THE ENACTMENTS OF JUSTINIAN.

BOOK III.

TITLE I.

CONCERNING ESTATES WHICH PASS BY INTESTACY.

He dies intestate who either did not make any will at all, or did not make it legally, or when the one which he did make was broken or void, or when no one has become an heir under it.

(1) The inheritances of intestate persons, by law of the Twelve Tables, belong in the first place to their proper heirs.

(2) But as We have previously stated, those are considered proper heirs who are under the control of the decedent, as a son or a daughter, a grandson or a granddaughter by a son, or a great-grandson or a great-granddaughter derived from a grandson born of a son; nor does it make any difference whether the children are natural or adopted. With these must also be counted such as have not been born in lawful marriage, but, nevertheless, obtain the rights of proper heirs in conformity with the provisions of Imperial Constitutions promulgated with reference to such matters, by having been brought before the courts of their cities; and also those included in Our own Constitutions, by which We have ordered that when anyone has cohabited with a woman not originally intending to marry her — although she was one whom he could have married — and has had children by her, and afterwards, induced by affection, has entered into a nuptial agreement with her, and had sons or daughters by her; not only shall those children born after the marriage-gift has been given be legitimate and under the control of their father, but also those born previously, and who gave occasion to the bestowal of legitimacy upon those subsequently born.

This rule We have determined shall stand, even though no children should be born after the execution of the dotal instrument, or where those who have been born have died. Thus a grandson or a granddaughter and a great-grandson or a great-granddaughter are included in the number of proper heirs only when the person superior to them in degree has ceased to be under the control of his ascendant, whether this has occurred through death, or for some other cause as, for instance, through emancipation; for if, when a man dies, his son Is under his control, his grandson by him cannot be a proper heir; and this principle We understand to be established with reference to other classes of descendants who are further removed.

Posthumous children, also, who, if they had been born during the lifetime of their father, would have been under his control, are proper heirs.

(3) Proper heirs become such even when they are ignorant of the fact; and even though they are insane they can still be heirs, because when anything can be acquired by us without our knowledge, this can also be done by insane persons under the same circumstances. Moreover, ownership is, as it were, continued after the death of a parent, and therefore minors have no need for the consent of a guardian, since an estate can be acquired by proper heirs without their knowledge; nor is the consent of a curator necessary for the acquisition of property by an insane person, since it vests by operation of law.

(4) Sometimes, also, a child becomes the proper heir of his ascendant although he was not under his control at the time of his death, as, for example, where a person taken captive by the enemy returns after the death of his father; for the law of *postliminium* brings this about.

(5) On the other hand, it sometimes occurs that although a party may belong to the family of the deceased at the time of his death, he does not become a direct heir; as, for instance, if a father be convicted of treason after his death, and on this account his memory is rendered infamous; for then he cannot have a direct heir, because the Treasury becomes his successor; still it may be said that he is legally his heir, but that his right of succession has been lost.

(6) When a son or a daughter, or a grandson or a granddaughter by another son survive, they are together called to the inheritance, nor does the one who is nearest in degree exclude the one who is more remote; for it seems just that grandsons and granddaughters should succeed to the place of their father.

For the same reason, where there is a grandson or a granddaughter by a son, and a great-grandson and a great-granddaughter by a great-grandson, they succeed on equal terms. And because it has been settled that grandsons and granddaughters, as well as great-grandsons and great-granddaughters, should succeed to the place of their ascendant, it has appeared to be proper that the estate should be divided not *per capita* but *per stirpes,-so* that a son may receive half of the estate, and two or more grandsons by another son the other half; and also where there are grandsons by two sons, by one of them perhaps one or two, and by the other three or four, one half of the estate should belong to the one or two and the other half to the three or four.

(7) But when the question arises whether anyone can be a proper heir, We must, in making the investigation, ascertain the time when it was certain that the deceased died without making a will, and this takes place where there is a will which has been abandoned. In accordance with this rule, if a son is disinherited and a foreign heir appointed, and after the death of the son it became certain that the heir appointed under the will will not be the heir, either because he was unwilling, or could not accept, the grandson will become the proper heir of his grandfather, for the reason that at the time it becomes certain that the head of the family died intestate, the grandson alone is found; and this principle is thoroughly established.

(8) And, again, where a grandson is born after the death of his grandfather, still, if he was conceived while the latter was living, he will become his direct heir if his father was dead, and the will of his grandfather was afterwards abandoned. It is evident if he were both conceived and born after his grandfather's death, he cannot become a direct heir when his father was dead and his grandfather's will was subsequently abandoned; because he was connected with the father of his father by no bond of relationship. Nor is anyone whom an emancipated son has adopted considered as one of the descendants of the grandfather. Such persons, also, as they are not considered descendants so far as the right to inherit is concerned, cannot demand the possession of property as next of kin. So much with reference to proper heirs.

(9) Emancipated children have no right of succession by the Civil Law, for they are not proper heirs, for the reason that they have ceased to be under the control of their father; nor are they included by any other right under the law of the Twelve Tables. The Prætor, however, induced by natural equity, grants them possession of the property as descendants, just as if they had been under the control of their ancestor at the time of his death, whether they are alone, or are in concurrence with proper heirs. Therefore, where there are two children, one emancipated and the other under the control of his father at the time of his death, it is evident that he who is under his control is the sole heir by the Civil Law; that is to say, he is the sole proper heir; but as the one who was emancipated is entitled to a share in the estate by the indulgence of the Prætor, it happens that the proper heir has only a right to the remainder.

(10) But those who after having been emancipated by their father have allowed themselves to be adopted, are not admitted to share in the estate of their natural father as children, provided they were in the adoptive family at the time when he died; although if they had been emancipated by their adoptive father while their own father was living, they are clearly entitled to the property of their natural father as they have never been in an adoptive family; and, agreeably to this, they begin to be in the place of strangers, so far as relates to their adoptive father; but where they have been emancipated by their adoptive father after the death of their own father, they are, as far as he is concerned, also in the position of strangers, and so far as relates to the property of their natural father they do not any the more obtain the position of children; and this principle has been adopted for the reason that it would be unjust for an

adoptive father to be able to determine to whom the estate of their natural father belonged, whether to his own children, or to his agnates.

(11) For this reason, adoptive children have fewer rights than natural children; for the latter who have been emancipated by the assistance of the Prætor, retain their position as children although they lose it by the Civil Law, but those who are adopted after having been emancipated not only lose their place as children by the Civil Law but are not aided by the Prætor; and this is only just, for a civil regulation cannot destroy a natural right, nor can sons and daughters, or grandsons or granddaughters cease to be such when they are no longer proper heirs; but adoptive children, after they have been emancipated, begin to occupy the position of strangers, because the right and title of son or daughter which they acquired by adoption they lose by another institution of the Civil Law, that is to say, by emancipation.

(12) These regulations are also observed in the possession of property which the Prætor promises in opposition to the provisions of the will of an ascendant to descendants who have been passed over, that is who have neither been appointed heirs, nor disinherited in conformity with law; for the Prætor calls to this possession of the estate both those who were under the control of their father at his death, and those who have been emancipated; but excludes those who were in an adoptive family at the time their natural parent died; and still less does he admit, on the ground of intestