, just like those which are established by the Civil Law. An interdict having reference to them will also lie.

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

We say that houses form part of the surface of land where they have been erected under the terms of a lease; and the ownership of them, in accordance with both civil and natural law, is vested in the proprietor of the soil.

TITLE XIX.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO PRIVATE RIGHTS OF WAY.

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

The Praetor says: "I forbid you to prevent the enjoyment of the private road or way in question, as you have done during the past year; unless you have obtained the use of the same from your adversary, either by violence, clandestinely, or under a precarious title."

(1) This interdict is prohibitory, and only has in view the preservation of rustic servitudes.

(2) In granting this interdict, the Praetor does not inquire whether the applicant has a servitude imposed by law or not, but only whether he has used the right of way for the present year, without employing violence, or secretly, or under a precarious title, and he protects him, although he may not be using the right of way at the time when the interdict is granted.

Therefore, whether he is entitled to the right of way, or whether he is not, he is in a position to claim the protection of the Praetor, provided he has made use of his right during a year, or for a reasonable period, that is to say, for not less than thirty days. This enjoyment has no reference to the present time, for, in most instances, we do not use a road constantly, but only when necessity demands it. Hence the Praetor restricted its use to the term of a year.

(3) We should compute the year back from the date of the interdict.

(4) If anyone makes use of this interdict, it will be sufficient to prove one of two things, namely, that he has used the road either to walk upon, or to drive over.

(5) Julianus says that the interdict will lie in favor of the plaintiff until he has entered upon the road, which is true.

(6) Vivianus very properly says that where anyone, on account of the inconvenience caused by a stream, or because the public highway has been obstructed, makes a new road through the field of a neighbor, he is, by no means, understood to acquire the use of it, even if he does

this frequently; hence the interdict cannot be employed by him, not for the reason that he has used the road by a precarious title, but because he has not used it at all. According to this, he is not considered to have used either road, since he has still less used the old one over which he did not travel, on account of the inconvenience caused by the stream, or because it was obstructed. The same rule must also be said to apply where it was not a public highway, but a private road which was obstructed, for, in this instance, the question is the same.

(7) If a tenant, a guest, or anyone else makes a road through the land of another, the proprietor will be considered to have used it, and therefore he will be entitled to the interdict; and this was also mentioned by Pedius, who added that, if he did not know through whose land he had passed, he would retain the servitude.

(8) If, however, I should make a road through land which a friend of mine thinks belongs to him, he will be understood to be entitled to the interdict for his own benefit, and not for mine.

(9) If anyone has not used a right of way for the past year, on account of an inundation, but did use it the year before, he can avail himself of this interdict by changing the date, and will be entitled to complete restitution under the clause of the interdict, "if there seems to me to be any good reason."

If, however, he has been prevented by violence from using the right of way, Marcellus thinks that he must be granted complete restitution. Moreover, the interdict with the changed date can be employed in other cases, in which a party is ordinarily entitled to demand complete restitution.

(10) It must also be noted that, where delay is granted to my adversary, and my case under the interdict will be prejudiced thereby, it is only just that the date of the interdict should be changed.

(11) If I have conveyed to you under a precarious title a tract of land to which a right of way is due, and you apply to the owner of the adjacent premises held under a precarious title, to permit you to use the said right of way, will you be barred by an exception, if you wish to employ the interdict against him to whom you have applied for permission to use the right of way under a precarious title?

The better opinion is that you will be barred; and this can be gathered from what Julianus said in a case of the same kind. For he asks, if I should convey to you a tract of land by a precarious title, to which a right of way is due, and you obtain the right to use the road by a precarious title, I can still avail myself of the interdict, because, as the precarious title does not bind me, so I am not considered to be in possession by anything which you may have done under such a title. For whenever my tenant, or the person to whom I conveyed the land by a precarious title, uses the road, I am understood to use it; for which reason I very properly say that I am enjoying the use of it. Hence he says the result will be that, if I have obtained the right of way by a precarious title, and I afterwards convey the land to you under the same title, and although you travelled upon the road with the belief that the right was due to my land, the interdict cannot be employed by me, and I will, not without reason, be held to have used the road by a precarious title, for not your opinion but mine should be considered. I think, however, that you can avail yourself of the interdict, although Julianus says nothing on this point.

(12) If anyone has used the right of way for the above-mentioned term of a year, without employing violence, or acting clandestinely, or relying on a precarious title, but has not used it since, or has done so clandestinely, or under a precarious title, let us see whether this will prejudice his rights. The better opinion is that it will not prejudice them .in any way, so far as the interdict is concerned.

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

Any right which has been properly acquired cannot be extinguished or changed by any defect which may supervene.

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

Labeo refers to the following case, namely: "If you are using a right of way which you have legally obtained from me, and I sell the land on which the right is imposed, and the purchaser afterwards prevents you from using it, although you may be considered to be using it clandestinely, so far as he is concerned (for anyone who makes use of a right, after having been forbidden to do so, uses it clandestinely) ; still, the interdict will lie in your favor for a year, because, during this year, there was a time when you made use of the right without the employment of violence, or without doing so clandestinely, or under a precarious title."

(1) It must be noted that a person is considered to make use of a right of way clandestinely, not only after he has been forbidden to do so, but also when he uses it after he from whom he acquired the right has been prohibited. It is clear that, if I was not aware that he had been forbidden to use it, and continue to do so, it must be said that I will not be injured.

(2) Where anyone has obtained the use of a right of way through my agent by having employed violence, or has acted clandestinely, or holds it by a precarious title, he can be prevented by me from using it, and he cannot avail himself of the interdict, because he who possesses by a defective title obtained through my agent is considered to have possession from me by violence, clandestinely, or under a precarious title.

Pedius says that, if anyone, in either of these ways, has acquired possession from a person whom he succeeded by inheritance, by purchase, or by any other title, the same rule will apply. For where we succeed to the rights of others, it is not just that we should be injured by something which did not injure him whom we succeed.

(3) In this interdict, the value of the interest which the party had in not having been prevented from using the right of way is taken into account.

(4) We are considered to enjoy servitudes through our slaves, our tenants, our friends, or our guests, and by almost all those who hold the servitudes in our name. Julianus, however, says that a servitude is not retained for the owner of the property by an usufructuary, and that this interdict will not lie in favor of the owner through the usufructuary.

(5) Julianus also says that if I have an usufruct in your land whose ownership is actually vested in you, and both of us pass through the land of a neighbor, we can both avail ourselves of this interdict.

If the usufructuary should be prevented from enjoying his right by a stranger, or by the owner, or the latter is interrupted by the usufructuary, the interdict will apply; for it can be employed against anyone whomsoever that interferes with the right of way.

(6) This interdict will also lie in favor of one who obtains possession of a tract of land by reason of a donation.

(7) Where anyone purchases land by my order, it is perfectly just that this interdict should be granted me, in order that he who bought the property under my direction should enjoy his right.

(8) If, however, anyone purchases the usufruct or use of land, or it is bequeathed or transferred to him, he will be entitled to this interdict.

(9) Further, anyone to whom land has been transferred by way of dowry can institute proceedings under this interdict.

(10) And, generally speaking, it must be said that there will be ground for this interdict in all cases where a right of way had been obtained by sale, or by any other contract.

(11) The Prseter says: "I forbid anyone to forcibly prevent you from repairing a road or path, and restoring it to the same condition in which it was when you enjoyed it during the last year, if you have not used it by employing violence, acting clandestinely, or by virtue of a precarious title.

"Anyone who wishes to avail himself of this interdict must furnish security to his adversary for any damage which may result from any fault of his."

(12) The public welfare also caused the introduction of this interdict, for it was only proper that an interdict should be promulgated for the benefit of him who enjoys a right of way in order to enable him to'repair the road. For how can anyone conveniently use a road or path unless he repairs it? For as soon as the road becomes damaged, he who is entitled to the right of way can use and enjoy it to less advantage.

(13) This interdict differs from the previous one, because all can have recourse to the latter who have used the road for a year; but only those can avail themselves of this interdict who have used the road for a year, and have, in addition, the right to repair it. This right, however, is held to be vested in him to whom the servitude is due. Therefore, anyone who makes use of this interdict must prove two things: first, that he has used the road for a year; and second, that he is entitled to the servitude, for if he fails to establish either of them, the interdict will not apply.

Nor is this unreasonable, for if he who wishes to enjoy the right of way until his claim to the servitude is established does not produce the proof of it, what has he lost who suffers him to do what he has already done for a year? But he who desires to repair the road undertakes something new, and ought not to be permitted to attempt this on the land of another, unless he shows that he is actually entitled to the servitude.

(14) Moreover, it may happen that someone has the right to pass and drive over the premises of another, but does not have the right to repair the road, because, in granting the servitude, it may have been expressly provided that the right to repair the road was not included; or it may have been done in such a way that if the beneficiary should wish to repair it, he would be allowed to do so only in a certain way.

Hence the Praetor very properly says, with reference to repairs, "I forbid anyone to prevent you from repairing the road, as you have a right to do," that is to say, to the extent that you are permitted in accordance with the terms of the servitude imposed.

(15) We understand by the term "repair," to restore the road to its former condition, that is to say, that it shall not be widened, or lengthened, lowered, or raised, for it is one thing to repair a road and a very different thing to build it.

(16) The question is asked by Labeo, if anyone desires to construct a new bridge for the purpose of repairing a road, whether he should be permitted to do so. He says that he should be permitted to do so, because a structure of this kind forms part of the repair of a road. I think that the opinion of Labeo is correct; provided that, if this was not done, one could not travel conveniently back and forth upon the road.

4. *Venuleius, Interdicts, Book I.*

The ancients expressly added that violence should not be employed to prevent anyone from bringing materials suitable for repairing a road. This provision is superfluous, as anyone who does not permit materials to be brought without which a road cannot be repaired is considered to use violence to prevent the repairs from being made.

(1) If, however, anyone who can bring the materials necessary for the repairs by a shorter route prefers to bring them by a longer one, in order to subject him who owes the servitude to annoyance, force can be used against him with impunity, because it is he himself who interferes with the repair of the road.

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

It is apparent that if anyone prevents the materials from being piled up, he employs force to prevent the repairs from being made.

(1) If anyone, being able to transport the materials through another part of a field without causing any inconvenience to the owner of the land, transports them through some other part, it has been very properly decided that force can be employed to prevent him from doing so.

(2) There is no doubt that this interdict can not only be granted to the person himself who has been interfered with, but also to his successors. It will also be granted for and against a purchaser.

(3) If anyone has a servitude that was not legally imposed, but of which he has had the enjoyment for a long time, the fact that he has used it for an extended period will entitle him to employ this interdict.

(4) He who wishes to avail himself of this interdict should furnish security to his adversary against any injury which may be caused by his acts.

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

As anyone who has enjoyed a servitude without a defective title suffers no prejudice to his rights, even though, during the past year, he has made use of it under a defective title, so in like manner a purchaser or an heir will not be injured if he has enjoyed a servitude under a defective title, if the vendor or the testator enjoyed it under a good one.

7. *Celsus, Digest, Book XXV.*

If anyone has passed to and fro through your land without the employment of violence, or without acting clandestinely, or under a precarious title, and still did so without any right, but with the intention of not traversing the land, if he had been forbidden; this interdict will not lie under these circumstances, for, to enable it to do so, the person referred to must possess some right in the land.

TITLE XX.

CONCERNING THE EDICT WHICH HAS REFERENCE TO WATER USED EVERY DAY AND TO SUCH AS IS ONLY USED DURING THE SUMMER.

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

The Praetor says: "I forbid force be used against you to prevent you from conducting the water in question the same way in which you have conducted it during the past year, provided you have not done so, either by violence, or clandestinely, or under a precarious title."

(1) This interdict is prohibitory, and is sometimes restitutory, and has reference to water in daily use.

(2) Water in daily use is not such as is made use of constantly, but is that which anyone can use every day if he so desires; although sometimes, while it may not be convenient to conduct it during the winter, one, nevertheless, has the right to do so.

(3) There are two kinds of servitudes relating to water, one of them for its daily use, and the other for its use in the summer. That which can be used every day differs from that which is used in the summer, for the former is such as is conducted constantly both in summer and in winter, although sometimes it is not made use of. That which is called water for daily use has its servitude divided by intervals of time. That which is for use during the summer is such as is only convenient to use during that season, as we are accustomed to speak of summer clothing, summer resorts, and summer camps, which we make use of occasionally during the winter, but for the most part during the summer.

I think water that is used in the summer, and that which is for daily use., should be distinguished by considering the intention of the parties, and the nature of the places where it is used; for if it is such that it can always be conducted, but I only use it in summer, it must be said that this is summer water. Moreover, if it can only be conducted during the summer, it is also summer water. If the places are such that, by their nature, the water can only be introduced during the summer, it must be held that it will properly be called summer water.

(4) When it is stated in the interdict, "as you have conducted the water during the past year," this means not every day, but even only one day or night during the entire year. Therefore, daily water is such as can be conducted every day during the winter or summer, although there may be times when it is not conducted. Summer water is such as can be conducted every day, but is used only in summer, and not in winter; not because this cannot be done during the winter, but because it is not usually the case.

(5) Again, the Praetor, in this interdict, only refers to water which runs continuously, for water cannot be conducted unless its flow is constant.

(6) Although we stated that this interdict only has reference to water which flows continuously, it also relates to such as can be conducted. For there is certain water which, though its flow is continuous, still cannot be conducted; as, for instance, well water, and such as is so deep underground that it cannot be raised to the surface so as to be of use. A servitude for drawing water of this kind, which cannot be conducted, may be imposed.

(7) These interdicts with reference to water and springs are considered only to apply to water which is drawn from its source, and not from anywhere else, for a servitude can be imposed upon water of this kind under the Civil Law.

(8) The source of water is the place where it originates, and is the spring itself, if it proceeds from a spring. If, however, it is derived from a river or a lake, the first parts of the trench by which it is conducted from the said river or lake into the canal is considered to be its source. If water, oozing through the ground, first appears in some place or other, it is clear that we must call the place where it first emerges from the earth its source.

(9) And, no matter in what way the right to water may be established, it must be held that this interdict will apply.

(10) If, however, the right to the water does not legally belong to anyone, but he thinks that he has the legal right to conduct it, and does so, as, in this instance, the error is not in law, but in fact, it must be held, and it is also our practice, that he is entitled to avail himself of this interdict; for it is sufficient if he thought that he had the legal right to conduct the water, and did not do so either by violence, or clandestinely, or under a precarious title.

(11) The question is asked whether these interdicts only have reference to water which is used for irrigating land, or whether they apply to all water, even such as is employed for our use and convenience. It is our practice to consider that they have reference to all kinds of water. Hence this interdict will be applicable, even where anyone desires to bring water into his houses in the city.

(12) Moreover, Labeo says that even where there are certain aqueducts which do not belong to the land, because they can be used by anyone, the interdict still will apply.

(13) Labeo also says that even if the Praetor, in this interdict, meant to refer to cold water, the interdicts should, nevertheless, not be refused where warm water is concerned, as the use of water of this kind is necessary, for sometimes it is employed instead of cold water in irrigating fields.

In addition to this, in some places warm water is indispensable for the purpose of irrigation, as, for example, at Hieropolis, since it is a fact that the Hieropolitans irrigate their lands in Asia with warm water. And although water of this kind may not be absolutely necessary for

irrigation purposes, still no one doubts that these interdicts will apply under such circumstances.

(14) There will be ground for this interdict whether the water is in a town or out of it.

(15) It, however, must be understood that the Prsetor orders the water to be conducted in the same way as it was conducted during the past year, hence this cannot be done in a larger quantity, or in a different place. Therefore, if the water which anyone wishes to conduct is different from that which he conducted during the past year, or if it was the same and he desires to conduct it through a different part of his premises, force may be used to prevent him from doing so.

(16) Labeo says that every portion of the land through which the water is conducted is entitled to the benefit of the servitude. Hence, if the plaintiff has purchased an adjoining field, and wishes to conduct the water which he has used during the past year into the field which he has recently purchased, he can legally avail himself of this interdict, as is the case of rights of way; so that, once having entered upon his own land, he can enter upon the other wherever he pleases, unless he is prevented by the person from whom the servitude of the water was obtained.

(17) The question is also asked where anyone mixes other water with that which he has used during the preceding year, whether he can be prevented from doing so with impunity. An opinion of Ofilius is extant, who thinks that he can legally be prevented from doing so, but only in the place where he first allows the water to run into his canal. Ofilius says that he can legally be prevented with reference to his entire right to the water. I concur in the opinion of Ofilius that the right cannot be divided, because violence cannot be employed with reference to a portion of the water, where this is not applicable to all of it.

(18) Trebatius holds that if a larger number of cattle are driven to a watering-place than the owner has a right to take there, all of them can be prevented from coming, because those which have been added to the cattle which had the right to drink will annul the right of all of them to make use of the privilege.

Marcellus, however, says that if he who has the right to conduct a certain number of cattle to a watering-place conducts more than that number, he should not be prevented from bringing all of them. This is true, because cattle can be separated.

(19) Aristo holds that he alone is entitled to employ this interdict who thinks that he has a right to do so; and not he who, well knowing that he has no such right, makes use of it.

(20) He also says that he who, during the past year, conducted water without violence, or clandestinely, or under a precarious title, but whose enjoyment during part of the same year was subject to one or the other of these defects, can still properly make use of this interdict for the time when he did so, and no such defect existed, should be taken into consideration; as it is true that there was a period during the past year when he enjoyed the servitude without employing violence, or acting clandestinely, or relying on precarious title.

(21) The question arose, where anyone has conducted water for a longer period than a year, and during the following time, that is, •within the year, the water flowed of itself, without his conducting it, whether there would be ground for this interdict.

Severus Valerius says that the interdict will lie in his favor, as he is considered to have conducted the water, although, strictly speaking, he may not be held actually to have done so.

(22) The question was also asked, if anyone thought that he had the right to conduct water every other day, and conducted it only one day, whether he could be held to have done so properly, and without deceiving the possessor of the land where the water originated, so that he would be entitled to make use of this interdict. For the Prastor says, "as you have conducted the water during the past year," that is, on alternate days, it makes no difference

whether the water was due every fifth day, or every other day, or daily, so far as he who desires to avail himself of the interdict is concerned; for as it is sufficient to have conducted the water only one day during the past year it is of no consequence what right to conduct it the person has, since if anyone who has the right to conduct it every fifth day wishes to avail himself of the interdict, alleging that he has the right to conduct the water every other day, he will be held to have no right to do so.

(23) Moreover, it must be noted that if, when you are conducting water, your adversary prohibits you from doing so, and then in the meantime, you lose your right to conduct it, you can, by means of this interdict, obtain restitution by recovering what you have lost.

I think that this opinion is correct.

(24) If you should sell and deliver the land upon which you are accustomed to conduct water, you can still avail yourself of the interdict.

(25) This interdict will lie against anyone who prevents me from conducting the water, and it makes no difference whether he has the ownership of the land or not, as he will still be liable under the interdict, for, after the servitude has once become operative, it can be claimed against anyone whomsoever.

(26) If a dispute arises between two rivals (that is to say, between two persons who conduct water through the same canal), with reference to the water, and each one of them claims to have the exclusive right, a double interdict will lie in their favor.

(27) Labeo thinks that, under this interdict, a man will be prevented from building anything on the land through which the water is conducted, or from digging or sowing there, or from cutting down any trees, or from erecting any building by means of which the water which he conducted during the past year under a good title through your land may be polluted, vitiated, spoiled, or deteriorated. He says that, in like manner, the interdict can be employed in the case of summer water.

(28) If anyone relinquishes the right to draw water, the abandonment will be valid.

(29) The Praetor further says, "I forbid violence to be employed to prevent you from drawing water, as you have done during the past summer, without the exertion of force, or clandestinely, or under a precarious title. I will grant this interdict to heirs, purchasers, and pra?torian possessors of property."

(30) This interdict has reference to summer water.

(31) As we have stated that a difference exists between water used only during the summer and that which may be used daily, it must also be noted that a difference exists between the interdicts; for the one which has reference to water used daily contains the following clause, "As you have conducted the water during the past year," and that which relates to water used only during the summer contains the following clause, "As you have conducted it during the past summer." This is not unreasonable, for as the individual in question did not use the water during the winter, he should refer, not to the present summer, but to the previous one.

(32) Learned men have decided that summer begins from the vernal equinox, and terminates at the autumnal equinox. Hence summer and winter are divided by the period of six months.

(33) Last summer is calculated from the comparison of two summer seasons.

(34) On this account, if an interdict is issued during the summer, sometimes the period includes a year and six months. This happens where water is conducted at the beginning of the vernal equinox, and the interdict is issued during the next summer, on the day before the autumnal equinox. Hence, if it is issued in the winter, the period will include two years.

(35) If anyone has been accustomed to conduct the water only during the winter, and not

during the summer, he can avail himself of the interdict.

(36) Anyone is entitled to an available interdict who has conducted the water during this summer and not during the previous one.

(37) The Praetor says: "I will grant an interdict to heirs, purchasers, and praetorian possessors of property." It should be observed that these words not only have reference to water used during the summer, but also to that used every day, for, as interdicts are granted to successors with reference to rights of way, so the Praetor thought that these also should be granted.

(38) The Prsetor says: "I forbid violence to be employed to prevent anyone from conducting water from a reservoir on his premises to whom the right to do so has been conceded. Whenever an interdict with reference to the construction of some work should be issued I will order security against threatened injury to be furnished."

(39) It was necessary to propose this interdict, for, as the preceding ones have reference to persons who conduct water from its source on account of a servitude having been imposed, or because they think that this has been done, it seemed to be just that an interdict should be granted to one who conducted water from a reservoir, that is to say, from the receptacle which contains water for the use of the public and which is designated a reservoir.

(40) If permission is given to conduct water from a reservoir, an interdict should be granted.

(41) Moreover, permission will be given to conduct water from a reservoir, a stream, or from any other public place.

(42) This permission is granted by the Emperor, and no one else has a right to give it.

(43) This right is sometimes granted to land, and sometimes to persons. When it is granted to land, it is not extinguished with the death of the party interested; but when it is granted to persons, it is lost by their death, and therefore does not pass to any other owner of the land, or to heirs or other successors.

(44) It is clear that the right can be claimed by him to whom the ownership of the land is transmitted. For if he proves that the water is due to his land, and has flowed in the name of him by whom the ownership has been transmitted to himself, he can undoubtedly obtain the right to conduct it; for this is not *a* favor, but it will be an injustice if it should not be obtained.

(45) We should also remember that, in this interdict, the entire question of the assignment of the right to the water is determined. For this interdict is not merely preliminary, as those formerly described are, nor does it only relate to temporary possession, but the party interested either has had the right assigned to himself, or he has not, and the interdict effectually disposes of the whole matter.

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

If I have the right to conduct the water during the day or the • night, I cannot do so at different hours than those during which I am entitled to conduct it.

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

We have adopted the rule that water can be conducted, not only for irrigating purposes, but also for the use of cattle, and even for pleasure.

(1) Several persons can conduct water from a river, provided they do not cause any damage to their neighbors, or even those who are on' the opposite bank, if the stream narrows.

(2) If you have conducted water from a public river, and it leaves its bed, you cannot follow it up, even though the place where it now runs belongs to me, because the servitude was not imposed upon that land. You can, however, follow it up, if the river should gradually accrue to your land by alluvial deposit, because the entire locality is subject to the servitude of

conducting the water of the river. But if the river, having changed its bed, begins to surround it, you cannot then follow it up, because the abandoned bed is not subject to the servitude which, in consequence, is interrupted.

(3) The water which originates in a brook is tacitly considered to b$ for the benefit of him who conducts it from thence.

(4) An aqueduct, whose origin is beyond the memory of man, is considered to have been lawfully established in the place through which it passes.

(5) He who is entitled to conduct water for daily use can place pipes in a stream, or do anything else; provided he causes no damage to the land of his neighbor, or interferes with the right of others to use water from the same source.

(6) Anyone who has a right to conduct water can also legally conduct other water above it by means of an aqueduct constructed upon the shore, provided no injury is done to the conduit below.

4. *Julianus, Digest, Book XLI.*

I granted to Lucius Titius the privilege of conducting water from my spring. The question arose whether I could grant to Msevius the right to conduct water by the same aqueduct. If you think that this action can be granted to two persons to conduct it by the same aqueduct, how ought they to avail themselves of the right?

The answer was that as a right of way can be granted to several persons conjointly, or separately; so, in like manner, the right to conduct water can legally be granted to them. If the parties do not agree among themselves, in what way shall they make use of it? It will not be inequitable to grant them a praetorian action, just as many authorities have decided that a suit of this kind can be granted in partition to several persons who are entitled to the enjoyment of an usufruct.

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

It is established that the use of water can be divided not only by seasons, but also by measurement. One person can have the right to conduct it for daily use, and another to do so during the summer; so that the water will be divided between them during the summer, and, during the winter, he.alone can conduct it who has the right to its daily use.

(1) It was agreed between two persons who were entitled to the privilege of conducting water by the same aqueduct, at different hours, that the hours for its use should be changed. If they had conducted it for a longer period than was necessary, as prescribed by the servitude, so that neither of them used it during the specified time for which it had been granted him, I ask whether they had lost the right to its use. It was denied that they had lost it.

6. *Neratius, Parchments, Book HI.*

While we are examining the interdicts which have reference to water used during the summer, we think that we should first determine what summer water is, concerning which an interdict is usually granted relating to the preceding season; that is to say, whether summer water should be decided to be such as one only has a right to use during the summer, whether the intention of him who has the right to conduct it during that season ought to be taken into account; whether this designation depends upon the nature of the water itself, which can only be conducted during the summer; or whether the advantage to the places to which it is conducted should be considered.

Hence it was held that the water was properly so called on account of two things; namely, its nature, and the benefit of the land upon which it is conveyed; so that if its nature is such that it can only be conducted during the summer, even though it is also desired to do this during the winter; or if its nature permits it to be conducted during any season of the year, and the benefit

to the places where it is taken only requires its use during the summer by the persons entitled to it, it is very properly called summer water.

7. *Paulus, Decisions, Book V.*

If proceedings are instituted with reference to a right of way, or the right to conduct water, security must be furnished that, as long as the plaintiff attempts to prove his right to the servitude, no obstacle will be offered to his conducting the water, or using the right of way. If, however, he denies that his adversary has any right to use the right of way, or to conduct the water, he should, without any apprehension of losing the servitude, furnish security that he will not make use of it until the case has been disposed of.

8. *ScsBvola, Observations.*

He who is entitled to a right of way through land for the purpose of conducting water is permitted to construct a canal through any part thereof that he wishes, provided he does not interfere with some other aqueduct.

TITLE XXI.

CONCERNING THE INTERDICT HAVING REFERENCE TO CONDUITS.

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

The Praetor says: "I forbid force to be employed against anyone to prevent him from repairing or cleaning any aqueduct, canal, or reservoir, which he has a right to use for the purpose of conducting water, provided he does not conduct it otherwise than he has done during the preceding summer, without the employment of violence, or clandestinely or under a precarious title."

(1) This interdict is extremely useful, for unless anyone is permitted to repair a conduit, he will be inconvenienced in his use of the same.

(2) Therefore, the Prsetor says, "An aqueduct and a canal." A canal is a place excavated throughout its length, and derives its name from a Greek word meaning to flow.

(3) A reservoir is a place from which one looks down, and from it public exhibitions are named.

(4) Conduits are opposed to ditches, and are for the purpose of conducting and forcing water from a stream, whether they are of wood, stone, or any other material whatsoever. They were invented for the purpose of containing and conveying water.

(5) A ditch is a place excavated at the side of a stream, and is derived from the word incision, because it is made by cutting; for the stone or the earth is first cut, in order to permit the water to be brought from the river. Pits and wells are also included in this interdict.

(6) The Praetor next says, "to repair and clean." To repair is to restore anything which is injured to its former condition. In the term "repair" are included to cover, or support from below, to strengthen, to build, and also to haul and transport everything necessary for that purpose.

.(7) Several authorities hold that the term "clean" only has reference to a canal which is in good condition, but it is evident that it also applies to one which needs repair, for frequently a canal needs both repairing and cleaning.

(8) The Praetor says, "for the purpose of conducting the water." This is added for a good reason, as he only is permitted to repair and' clean a water-course who made it in order to conduct water.

(9) This interdict will also lie in favor of one who has not the right to conduct water, provided he did conduct it either during the previous summer, or during that year; as it is sufficient that

he did not do so by the employment of violence, or clandestinely, or under a precarious title.

(10) If anyone desires to make a conduit of stone, which was previously merely dug through the earth, it is held that he cannot legally avail himself of this interdict, for he who does this does not merely repair the water-course.

This opinion was adopted by Ofilius.

(11) Hence, even if a person wishes to dig a canal through a different place, he can be prevented from doing so with impunity. This rule also applies whether he lowers, raises, widens, extends, covers, or uncovers the conduit. I, however, think that he can be prevented from changing it in other respects, but so far as covering and uncovering it is concerned, I do not believe that he can be interfered with, unless his adversary proves that it is for his advantage that this should not be done.

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

Labeo asserts that a conduit which has been open cannot be changed to a subterranean one, because, by doing so, the owner of the land will be deprived of the privilege of watering his cattle, or of drawing water from the said conduit.

Pomponius says that he does not concur in this opinion, because the owner enjoys this privilege rather from accident than from any right which he possesses, unless this was the intention in the beginning when the servitude was imposed.

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

Servius, however, holds that water which formerly flowed through an open channel is conducted in a different way, if it is subsequently conveyed through one that is covered; for if anyone constructs a work by means of which the water is better preserved or contained, he cannot be prevented from doing so with impunity.

I think the contrary applies with reference to a pipe, unless greater benefit is derived by the adversary.

(1) Servius and Labeo say that if a person wishes to make the conduit of stone which, in the first place, was dug through the earth, and therefore did not retain the water, he should be heard. If, on the other hand, he should change the conduit which was formerly built of stone into merely a ditch through the earth, either wholly or in part, he cannot be prevented from doing so. It seems to me that any urgent and necessary repairs should be permitted.

(2) If anyone desires to connect a new channel or new pipes with the water-course, which were never there before, Labeo says that this interdict will be applicable. We, however, are of the opinion that, in a case of this kind, the benefit of him who conducts the water without causing any inconvenience to the owner of the land should be considered.

(3) If water is conducted into a lake, and from the latter by means of several aqueducts, this interdict will lie for the benefit of anyone desiring to repair the lake itself.

(4) This interdict has reference to all conduits, whether they are situated in public or in private places.

(5) Even if the pipe is for the purpose of conducting warm water, this interdict will also be available, where any repairs of the same should be made.

(6) Aristo thinks that a praetorian action will lie where a subterranean pipe through which vapor is conveyed into hot baths requires repairs; and it must be said that an interdict can also be employed in a case of this kind.

(7) This interdict is also granted to the same persons, in the cases above enumerated, in which interdicts with reference to water are granted.

(8) Where notice to desist from the construction of a new work is served upon anyone who is repairing a conduit, it has been very properly held that he need not pay any attention to it, for as the Prator forbids violence to be employed against him under such circumstances, it is absurd that he should be interfered with by the service of notice to stop the construction of a new work.

It must be said that an action *in rem* can undoubtedly be brought against the party in question, on the ground that he had no right to make the repairs.

(9) There is no question whatever, that he who makes the repairs should give security against threatened injury.

(10) Ofilius thinks that this interdict will lie in favor of anyone who is prevented from bringing or transporting any materials required for repairs. This is true.

4. *Venuleius, Interdicts, Book I.*

The interdict is also granted where aqueducts ought to be repaired, and no inquiry is made whether a right to conduct the water exists or not. For the repair of roads is not as necessary as that of aqueducts, for if the latter are not repaired, the entire use of the water will be stopped, and persons will be exposed to death by thirst. It is evident that water cannot be obtained without repairing aqueducts; but if a road is not repaired, passage to and fro will only be rendered difficult, and this is less during the summer time.

TITLE XXII.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO SPRINGS.

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

The Prater says: "I forbid force to be employed to prevent you from making use of the spring in question, the water of which you have used during the past year, without employing force, or clandestinely, or under a precarious title. I will also grant an interdict of the same kind with reference to lakes, wells, and fish-ponds."

(1) This interdict was introduced for the benefit of him who is prevented from using the water of a spring. For servitudes are usually granted not only for the purpose of conducting water, but also for drawing it; and as those relating to the conducting of water and the drawing of the same are distinct, so, also, the interdicts relating to them are separately granted.

(2) Moreover, this interdict will apply if anyone is prevented from using water; that is to say, if he is either hindered from drawing it, or driving his cattle to it.

(3) The same rule which we have mentioned as governing previous interdicts must also be said to apply to those which have reference to persons.

(4) This interdict will not lie in the case of cisterns, for a cistern has not perpetual, or running water. From this it is evident that, in all these instances, it is required that the water be running. Cisterns, however, are filled by rains. In conclusion, it is established that the interdict will not apply if the lake, fish-pond, or well, does not contain running water.

(5) It is clear that the interdict will also be sufficient, where anyone is prevented from using a road giving access to the water to be drawn.

(6) The Praetor next says: "I forbid force to be employed to prevent you from repairing and cleaning the spring in question, in order that you may retain the water; provided you do not make use of it in a different way than you have done during the past year, without the employment of force, or clandestinely, or under a precarious title."

(7) This interdict is as advantageous as the one which has reference to the repair of conduits; for if it is not permitted to clean and repair a spring, it will be of no use.

(8) A spring should be cleaned and repaired for the purpose of retaining the water, so that anyone may use it in the same way in which this was done during the past year.

(9) To retain water is to confine it in such a way that it will not overflow, or be lost; provided anyone is not permitted to seek for and open new springs, for this is an innovation upon what has been done during the preceding year.

(10) An interdict can also be employed where a lake, a well, or a fish-pond is to be repaired or cleaned.

(11) This interdict is granted to all persons who are allowed to make use of the one having reference to summer water.

TITLE XXIII.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO SEWERS.

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

The Praetor says: "I forbid force to be employed by you against anyone who has the right to repair and clean the sewer in question, which is common to his house and yours. I will order security to be furnished for the reparation of any damage which may result from the work."

(1) The Praetor placed two interdicts under this title, one of which is prohibitory, and the other restitutory, and he first discusses the one which is prohibitory.

(2) By means of these interdicts, the Praetor provides that sewers shall be cleaned and repaired, and both of them have reference to the health and protection of cities; for the filth of the sewers threatens to render the atmosphere pestilential and ruin buildings.

The same rule applies even when the sewers are not repaired.

(3) This interdict applies to private sewers, for those which are public demand the care of officials.

(4) A sewer is an excavation by means of which filth is carried away.

(5) The interdict first mentioned is prohibitory, and by it a neighbor is prevented from using violence to prevent a sewer from being cleaned and repaired.

(6) In the term "sewer" are included both the ditch and the pipe.

(7) For the reason that the repairing and cleaning of sewers is considered to have reference to the public welfare, it was decided that the clause, "if you have not made use of it by violence, or clandestinely, or under a precarious title," should not be added; so that, even if anyone had used it under such circumstances, he still would not be prevented from repairing or cleaning the sewer, if he desired to do so.

(8) The Praetor next says, "which is common to his house and yours." In this instance, the term "house" must be understood to signify every kind of building, just as if it had been said "to his building and yours."

Labeo goes even farther, for he thinks that there will be ground for this interdict, if there is a vacant space between the two edifices, and if, as he suggests, the sewer leads from a house in the city to adjoining land.

(9) Labeo also holds that anyone who desires to connect his private sewer with a public one ought to be protected against being prevented by violence. Pomponius says that if anyone desires to construct a drain which will flow into a public sewer, he should not be hindered from doing so.

(10) Where the Praetor says, "is common to his house and yours," he means is directed towards, extends to, or comes as far as your house.

(11) This interdict also has reference to a next neighbor, as well as against others farther away, through whose houses the sewer in question runs.

(12) For which reason Favius Mela says that this interdict will lie to authorize anyone to enter the house of a neighbor, and take up his pavement for the purpose of cleaning the sewer.

Pomponius, however, says that, in this instance, the penalty of a stipulation for the reparation of damage may be incurred; but this will not be the case if the person above mentioned is ready to replace what he was obliged to take up for the purpose of repairing the sewer.

(13) If anyone serves notice of a new work upon me when I am cleaning or repairing my sewer, it is very properly held that I may pay no attention to the notice, and can continue to repair what I have begun.

(14) The Praetor, however, promises that security shall be given against any injury which may result from defective work; for, just as permission is given to repair and clean sewers, so it must be said that no damage should be caused to the houses of others.

(15) The Praetor next says: "You shall restore all to its former condition, where anything has been done to a public sewer or placed in it by which its use may be interfered with. Likewise, I forbid anything to be done to the sewer, or to be thrown into it."

(16) This interdict has reference to public sewers, and prohibits anything being thrown into them, or deposited in them by which their use may be injuriously affected.

2. *Venuleius, Interdicts, Book I.*

Although the repair of existing sewers, and not the construction of new ones, is included in this interdict, Labeo says that an interdict should, nevertheless, be granted to prevent anyone from employing violence against another who builds a sewer, because the same question of public welfare is involved; as the Praetor has, by an interdict, forbidden force to be used to hinder anyone from constructing a sewer in a public place. This opinion is also adopted by Ofilius and Trebatius. Labeo also says that anyone ought, without interference, to be permitted by the interdict to clean and repair a sewer already constructed; but that the officer in charge of the public highways should grant permission to build a new one.

TITLE XXIV.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO WORKS UNDERTAKEN BY VIOLENCE OR CLANDESTINELY.

1. *Vivianus, On the Edict, Book LXXI.*

The Praetor says: "I order you to restore to its former condition everything which you have done to the property in question by the employment of violence or clandestinely, as soon as proceedings are instituted against you for that purpose."

(1) This interdict is restitutory, and, by means of it, the deceit of those who have undertaken to do anything' with violence, or clandestinely, is obviated; and they are ordered to restore fhe property to its former condition.

(2) It makes very little difference whether the party in question has the right to do the work or not; for, even if Be has, he will, nevertheless, be liable under the interdict, because he employed violence or acted clandestinely; since he should protect his rights, and not contrive to injure hers.

(3) Then the question is asked whether anyone can oppose to this interdict the exception that the defendant did not do anything which he had not acquired a right to do. The better opinion is that he will not be allowed to avail himself of such an exception, for he cannot protect himself legally by an exception, where he has employed violence or acted clandestinely.

(4) This interdict only has reference to work which is done upon land, with the employment of violence or in a clandestine manner.

(5) Let us see what is meant by the employment of violence, or a clandestine act. Quintus Mucius says that anything is considered to have been done with the employment of violence where a person does it after he has been forbidden. The definition of Quintus Mucius appears to me to be complete.

(6) Pedius and Pomponius assert that if anyone is forbidden to proceed with a work by the casting of even a small stone upon it, he will be held to have used violence; and this is our practice.

(7) Cascellius and Trebatius think that the same rule will apply, if he proceeds with the work after notice has been served upon him in the presence of witnesses, which is true.

(8) Moreover, Aristo says that he also employs violence who, knowing that he will be opposed, uses force to avoid being prohibited.

(9) Likewise, Labeo says that if I forbid anyone to proceed, and he desists while in my presence, but afterwards resumes the work, he will be considered to have employed violence, unless he has obtained my consent, or has some other good reason for doing so.

(10) If anyone is prevented by weakness, or is restrained by the fear of offending you, or someone whose power is exerted in your favor, and, for either of these reasons, does not forbid you to proceed, you will not be considered to have employed violence. This was also stated by Labeo.

(11) He also says that if anyone should deter you when you desire to prevent me from doing the work, for instance, by arms, without any fraudulent act on my part, and, on this account, you do not come to prevent me, I will not be considered to have employed violence.

2. *Venuleius, Interdicts, Book II.*

So that it may not be within the power of another to render my condition worse, without my being guilty of any offence.

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

In order to prevent anyone from proceeding, it is not necessary that the person himself should act, for anyone is legally considered to have hindered another, either by his slave or by his agent. The same rule will apply if a day laborer employed by me should attempt to prevent him. Nor can the objection be urged that action is not ordinarily acquired through the agency of one who is free; for the hindrance proves that you effected this by the employment of violence. And why should this be remarkable, when I will be entitled to bring suit, even if you have done the work clandestinely, and therefore, the right of action will be acquired by me, rather through the illegal act which you have committed, than through that of another?

(1) It should be noted that it is not necessary for the violence to be exerted continuously; for after it has once been committed in the beginning, it is considered to endure.

(2) If permission has been granted, an exception will be necessary to oppose him who makes use of the interdict.

(3) Moreover, if not only I should grant permission, but if my agent, or a guardian who is administering a guardianship, or the curator of a ward, an insane person, or a minor, should also grant it, it must be said that there will be ground for an exception.

(4) Nerva asserts that it is clear there will be no ground for an exception if the Governor, or some official having charge of the business of a city, permits work to be done in a public place; for he says that although the care of public places may have been entrusted to him, still the right to transfer them was not granted. This is only true where municipal law does not

confer greater authority upon the public official having charge of the affairs of a city.

The same rule should be adopted if the right was granted by the Emperor himself, or by someone upon whom he has bestowed the power to do so.

(5) If anyone is ready to defend himself in court against certain persons who think that he should be forbidden to construct a work, let us see whether he will be held to have desisted through the employment of violence. The better opinion is that he should be considered to have done so, if he offers to give security, and is ready to defend his right. This was also stated by Sabinus.

(6) Again, if anyone is prepared to furnish security against any damage which may result, when he has only been forbidden to proceed on this account, or because he did not defend himself, or for the reason that he did not furnish security against threatened injury, it must be said, in consequence, that he has ceased to proceed with the work through the employment of violence.

(7) Cassius says that he is held to have acted clandestinely who conceals what he is doing from his adversary, and fails to notify him, provided he feared, or thought that he had good reason to fear, opposition.

(8) Aristo also thinks that he acts clandestinely when, with the intention of concealing what he is doing, he keeps with him the person

whom he thinks will oppose him, and believes, or has reason to believe, that he will oppose what he expects to d.o.

4. *Venuleius, Interdicts, Book II.*

Servius says that he is held to have acted clandestinely, even if he thinks that no controversy will arise with reference to what he does; for it is not necessary to pay attention to every one's inconsiderate opinion and judgment, otherwise, fools would be in a better condition than wise men.

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

He who does work in a different way than that in which he gave notice that it would be done, or deceives the person who had an interest in not having it performed, or intentionally serves notice upon his adversary, when he knows that he cannot hinder him, or notifies him so late that he cannot leave his house in order to interfere with the work, is held to have acted clandestinely. Aristo says that Labeo adopted this opinion.

(1) When anyone gives notice that a new structure is about to be erected, he is not always considered to have acted clandestinely, if he does the work after the notice has been given; for (according to Labeo), both the day and the hour should be included in the notice, as well as the place where the work is to be done, and the nature of it. A notice should not be either vague nor obscure, nor should it so restrict the adversary that he cannot appear within the time designated, in order to prevent the work from being performed.

(2) If there is no one upon whom the notice can be served, and no fraud has been committed by the person intending to do the work, notice should be served upon the friends or agent of the party interested, or at his house.

(3) Servius, however, very properly states that it will be sufficient to notify the husband of a woman, who is interested, that the work is about to be done, or to do it with his knowledge; although it will also be sufficient not to have the intention of concealing it from him.

(4) He also says, that if anyone desires to construct a new work in a public place belonging to a municipality, it will be sufficient if notice is served upon the official having charge of the affairs of the city.

(5) If anyone, thinking that certain land belongs to you, while in fact it is mine, undertakes a new work with the intention of concealing it from you, but not from me, the interdict will lie in my favor.

(6) He also says that, if someone undertakes a new work with the -intention of concealing it from my servant, or my agent, I will be entitled to an interdict.

(7) If anyone who did not serve notice that he was about to begin a new work, but was himself notified not to undertake it, and, nevertheless, does so, I think that the better opinion will be that he em-, ployed violence.

(8) These words, "what has been done by violence or clandestinely," Mucius says should be understood to mean what you yourself, or anyone of your people, have done, or what has been done by your command.

(9) Labeo, however, thinks that a larger number of persons are included in these words; for, in the first place, it includes the heirs of the persons enumerated by Mucius.

(10) He also says that this interdict is available against an agent, a guardian, a curator, and a municipality or syndic, as representing other parties.

(11) If my slave undertakes a new work, an action cannot be brought against me on this account, but it will be necessary for him to do it either in my name, or in his own; for if I have your slave employed by the day, and he begins any work in my name, proceedings can be instituted under this interdict on this ground, not against you, but against me, by whose order, or in whose name the work was performed by your slave.

(12) In like manner, where such work is performed by the order of anyone, this action will lie not against him, but against the person in whose name the order was given. For if an agent, a guardian, a curator, or the duumvir of a municipality, acting in the name of him or those whose business he transacts, should order the work to be performed, proceedings must be instituted against him in whose name this was done, and not against him who ordered it to be done. If I direct you to order work to be performed, and you obey me, the action should be brought against you, and not against me.

(13) As the interdict is expressed in the following terms, "what has been done by violence, or clandestinely," and not "what you have done by violence, or clandestinely," Labeo thinks that it extends to other persons than to those whom we have mentioned above.

(14) Our practice renders me liable under the interdict *Quod m aut clam,* whether I have done any new work or ordered it to be done.

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

If I direct you to construct a new work, and you order another to do it, it cannot be considered that it has been done by my command; therefore, you as well as the other party, will be liable. Let us see whether I, also, will be liable. The better opinion is that I will be, as I directed another to begin it. But if any one of these three should make reparation, the other two will be released.

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

If another person should construct the new work without my permission, I will only be liable to the extent of allowing it to be demolished.

(1) Neratius also says that where the slave of any person constructs a new work, by the employment of violence, or clandestinely, he will be required, under the interdict to restore everything to its former condition, at his own expense, or permit this to be done, and surrender the slave by way of reparation. He asserts that it is evident that if the interdict is employed after the slave has died, or been alienated, his master will only be compelled to

permit the work to be demolished, so that the purchaser can be sued under the interdict for payment of the expenses, or the surrender of the slave by way of reparation; but he will be released from liability, if the owner of the new work restores everything at his own expense, or has judgment rendered against him because he did not do so.

If, on the other hand, the master of the slave either restores everything to its former condition, or has judgment rendered against him for the amount of damage sustained, the same rule will apply. But if he has only abandoned the slave by way of reparation, the interdict can be properly employed against the owner of the new work.

(2) Julianus says that anyone who constructs a new work before the withdrawal of the notice, and in violation of what he was forbidden to do, will be liable under two interdicts, one of them being based upon the notice which has been served with reference to a new work, and the other upon the employment of violence, or clandestine action. Where the withdrawal of the notice has been made, the defendant is not considered to have acted with violence or clandestinely, even though the prohibition remains; for a person who has given security ought to be permitted to build, because, by doing so, he becomes the possessor, and he should not be held to have acted clandestinely either before or after the withdrawal of the notice, since he who serves notice of a new work cannot be considered to have concealed himself, or to have been warned before he caused any controversy.

(3) It is very properly asked by Julianus whether this interdict may not be opposed by the exception: "Have you not done this work by the employment of violence, or clandestinely?" For instance, I use the interdict *Quod vi aut clam* against you; can you oppose me with the exception, "Have you not done the work by violence, or clandestinely?"

Julianus says that it is perfectly just for this exception to be granted; for he states that if you build anything by violence or clandestinely, and I demolish it by violence, or clandestinely, and you employ this interdict against me, I will be entitled to the benefit of this exception. This procedure, however, should not be resorted to unless good and sufficient cause exists; otherwise, everything ought to be referred to the wisdom of the judge.

(4) Gallus doubts whether still another exception may not be interposed; for example, where for the purpose of preventing a fire from spreading I demolish the house of my neighbor, and proceedings are instituted against me either under the interdict *Quod vi aut clam,* or for the reparation of wrongful damage. Gallus is uncertain whether the exception, "if you have not done this to prevent the spread of the fire," ought to be employed.

Servius says that if a magistrate directed this to be done, the exception ought to be granted, but a private individual should not be permitted to demolish the house. If, however, any act was committed by violence, or clandestinely, and the fire did not extend to that point, the amount of simple damages should be estimated, but if it did reach that point, the party in question should be released from liability.

He states that the conclusion would be the same if the act had been committed for the prevention of future injury, as, both houses having been destroyed, it would appear that no injury or damage had been caused. But if you should do this when there was no fire, and fire should afterwards break out, the same rule will not apply; because, as Labeo says, the appraisement of damages should be made, not with reference to the former event, but according to the present condition of the property.

(5) We have noted above that, although the terms of the interdict have a broad application, still, the proceeding is held to apply only to work which is performed upon land. Hence, he who takes the crops is not liable under the interdict *Quod vi aut clam,* for he does not perform any new work upon the land. He, however, who fells trees, or cuts reeds or willows, will be liable; for, to a certain extent, he lays hands upon the earth, and injures the soil. The same rule applies to the cutting of vines. He, however, who removes the crops, should be sued by an

action on theft. Therefore, where anyone constructs a new work upon the soil, there will be ground for the interdict. Anything which is done to trees we understand to apply to the soil, but not anything which is done with reference to the fruits of trees.

(6) If anyone spreads a heap of manure over a field whose soil is already rich, proceedings can be instituted against him under the interdict *Quod vi aut clam.* This is proper, because the soil is deteriorated.

(7) It is clear that if anything new is built for the purpose of cultivating land, the interdict *Quod vi aut clam* will not apply, if the condition of the land is improved, even though it may have been constructed by violence or clandestinely, after notice has been served prohibiting it.

(8) Again, if you dig a ditch in a public wood, and my ox falls into it, I can proceed against you under this interdict, because this has been done in a public place.

(9) If anyone should demolish a house, there is no doubt that he will be liable under the interdict, even though he did not level it with the ground.

(10) Hence., if he removes the tiles from a building, the better opinion is that he will be liable to the interdict.

8. *Venuleius, Interdicts, Book II.*

For the origin of things of this kind is derived from the soil. Moreover, tiles are not of themselves possessed, but only with the entire edifice, nor does it make any difference whether they are attached to it, or only placed upon it.

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

If anyone removes branches from trees, we still allow this interdict to be employed. With reference to what we have stated as to the removal of tiles from a building, if they are not placed upon the building, but are separate from it, this interdict will not apply.

(1) If, however, a lock, a key, a bench, or a wardrobe is carried away, proceedings cannot be instituted under the interdict *Quod vi aut clam.*

(2) But if anyone tears away something which is attached to a house, for instance, a statue, or anything else, he will be liable under the interdict *Quod vi aut clam.*

(3) If anyone cultivates land with violence, or clandestinely, or excavates a ditch therein, he will be liable under this interdict. If he burns a heap of straw, or scatters it in such a way that it cannot be used for the benefit of the land, there will not be ground for the interdict.

10. *Venuleius, Interdicts, Book II.*

This is because the pile of straw is not attached to the soil, but is supported by it, but buildings are attached to the soil.

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

Labeo says that anyone who pours something into the well of his neighbor, in order to spoil the water by doing so, will be liable under the interdict *Quod vi aut clam,* because living water is considered to constitute part of the land, and this is just as if he had constructed a new work in the water.

(1) If anyone should remove, either by violence or clandestinely, a statue erected in a city in a public place, the question arose whether he would be liable under this interdict. An opinion of Cassius is extant to the effect that he whose statue has been erected in a public place in a city can avail himself of this interdict, because it is to his interest that the statue should not be removed. Moreover, the municipal authorities can also bring an action of theft, on the ground that the property, having become public, is theirs. If, however, the statue should fall, they themselves can remove it. This opinion is correct.

(2) If anyone removes a statue from a monument, will the person to whom the right of sepulture therein belongs be permitted to institute proceedings under the interdict? It is established that, in cases of this kind, there will be ground for the interdict, and, indeed, it must be said that where anything has been placed on a tomb for the purpose of ornamenting it, it is considered to form part of the same.

This rule is also applicable if the party tears away or breaks down a door.

(3) If anyone should come into my vineyard, and remove the supports of my vines, he will be liable under this interdict.

(4) Where the Prsetor says, "what is done by violence, or clandestinely," let us see what time should be considered, and whether the past or the present is referred to. This point is explained by Julianus, for he says that, in this interdict, we must understand the present time to be meant. If, however, any damage has resulted, and the master, or he whose land was injured, removes the cause of the damage at his own expense, it is better to adopt the opinion which Julianus holds, namely, that the damage should be repaired, and the expenses be reimbursed.

(5) This interdict includes everything whatsoever which has been done with violence or clandestinely. But it sometimes happens that the same work has been partly accomplished by violence, and partly clandestinely; as, for instance, although I forbade you to proceed, you laid the foundation of a building, and afterwards, we having agreed that you should not finish it, you, nevertheless, did so, during my absence and without my knowledge; or, on the other hand, you, having laid the foundation clandestinely, completed the building in spite of my opposition.

This is our practice; for the interdict is sufficient when the work has been done with violence and clandestinely.

(6) If the new work was constructed by the order of a guardian or a curator, as it is established (and as Cassius holds), that a ward or an insane person is not liable on account of the fraud of his guardian or curator, the result will be that an equitable action or an available interdict will lie against the guardian or curator himself. It is clear, however, that the ward and the insane person will be liable to the extent of permitting the demolition of the work, as well as to a noxal action.

(7) Should a slave be excused who has constructed a new work in obedience to the orders of a guardian or a curator? For slaves are usually pardoned when they obey their masters or those who occupy their places, in the performance of acts which have not the atrocious character of crimes, or serious offences. In this case this should be admitted.

(8) If the land should be sold after a new work has been constructed with violence or clandestinely, let us see whether the vendor can, nevertheless, avail himself of this interdict. The opinion of certain authorities is extant to the effect that the interdict will lie in favor of the vendor, even if the sale has not been concluded, and nothing had been paid to the purchaser in an action on sale for the work which was constructed before the transaction took place; for it is sufficient if, on this account, the vendor sold the land at a lower price. The same rule should be adopted where he did not sell it at a lower price.

(9) It is, however, clear that if the new work was constructed after the sale of the land, even if the vendor himself has proceedings under the interdict instituted against him, for the reason that delivery has not yet been made, he will still be liable to the purchaser in an action on purchase; for all benefits and inconveniences should be for the advantage or disadvantage of the latter.

(10) If land has been sold under the condition of being returned if a higher price can be obtained, who will be entitled to the interdict? Julianus says that the interdict *Quod vi aut*

clam will lie in favor of the person to whose interest it was that the work should not be constructed. For when land is sold under this condition, all the advantage and disadvantage will be enjoyed or endured by the purchaser; and this applies to whatever was done before the property was transferred under the terms of the sale. Therefore, if any new work has been constructed with violence, or clandestinely, although the condition of the vendor may be improved, the purchaser will be entitled to an available interdict, but he will be compelled to assign the right of action acquired under the action of sale, as well as any other profits which may have been obtained in the meantime.

(11) Aristo, however, says that notice must even be served upon him who is not in possession, for he states that if anyone should sell me a tract of land which he has not yet delivered, and a neighbor, desiring to construct a new work, knowing that I have bought the land, and am living upon it, should notify me, he will hereafter be secure so far as any suspicion relating to the clandestine construction of a new work is concerned; which in fact is true.

(12) In case a sale is made of land under the condition that it will be of no effect, if a better price can be obtained within a certain time, and the land is delivered to the purchaser under a precarious title, I think that he can make use of the interdict *Quod vi aut clam.* If, however, delivery has not yet been made, or if it has been made under a precarious title, I do not believe there can be any doubt that the vendor will have a right to the interdict, for it will lie in his favor even though the property may not be at his risk.

Nor does it make much difference if it is at the risk of the purchaser, for immediately after the sale has been contracted, the property is at the risk of the purchaser an'd, nevertheless, before delivery has been made, no one will maintain that he is entitled to the interdict. Still, if he is in possession precariously, let us see whether he can avail himself of the interdict, because he has the interest, no matter by what title he holds possession. Therefore, even if he has leased the property, there is much more reason that he should be entitled to it; for, beyond all doubt, a tenant can institute proceedings by means of the interdict.

If the condition of the vendor should become better before the work has been constructed with violence, or clandestinely, Julianus entertains no doubt that the interdict will lie in favor of the vendor, for the disagreement between Cassius and Julianus relates to a new work which has been begun in the meantime, and has no reference to one which has subsequently been undertaken.

(13) If a tract of land has been sold under the condition that if the purchaser is not pleased with it, the sale will be void, it is more easy for us to determine that the purchaser will be entitled to the interdict, provided he is in possession. If the question of the annulment of the sale is referred to a third party for arbitration, the same rule should be adopted. This is also the case if it is sold under the condition that if some event transpires, the land shall be considered as not sold.

The same rule must be said to apply, if the sale was contracted with the understanding that it would be void if the terms were not complied with within a specified time.

(14) Julianus also says that this interdict not only lies in favor of the owner of the land, but also in favor of those whose interest it is not to have the new work constructed.

12. *Venuleius, Interdicts, Book II.*

Although a tenant and an usufructuary are entitled to the benefit of this interdict with reference to the crops, still, the owner will also be entitled to it if he has any additional interest.

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

Finally, if there are trees on the land, the usufruct of which belongs to Titius, and they are cut down by a stranger, or by the owner, Titius can institute proceedings against both of them,

under the Aquilian Law, and the interdict *Quod vi aut clam.*

(1) Labeo says that if the new work is constructed against the opposition of your son, you will be entitled to the interdict, just as if the opposition had been made by yourself; and your son will also be entitled to it, nevertheless.

(2) He also says that no one is considered to have constructed a work clandestinely against a son under paternal control, where the land forms a part of his *peculium;* for if he was aware that he was under paternal control, he will not be considered to have done the work with the intention of concealing it from him, as he knows that he cannot bring suit against him.

(3) If one of two joint-owners of a tract of land cuts down any trees, the other can institute proceedings against him under this interdict, as it lies in favor of any person having an interest in the property.

(4) It is stated still more broadly by Servius, that if you grant me permission to cut down trees on your land, and then someone else cuts them down with violence, or clandestinely, I will be entitled to this interdict, because I am the party interested. It is still more easy to admit this, if I have purchased from you, or have obtained from you by some other contract, permission to cut the trees.

(5) If a new work was constructed with violence, or clandestinely, upon land which at the time did not belong to anyone, and the ownership of it afterwards vested in some person, the question arises whether there would be ground for the interdict; as, for instance, where a succession was vacant, and Titius afterwards entered upon the estate, would he be entitled to the interdict? It was frequently stated by Vivianus that this interdict will lie in favor of the heir, because the work had been performed before his acceptance of the estate.

Labeo says that it makes no difference if the party in question did not know who would be the heir, for he can readily make use of this pretext, even after the estate has been accepted. He also says that no objection can be raised because, at that time, there was no owner of the land, for a burial-place has no owner, and if any new work is" constructed upon it, I can institute proceedings by means of the interdict *Quod m aut clam.*

It should also be added to what has previously been stated that inheritance takes the place of ownership. It can very properly be held that the interdict will lie in favor of the heir and other successors, if the work was constructed with violence, or clandestinely, before or after they succeeded to the estate.

(6) If my tenant constructs a new work with my consent, or I afterwards ratify his act, it is just the same as if my agent had constructed it. In this instance it is established that I will be liable, whether he acted with my consent, or whether I ratified what he had done.

(7) Julianus says that if a tenant cuts down a tree, the ownership of which was in dispute, or does anything else, and it was done by .order of the owner, both parties will be liable, not only for permitting the tree to be cut down, but also for the payment of all expenses of restoring the property to its former condition. If, however, the owner did not order the work to be done, the tenant will be liable for permitting the tree to be felled, and for the payment of the expenses; and the owner will be compelled to do nothing more than to allow the removal of the tree.

14. *Julianus, Digest, Book LXVIII.*

For if my slave constructs a new work without my knowledge, and I afterwards sell or manumit him, proceedings can only be instituted against me to compel me to allow the work to be demolished. The plaintiff, however, can proceed against the purchaser of the slave, and force him to surrender him by way of reparation, or pay the expense incurred in restoring the property to its original condition.

This action can also be brought against the slave himself, after he has been manumitted.

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

This interdict can always be employed against him who is in possession of a new work. Therefore, if anyone has constructed a new work upon my land without my knowledge or consent, there will be ground for the interdict.

(1) If you have leased your land for excavation, and the lessee throws the stones which he takes out upon the field of a neighbor, Labeo says that you will not be liable under the interdict *Quod vi aut clam,* unless this was done by your direction. I, however, think that the lessee will be liable, but not the lessor, unless to the extent of being compelled to permit the removal of the stones, and to assign any right of action which he may have; otherwise, he cannot be held responsible.

(2) Labeo says that if earth is piled up by my order upon a burial-place belonging to another, proceedings can be instituted against me under the interdict *Quod vi aut clam;* and if this was done with the common consent of several persons, proceedings can be instituted against any one of them, or against each one individually; for an undertaking in which several persons are concerned renders each of them individually liable in full.

If, however, some of them acted on their own responsibility, suit should be brought against all, that is to say, for the entire amount. Hence, if one of them is sued, this will not release the others, and even if a judgment is rendered against only one, the result will be the same; while, in the former instance, if one is sued, the others will be released. In addition to this, the action based oh the violation of a sepulchre can be brought.

(3) This interdict is granted against the heir and other successors, for the amount which has come into their hands, but it will not be after a year has elapsed.

(4) The year begins to run from the time when the work has been completed, or labor upon it has ceased, even though it may not be finished. Otherwise, if the year was computed from the day when the work was begun, it would be necessary to bring several suits against those who delayed its completion.

(5) If, however, the place in which the work was performed was not easy of access (as, for example, if it was done with violence, or clandestinely in a burial-place, or in some other retired locality, or under ground, or under water, or in a sewer), the interdict will lie with reference to the new work, even after the lapse of a year, if proper cause be shown. For if proper cause is shown, the exception based on the fact that a year has elapsed cannot be pleaded, that is to say, where good and sufficient cause for ignorance is established.

(6) If anyone who "is absent on business for the State, when he returns, desires to make use of the interdict *Quod vi aut clam,* the better opinion is that he should not be excluded from doing so on the ground of a year having elapsed, but that he will be entitled to a year after his return. For if a minor under twenty-five years of age should be away on public business, and, during his absence, attains his majority, the year will be reckoned from the date of his return, and not from the day when he completed his twenty-fifth year.

This was stated in a Rescript by the Divine Pius, and confirmed by all the other Emperors who succeeded him.

(7) In the proceedings under this interdict, the amount of the judgment is based upon the interest of the plaintiff in not having the new work constructed. It is the duty of the judge to decide that the property shall be restored in such a way that the condition of the plaintiff will be the same as it would have been if the new work, on account of which the action was brought, had not been undertaken either by violence, or clandestinely.

(8) Therefore, sometimes the right of ownership must be taken into consideration, as, for example, where servitudes are lost, or usufructs extinguished because of the new work which was undertaken, which may not only happen while it was in progress of construction, but also

at the time of its demolition, when the condition of the servitudes, of the usufruct, or of the property itself becomes impaired.

(9)r The interest of the plaintiff, however, must be established by his oath in court, or, if this cannot be done, it must be determined by the judge.

(10) Where anyone has been guilty of fraud to avoid restoring the property to its former condition, he must be considered as having the power to do so.

(11) In this interdict, the negligence of the defendant must also be taken into consideration, and this must be estimated in accordance with the wisdom of the judge.

(12) For the reason that this interdict has reference to the interest of the plaintiff in not having a new work constructed, if he has obtained the value of his interest by means of some other action, the result will be that he can obtain nothing else by the employment of this interdict.

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

This interdict will lie in favor of those who are not in possession of the property, provided they have an interest therein.

(1) Where anyone, with violence, or clandestinely, cuts down trees which do not bear fruit, as, for instance, cypresses, the interdict will only lie in favor of the owner. If, however, any pleasure is afforded by trees of this kind, it may be said that the usufructuary also has an interest on this account, and that he will be entitled to the interdict.

(2) In short, if anyone has constructed a work with violence, or clandestinely, and is in possession, he must permit the removal of what has been built, and pay the expenses of doing so; but if he who did the work is not in possession, he must pay the expense of removal; if he is in possession, but did not construct the work, he must only permit it to be removed.

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

The interdict *Quod vi aut clam* is acquired for the owner by almost any person, and even by a tenant.

18. *Celsus, Digest, Book XXV.*

If anyone cuts down any timber before it is mature, he will be liable under the interdict *Quod vi aut clam.* In like manner, if he cuts it down after it has matured, and the owner sustains no damage, he will not be liable for anything.

(1) It has been very properly stated that if you should petition a magistrate to order your adversary to appear in court, in order to prevent him from serving notice upon you not to construct a new work, you will be held to have acted clandestinely, if, in the meantime, you proceed with the work.

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

Sabinus says that a son under paternal control, who is a tenant, is entitled to the interdict *Quod vi aut clam* against anyone who sets fire to trees.

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

He is considered to have acted with violence who continues the construction of a new work after having been forbidden to do so; for instance, by deterring his adversary from notifying him, or by closing a door against him.

(1) A man is also understood to be prevented by any kind of an act whatsoever; that is to say, by the opposition of someone speaking to him, or raising his hand against him, or throwing a stone upon the structure with the intention of forbidding him to proceed.

(2) Moreover, he who has been forbidden to proceed acts with violence as long as matters

remain in the same condition; for if he afterwards makes an agreement with his adversary, he ceases to use violence.

(3) Likewise, if the work which has been prohibited is carried on by the heir, or by someone who purchased the property from him, without having knowledge of the facts, Pomponius says that it should be held that he will not be liable to the interdict.

(4) Any new work which is done in a ship, or with reference to any other movable property, even if it will increase its dimensions, is not included in this interdict.

(5) Whether the work is constructed in a private or a public place, or in one which is- sacred or religious, the interdict will lie.

21. *Pomponius, On Sabinus, Book XXIX.*

Where a new work is ordered to be removed by'a judge who has been applied to under this interdict, and anyone else removes it with violence, or clandestinely, the party against whom judgment has been rendered will, nevertheless, be ordered, under all circumstances, to restore the property to its former condition.

(1) If I order my slave to construct a new work, and no suspicion of clandestine action attaches to me, but my slave thinks that my adversary will oppose him if he should hear of it; will I be liable ? I do not think that you will be, because I, personally, should only be considered.

(2) In the construction of a new work, the land as well as the air which may be affected must be taken into account.

(3) If anyone, on account of the construction of a new work, loses any right attaching to his land, this should be remedied by the interdict.

22. *Venuleius, Interdicts, Book II.*

If you have drawn over, and planted a sprout of one of my vines on your land, and it takes root, I will be entitled to the interdict *Quod vi aut clam* for the term of a year. If, however, the year should elapse, I shall no longer have a right of action; for even the roots which remain on my land become yours, because they are accessory.

(1) If anyone cultivates land with violence, or clandestinely, I think that he will be liable under this interdict, just as if he had dug a ditch; for the application of this interdict is not based upon the kind of work, but upon every description of labor which is performed upon the soil.

(2) If you attach a tablet to my door, and before serving notice upon you I remove it, and we then institute proceedings against one another under the interdict *Quod vi aut clam,* and you do not desist to enable me to be released, you should have judgment rendered against you for not restoring the property to its former condition, to the extent of my interest; or I can plead an exception based upon the fact that you have acted with violence, or clandestinely, or under a precarious title.

(3) If you throw manure upon my premises, after I have forbidden you to do so, Trebatius says that you will be liable under the interdict *Quod vi aut clam,* even though you cause me no damage, and do not change the appearance of my land.

Labeo is of the opposite opinion, for he holds that anyone will not be liable under this interdict who merely makes a road through my land, or releases a bird of prey there, or hunts upon it, without constructing any new work.

(4) If anyone extends his roof or gutter above a tomb, even if it does not touch the monument itself, proceedings can, nevertheless, lawfully be instituted against him by means of the interdict *Quod vi aut clam,* because a sepulchre is not only a place intended for interment, but

is entitled to all the air above it, and, on this account, the action for violation of a tomb can be brought.

(5) If he who served notice that he was about to undertake a new work should begin it immediately, he will not be understood to have done so clandestinely; but he will be considered to have acted clandestinely if he undertakes it after the designated time has expired.

TITLE XXV.

CONCERNING THE WITHDRAWAL OF OPPOSITION.

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

The Praetor says: "The notice will hold, if the complainant has a right to prevent the construction of a new work against his consent; otherwise, I will grant a withdrawal of the prohibition."

(1) Withdrawals of opposition are discussed under this Title.

(2) The words of the Praetor indicate that a withdrawal of this kind only should be made where the notice does not hold, and that he intends that it only should hold where the person serving it has a right to forbid a new work being constructed without his consent. Moreover, whether security is given or not, the .withdrawal granted is only applicable to property with reference to which the notice is not valid. It is clear that if security has been furnished, and withdrawal is granted afterwards, the withdrawal is not necessary.

(3) He only is entitled to serve notice not to construct a new work in whom the right of ownership or the servitude is vested.

(4) It was also held by Julianus that the usufructuary had the right to recover the servitude; and, according to this, he can serve notice upon a neighbor not to construct a new work, and the withdrawal of opposition will also be valid.

If, however, he should serve notice upon the owner of the land himself, the withdrawal of opposition would be of no effect, nor would the usufructuary have any right of action against the owner, since he has one against the neighbor; as, for instance, to prevent him from raising his house to a greater height. But if his usufruct should be impaired by this act, he ought to bring an action to recover it.

Julianus says the same thing with reference to others to whom servitudes are due from their neighbors.

(5) Julianus also says that it is not inequitable to allow a person, who has received land in pledge, the retention of a servitude imposed upon said land.

TITLE XXVI.

CONCERNING PRECARIOUS TENURES.

1. *Ulpianus, Institutes, Book I.*

A precarious tenure is one by which a party petitioning for it is permitted to enjoy the use of property as long as he who grants him permission suffers him to do so.

(1) This species of generosity is derived from the Law of Nations.

(2) It differs from a donation, in that he who makes a donation has no intention of receiving the property again; but he who grants anything by a precarious tenure does so with the expectation of resuming control of the property when he chooses to release it from the tenure.

(3) It also resembles a loan for use, for he who lends property in this manner does so in such a way as not to render the article loaned the property of the person who receives it, but he only

permits him to make use of it.

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

The Praetor says: "You must return the property in question to him from whom you hold it by a precarious tenure, or which you have ceased to possess through some fraudulent act."

(1) This interdict is restitutory. It is based upon natural equity, and lies in favor of anyone who desires to revoke the precarious tenure.

(2) For it is naturally just that you should only enjoy my liberality as long as I desire you to do so, and that I can revoke it whenever I change my mind. Therefore, where anything is granted under a precarious tenure, we can not only make use of the interdict, but also of the *Actio prasscriptis verbis,* which is based upon good faith.

(3) He is considered to hold property by a precarious title who has possession of the same either in fact or in law, for the sole reason that he has asked for, and obtained the right to possess, or to use it.

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

For example, where you have requested me to give you a right of way over your land, or to permit you to allow your gutter to project over my roof, or your beams to rest upon my wall.

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

A precarious title also exists with reference to movable property.

(1) Moreover, we must also remember that he who holds property by a precarious tenure is also in possession of the same.

(2) It is not he who has asked for the property under a precarious tenure, but he who holds it under such a tenure, that is liable under this interdict. For it may happen that he who did not ask for it may, nevertheless, hold it by a precarious tenure; as, for instance, if my servant should apply for it, or anyone else who is under my control should do so, he will acquire it for me under this tenure.

(3) Likewise, if I should ask for property under a precarious tenure, which already belongs to me, although I have made this request, I will not hold the property under this tenure, for the reason that it is established that no one can hold his own property by a precarious title.

(4) Likewise, he who requests property to be given him under a precarious tenure, for a certain period of time, will still be considered to .possess it under this tenure after the time has elapsed, even though he may not have asked to hold it longer; as the owner of property is understood to renew the precarious tenure when he permits the person who asked for it under such a title to continue to hold possession of the same.

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

If while the precarious tenure is still existing, you request that it be continued for a long time, it will be extended; for the title to possession is not changed and a precarious title is not created in this way, but is merely prolonged. If, however, you request it after the time has elapsed, the better opinion is that a precarious title having once been extinguished is not renewed, but a new one is established.

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

If, in the meantime, the owner of the property should become insane, or die, Marcellus says that it is not possible for the precarious tenure to be renewed. This is true.

(1) If my agent, under my direction, asks for property under a precarious tenure, or if I ratify his act, I will properly be said to hold it under such a tenure.

(2) He who has asked permission to reside upon land under a precarious tenure is not in possession of the land, but its possession remains with the person who granted him permission. For jurists hold that an usufructuary, a tenant, and a lessee, all live on the land, and still they are not in possession of it.

(3) Julianus says that where anyone who has forcibly ejected another afterwards obtains from him the same land by a precarious tenure, he ceases to possess it by force, and begins to hold it by a precarious title; and he does not think that he has changed his title to the property, as he commences to possess it under a precarious tenure with the consent of him who ejected him. For if he had bought the same property for him, he would begin to acquire the ownership of the same as the purchaser.

(4) The question arose, if anyone should give his property to me in pledge, and then ask to hold it by a precarious tenure, whether there would be ground for this interdict. The point in this case is whether a precarious title to one's own property can exist. The better opinion seems to me to be that the precarious tenure relates to the pledge, as it is the possession, and not the ownership, which is granted. This opinion is extremely useful, for, every day, creditors are requested by those who have given their property in pledge, to permit them to hold it by a precarious tenure. A precarious tenure of this kind should be valid.

7. *Venuleius, Interdicts, Book HI.*

But if I am entitled to retain possession of property by means of the interdict *Uti possidetis,* although the question relating to the ownership of the same may not have been decided, and I grant you possession of it under a precarious tenure, you will be liable under this interdict.

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

The question arose, if Titius should request me to allow him to use something belonging to Sempronius, and I afterwards ask Sempronius to grant permission for this to be done and he, desiring to favor me, gives permission, Titius will hold the property from me by a precarious title, and I can sue him under the interdict. Sempronius, however, cannot proceed against him, because the following words, "which.you hold of him by a precarious title," show that the interdict can be employed by the person who asked for the precarious tenure, and not by him to whom the property belongs.

But will Sempronius be entitled to sue me under the interdict, on account of my having requested him to permit the property to be held under a precarious tenure? The better opinion is, that he will not be entitled to the interdict, because I do not hold the property by a precarious title, as I did not obtain it for myself, but for another. He will, nevertheless, be entitled to an action on mandate against me, because he granted it to you under my direction. Or, if anyone should say that this was done, not by my direction, but rather in order to render me his debtor, it must be held that an action *in factum* should also be granted against me.

(1) When anyone has obtained property from Titius under a precarious tenure, it is also considered to be held from his heir in the same manner, as is stated by Sabinus and Celsus; and this is our practice. Therefore, a man is considered to hold property under this tenure from all other successors; which opinion is approved by Labeo. He adds that, even if he did not know that there was an heir, fie would still hold the property from him under a precarious tenure.

(2) Let us see what the rule will be, if you request me to grant you property under a precarious tenure, and I alienate it; will the tenure continue to exist, after the transfer of the property to another ? The better opinion is that he can make use of the interdict, if he has not revoked the precarious tenure; just as if you held the property in this way from him, and not from me, and if you permit him to hold it by this tenure for some time, he can properly employ the interdict just as if you held it from him.

(3) The Prsetor wished that he also should be liable under this proceeding, who committed a fraudulent act in order to avoid retaining possession. It must be noted that anyone who retains possession by a precarious tenure is not liable for negligence, but only for fraud; although he who has borrowed an article is responsible for negligence, as well as for fraud. And it is not without reason that he who obtains property by a precarious title is only liable for fraud, for all this only arises from the generosity of him who granted the property under such a tenure; and it is sufficient if he is only liable for fraud. It may, however, be said that he will also be liable for gross negligence which resembles fraud.

(4) Under this interdict the property should be restored to its original condition, and if this is not done, judgment must be rendered for the amount of the interest of the plaintiff in having the property restored to its former condition, from the time when the interdict was issued. Therefore, an estimate of the crops should also be made, and paid for from the same date.

(5) If he who obtained the property under a precarious tenure does not make use of a servitude, and, on this account, it is extinguished, let us see whether he will be liable to the interdict. I think that he will not be liable, unless he was guilty of fraud.

(6) Generally speaking, it must be held that in making restitution, both fraud and gross negligence should be taken into account, but nothing else. It is evident that after the issue of the interdict, fraud, and both gross and ordinary negligence should be considered, for where anyone who holds property under a precarious tenure is in default, he should be responsible for everything.

(7) Labeo says that this interdict can be employed after the lapse of a year, and this is our practice; for, as property is sometimes granted under a precarious tenure for a considerable time, it would be absurd to hold that there will be no ground for the interdict after a year.

(8) The heir of him who asks that he be granted the property under a precarious tenure will be liable under this interdict, just as he himself would be, if he had possession of the property, or was guilty of fraud to avoid having it, or to prevent it from coming into his hands; but he will only be liable for the amount of the profit which he obtained, where any fraud was committed by the deceased.

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

Precarious possession can be established between parties who are either present, or absent; for instance, by means of a letter, or a messenger.

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

Although anyone may have only asked for a female slave under a precarious tenure, it is held that it was intended that he should be entitled to any offspring of the said female slave.

11. *Celsus, Digest, Book VII.*

If a debtor who has asked that property pledged be given him under a precarious tenure should discharge the debt, the said tenure comes to an end; as it was the intention of the parties that it should only continue to exist until the time when the debt was paid.

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

When anything is granted under a precarious tenure, and it is agreed that the grantee shall hold possession under it until the *Kalends* of July, will he who received it be entitled to an exception to prevent him from being deprived of possession of the property before that time? An agreement of this kind is of no force or effect, for it is not lawful for property belonging to another to be held in possession against the consent of the owner.

(1) Property held by a precarious tenure passes to the heir of him who granted it, but it does not pass to the heir of him who received it, because possession was given only to himself, and

not to his heir.

13. *Paulus, On Quintus Mucius, Book XXXIII.*

If your slave should request that property be granted him under a precarious tenure, and this is done by your order, or you ratify his request- in your own name, you will be liable as holding the property in this manner. If, however, your slave or your son should make a request in his own responsibility, without your knowledge, you will not be considered to hold the property under a precarious tenure, but the person who granted it will be entitled to proceed against you by the action *De peculia,* or by that for property employed for the benefit of another.

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

The interdict having reference to property held by a precarious tenure was introduced with good reason, because there was no action available for this purpose under the Civil Law. For occupancy by a precarious tenure relates to donations and benefactions, rather than to contracts made in the ordinary course of business.

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

It is based upon absolute justice, as it prescribes that a person shall only make use of our property to the extent that we are willing to grant him permission to do so.

(1) Guests, and others who are entitled to free lodgings, are not understood to hold under a precarious tenure.

(2) We can hold under a precarious tenure property which consists of a right, as thai which permits the insertion of beams into a building, or allows structures to project over land.

(3) Anyone who has obtained security for the restitution of his property is not entitled to the benefit of the interdict relating to a precarious tenure.

(4) There is no question that anyone who has obtained possession under a precarious tenure does not actually acquire it. But is there any doubt that he who has requested to grant it, will continue to retain possession? Where possession under a precarious tenure has been granted to a slave, it is established that it is held by both parties; by him who made the request, because he holds possession in fact, arid by the owner of the property, because he did not have the intention of relinquishing it.

(5) It makes no difference, so far as this interdict is concerned, in what place anyone holds possession, or began to hold it under a precarious tenure.

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

If I adopt a person to whom property has been granted under a precarious tenure, I will also hold possession of it under the same tenure.

17. *The Same, On Sabinus, Book XXIII.*

When anyone possesses land under a precarious tenure, he can make use 'of the interdict *Uti possidetis* against all other persons, except him from whom he obtained the land.

18. *Julianus, Digest, Book XIII.*

Anyone can give his own property under a precarious tenure to the. party in possession, even though he himself does not possess it.

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

Two persons cannot hold the same property by a precarious title, any more than two can hold possession of the same thing through violence, or clandestinely; for two just or unjust possessions of it cannot exist at one and the same time.

(1) Anyone who requests that my slave be transferred to him under a precarious title is

considered to hold him from me under such a title, if I grant his request; and hence he will be liable to me under the interdict in question.

(2) Where anything is requested to be granted under a precarious tenure, we cannot only make use of this interdict, but also of the proceeding for the recovery of property whose amount is undetermined; that is to say, the *Actio Prasscriptis Verbis.*

20. *Ulpianus, Opinions, Book II.*

The vendor can follow up any property which has been sold, and which is to remain in the hands of the purchaser under a precarious title, until the entire price has been paid, if it was the purchaser's fault that payment has not been made.

21. *Venuleius, Actions, Book IV.*

When anyone obtains permission to reside upon land under a precarious tenure, it is superfluous for the words, "For him and his household" to be added; for it is understood that permission is granted through him for his family to make use of the property.

22. *The Same, Interdicts, Book HI.*

If anyone who is in possession merely as possessor should request the owner of the property to grant him permission to retain it under a precarious tenure, or if he who purchased property belonging to another should make this request to the owner of the same, it is evident that they will hold possession under a precarious tenure; and they should not be considered to have themselves changed their title to possession, as possession under a precarious tenure has been granted them by the owner of the land. For if you should ask another for property in your possession to be granted you under a precarious tenure, you will be considered to have ceased to possess it under the first title, and to begin to hold it under a precarious one.

On the other hand, if a person who has the right to take the property away from the possessor should ask him to grant it to him by a precarious tenure, he will be liable under the interdict in.question; as an advantage has been obtained by this request, that is to say, the possession which belongs to another.

(1) If a ward, without the authority of his guardian, should ask that property be granted him under a precarious tenure, Labeo says that he will hold precarious possession of it, and will be liable under this interdict; for where anyone has possession naturally, there is no ground for the exertion of the authority of a guardian. The words, "which you hold under a precarious tenure," are perfectly applicable, because what he possesses he holds by the title under which he asked for the grant of the property. There is nothing new to be determined by the Praetor in this case; for if the ward holds the property, he will be required by the judge to surrender it, and if he does not hold it, he will not be liable.

TITLE XXVII.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO THE CUTTING OF TREES.

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

The Praetor says: "If a tree projects from your premises over those of your neighbor, and you are to blame for not removing it, I forbid force to be employed to prevent him from doing so and keeping it as his own."

(1) This interdict is prohibitory.

(2) Where a tree projects over the house of a neighbor, the question arises whether the Praetor can order the entire tree to be removed, or only that portion of it which projects above the building? Rutilius says that it should be taken out by the roots, and this is held to be correct by many authorities. Labeo asserts that if the owner does not remove the tree, he who is injured

by it can, if he wishes to do so, cut it down and carry away the wood.

(3) Vines are also included under the term trees.

(4) This interdict lies not only in favor of the owner of the house, but also in favor of the usufructuary of the same, for the reason that it is to his interest, also, that the tree should not project above the building.

(5) Moreover, the opinion should be adopted, that if a tree projects over a house owned in common by several persons, each of the joint-owners will be entitled to the benefit of the interdict, and indeed, for the entire amount, because each one of them has a right to bring an action to recover servitudes.

(6) The Praator says: "If you are to blame for not removing it, I forbid force to be employed to prevent him from doing so." Therefore, authority to remove the tree is first granted to you, and if you fail to do so, then the Prator forbids you to employ violence in order to prevent your neighbor from removing it.

(7) The Prsetor also says: "Where a tree on your premises projects over those of your neighbor, and you are to blame for not trimming it up to a height of fifteen feet from the ground, I forbid force to be employed to prevent your neighbor from trimming it up to the height aforesaid, and removing the wood for his own use."

(8) What the Prsetor says, the Law of the Twelve Tables intended to establish; namely, that the branches of trees should be cut off within fifteen feet of the ground, in order that the shade of the tree may not injure the land of a neighbor.

(9) There is a difference between the two Sections of the interdict, for if the tree projects over a neighboring house, it must be entirely cut down; but if it projects over land, it need only be trimmed to the height of fifteen feet from the ground.

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

If a tree on the premises of a neighbor is made to project over your land by the force of the wind, according to the Law of the Twelve Tables, you can bring an action against your neighbor to compel him to remove it, on the ground that he has no right to have a tree in that condition.

TITLE XXVIII.

CONCERNING THE INTERDICT HAVING REFERENCE TO THE GATHERING OF FRUIT WHICH HAS FALLEN FROM THE PREMISES OF ONE PERSON UPON THOSE OF ANOTHER.

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

The Praetor says: "Where any nuts fall from the premises of your neighbor upon yours, I forbid force to be employed to prevent him from gathering them, and carrying them away within the space of three days."

(1) All kinds of fruits are included under this term.

TITLE XXIX.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO THE PRODUCTION OF A PERSON WHO IS FREE.

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

The Praetor says: "You shall produce any person who is free, the possession of whom you fraudulently hold."

(1) This interdict has been framed for the purpose of maintaining freedom; that is to say, to

prevent any persons who are free from being restrained of their liberty by anyone.

2. *Venuleius, Interdicts, Book IV.*

For there is not much difference between slaves and persons who have not the power to depart at their pleasure.

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

The *Lex Favia* also had reference to this, and the interdict does not prevent recourse to the Favian Law, for a person can institute proceedings under the interdict, and an accusation can still be brought under the *Lex Favia,;* and *vice versa,* anyone who institutes proceedings under this law can, nevertheless, avail himself of the benefit of the interdict, especially as one party can employ the interdict, and the other make use of the action authorized by the Favian Law.

(1) These words, "any person who is free," have reference to every one who is free whether he has reached the age of puberty or not; whether the individual is male or female; whether there is one, or there are several; and whether the party in question is his own master, or under the control of another; for we only consider whether he is free.

(2) He, however, who has another under his control, will not be liable under this interdict, as he is not considered to hold anyone fraudulently who avails himself of a right to which he is legally entitled.

(3) If anyone restrains of his liberty a person whom he has ransomed from the enemy, he will not be liable under the interdict, because he does not do so fraudulently. It is clear that if he tenders the amount of the ransom the interdict will apply. But, if he releases him without having received the money, it must be said that there will be ground for the interdict, if once having given him his liberty, he afterwards desires to hold him.

(4) If anyone retains his son, who is not under his control, he is usually considered to do so without being guilty of fraud; for genuine affection causes his retention to be made, without the presumption of fraud, unless the existence of bad faith is evident. Hence, the same rule will apply if a patron subjects to his authority his freedmen, his foster-child, or a slave still under the age of puberty, who has been surrendered by way of reparation for damage which he has caused. And, generally speaking, anyone who has a good reason for retaining control of a freeman is not considered to act in bad faith.

(5) If anyone continues to hold a free person with his own consent, he is not considered to do so in bad faith; but what if he holds him with his consent, but, after having deceived, seduced, or solicited him, without having good and sufficient reasons for doing so ? He is very properly held to retain him fraudulently.

(6) A man who does not know that a freeman is one of his family is not guilty of bad faith; but when he is aware of it, and still holds him, he is not free from fraud.

(7) It is clear that if he who holds possession of the freeman is in doubt as to whether he is free or a slave, or institutes proceedings to ascertain his condition, this interdict must not be employed, but proceedings to establish freedom should be instituted, for it has very properly been held that there will only be ground for this interdict where there is no doubt that the man is free. If, however, a question is raised as to his condition, the right to bring another action ought not to be prejudiced.

(8) The Praetor says, "You shall produce the person." To produce hin\ is to bring him to public notice, and afford an opportunity of seeing and touching him. The term "to produce" literally means not to keep him in secrecy.

(9) This interdict will lie in favor of every individual, for no one is forbidden to favor freedom.

(10) It is clear that all those who are liable to suspicion should be' excluded from the use of this interdict, if the character of the person is such that he is presumably acting in collusion, or for the purpose of annoyance.

(11) If, however, a woman or a minor desires to make use of this interdict for the benefit of a blood-relative, a parent, or a connection, it must be said that the interdict should be granted; for they can prosecute others in criminal cases when they do so for injuries committed against themselves.

(12) But where there are several persons who wish to avail themselves of this interdict, the one who has the greatest interest in the matter, or who is best fitted for the purpose, should be selected by the PraBtor; and this choice should depend upon the relationship, the trustworthiness, or the rank of the individual selected.

(13) If, however, when proceedings have been instituted under this interdict, another person desires to proceed under it, it is evident that permission to make use of it cannot afterwards readily be granted to another, unless something can be proved with reference to the perfidy of the original prosecutor. Therefore, where proper cause is shown, this interdict can be employed more than once. For one person cannot be prosecuted more than once in criminal cases, unless the first accuser is convicted of prevarication. But the defendant, having been convicted, prefers to pay the damages assessed in court rather than produce the man, it will not be unjust to grant the same interdict against him repeatedly, or grant it to the same party who cannot be barred by an exception, or to someone else.

(14) Labeo says that this interdict may be granted against a person who is absent, and if no defence is made by him, his property can be taken in execution.

(15) This interdict is perpetual.

4. *Venuleius, Interdicts, Book IV.*

If anyone restrains of his liberty a freeman who is not aware of his own condition, he will still be required to reproduce him, if he fraudulently retains him under his control.

(1) Trebatius, also, says that anyone who in good faith purchases a freeman as a slave, and retains him under his control, is not liable.

(2) A man who is free should, at no time, be fraudulently restrained of his liberty, and this is so far true that some authorities hold that not even the least delay should be allowed the person required to produce him, as he is liable to the penalty for an act which has been committed.

(3) This interdict does not lie in favor of a creditor, for the purpose of producing his debtor in court; for no one is obliged to produce a debtor who conceals himself, but under the Edict of the Pra?tor his property may be taken in execution.

TITLE XXX.

CONCERNING THE INTERDICT WHICH HAS REFERENCE TO THE PRODUCTION OF CHILDREN AND THEIR RECOVERY.

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

The Praetor says: "You shall produce any male or female child who is subject to the authority of Lucius Titius, and who is in your hands, or whose possession you have fraudulently relinquished."

(1) This interdict is intended to be employed against one whom a parent desires shall produce a child that he alleges is subject to his authority. It is evident from the words of the Edict tha,t it will lie in favor of the person entitled to the control of the child.

(2) In this interdict, the Prsetor does not consider the reason why the child is in the possession of him who is required to produce it, as is the case in a former interdict; but holds that it should by all means be restored, if it is subject to the authority of the plaintiff.

(3) If, however, it is the mother of the child who retains it in her possession, and it appears to be better that it should remain under her care than to be placed under that of its father, that is to say, if the reason is perfectly just, the Divine Pius decided, and it was stated in a Rescript by Marcus Severus, that relief should be granted to the mother by means of an exception.

(4) In like manner, if it should be ascertained that the child was under no one's control, although this decision may be unjust, if anyone should attempt to proceed under this interdict, he can be barred by the exception of *res judicata;* so that the question is no longer whether the child is under the control of the plaintiff, but whether there has been a decision on this point.

(5) If a father wishes to take his daughter away, or to have her produced after she is married to me, cannot an exception be granted me against the interdict, if he, having, in the first place, agreed to the marriage, should afterwards desire to dissolve it, even if children have been born? Where a marriage has been properly solemnized, it certainly ought not, under our practice, to be interfered with on account of paternal control. Still, an attempt should be made to persuade the father not to exert his right of paternal authority with too much severity.

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

On the other hand, the father can, with much more propriety, be compelled by the husband of his daughter to produce her, and permit him to recover her, even if she is under paternal control.

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

The Prsetor next says: "If Lucius Titius is under the control of Lucius Titius, I forbid force to be employed to p'revent the latter from taking Lucius Titius with him."

(1) The interdicts previously mentioned are exhibitory, that is. to say, they have reference to the production of children and others of whom we have spoken. This interdict also relates to the removal of such persons, and anyone who has the right to do so can take them away from him. Therefore, the first interdict, which relates to the production of children, is preparatory to this one, by which the plaintiff can remove the person who was produced.

(2) This interdict should be granted for the same reason for which we have stated children should be produced in court. Hence, whatever we have previously stated should also be understood to be applicable here.

(3) Moreover, this interdict is not granted against the child itself whom the plaintiff desires to take away, but someone must appear to defend it against the interdict. The interdict, however, will not lie, and the Praetor himself can at once proceed, and render a decision, if any controversy arises before him as to whether the child is, or is not, under paternal control.

(4) Julianus says that whenever an interdict is employed, or an investigation is instituted with reference to the removal of a child, and the latter is under the age of puberty, in some instances the inquiry should be deferred until the child reaches that age, and in others, it ought to be decided without delay. This is a matter which must be determined in accordance with the rank of the persons between whom the controversy has arisen, and the nature of the case. If the party who alleges that he is the father is one whose social position, wisdom, and integrity are established, he will be entitled to keep the minor in his care until the case has been disposed of; but if he who instituted proceedings is of inferior rank, a malicious person, or one of bad reputation, the investigation should take place at once.

Likewise, if he who denies that the minor is under the control of another is honorable in every respect, and is either a testamentary guardian, or one appointed by the Praetor, and has care of

the ward, and charge of him during the trial of the case; and on the other hand, he who alleges that he is his father is a malicious person, the investigation should not be postponed.

Where, however, both parties are liable to suspicion, either on account of inferior rank, or bad character, Julianus says it will not be improper to appoint someone else by whom the child can be brought up in the meantime, and postpone the determination of the case until it reaches the age of puberty; in order that, through the collusion or ignorance of one or the other of the contending parties, a child who is independent may not be decided to be under the control of another, or one who is subject to the authority of another may be held to occupy the place of the head of a household.

(5) Even if it should be conclusively proved by the father that the child is under his control, still, if after investigation it is ascertained that the mother should have the preference, and retain possession of the child, she can do so; for it was established by several decrees of the Divine Pius that the mother can obtain permission for the child to remain with her on account of the bad character of the father, without any diminution of paternal authority.

(6) In this interdict, the Praetor orders that a girl or a boy seventeen years of age, or one who is near that age, shall, pending the hearing of the case, be left in the care of the mother of the family. We say that a child is near the age of seventeen, immediately after he has reached that of puberty. The mother of a family is understood to be a woman of acknowledged good repute.

4. *Africanus, Questions, Book IV.*

If I say that anyone who alleges that he is the head of a household is my son, and under my control, and that, by my order, he has entered upon an estate, I ought to assert my claim to it, and have recourse to the interdict under which I can take my son away with me.

5. *Venuleius, Interdicts, Book IV.*

If a son is in the possession of another with his own consent, this interdict cannot be employed, because he is rather in his own possession than in that of him against whom proceedings may be instituted under the interdict, as he has free power to depart or remain; unless there is a dispute between two persons, each of whom alleges that he is his father, and one of whom demands that the child shall be produced by the other.

TITLE XXXI.

CONCERNING THE INTERDICT UTRUBI.

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

The Praetor says: "I forbid force to be employed to prevent anyone from removing a slave from the place where he is at present, if he has remained there the greater part of the year."

(1) This interdict has reference to the possession of movables; it, however, obtains its validity in the same way as the interdict *Uti possidetis,* which only applies to real property; so that he also will succeed under this interdict who has obtained possession of the slave without the employment of force, or clandestinely, or by a precarious title, if an adversary attempts to interfere with his possession.

TITLE XXXII.

CONCERNING THE INTERDICT HAVING REFERENCE TO THE REMOVAL OF TENANTS.

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

The Praetor says: "I forbid force to be employed to prevent your tenant from leaving, and taking with him the slave in question, if the latter does not constitute a part of the property

which, in accordance with the agreement between yourself and the plaintiff, should be held by way of pledge to secure the rent; whether the said property has been taken or brought inta your house, born there, or made there*;* but if he forms part of the same, I forbid you to prevent your tenant from taking him away with him, when he departs; provided he has paid you the rent out of said property, or has furnished you security for it, or you are to blame for its not having been paid."

(1) This interdict was introduced for the benefit of a lessee who wishes to depart after having paid his rent. It does not lie in favor of a tenant on a farm.

(2) Relief can also be given to a lessee by extraordinary proceedings, and therefore this interdict is not frequently employed.

(3) Still, it will lie in favor of one who has a gratuitous lodging.

(4) If the rent is not yet due, Labeo says that this interdict cannot be employed, unless the tenant is ready to pay it. Hence, if he has paid it for half the year, and owes it for the other half, he cannot have recourse to the interdict unless he pays the rent for the remaining six months. This, however, is only the case where a special agreement was made when the house was rented, providing that the lessee should not be permitted to leave before the end of the year, or before a specified time has elapsed.

The same rule applies where anyone rents a house for several years, and the term has not yet expired; for where property is pledged for the entire amount of the rent, the result will be that the interdict will not be available, unless the articles pledged have been released.

(5) It must, however, be noted that the Praetor does not require the property to belong to the lessee, nor that it should have been expressly pledged, but that it must be brought into the house as pledged. Hence this interdict will apply, even if the property belongs to another, if it has been brought into the house for the purpose of being pledged, and is such as cannot be given in pledge. If it has not been brought in for that purpose it cannot be retained by the lessor.

(6) This interdict is perpetual, and is granted for and against heirs.

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

There is no doubt that this interdict will lie in favor of a lessee, even with reference to property which does not belong to him, but which has been lent to, hired by, or deposited with him.

TITLE XXXIII.

CONCERNING THE SALVIAN INTERDICT.

1. *Julianus, Digest, Book XLIX.*

If a tenant on a farm brings a female slave on the land, for the purpose of pledging her, and afterwards sells her, an interdict should be granted in order to obtain possession of a child born to the said female slave while she was in the hands of the purchaser.

(1) If a tenant brings property on a farm, which is owned by two persons, for the purpose of pledging the same, with the understanding that it shall be jointly encumbered to both of them, each one can properly make use of the Salvian Interdict against a third party; but if this interdict is granted with reference to them alone, the position of the possessor will be preferable.

If, however, it was agreed that the property should be equally encumbered to each of the joint-owners of the land, a praetorian action should be granted between them, and against other parties, by means of which each of the said joint-owners can obtain possession of half

the property.

(2) It is proper that the same rule should be observed where a tenant brings property held in common with another upon the land, for the purpose of pledging the same, so that pursuit of the pledge may only be made for half of the value of the property in question.

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

In the Salvian Interdict, if the property to be pledged is brought upon land belonging to two joint-owners, the party in possession will be preferred, and they must have recourse to the Servian Action.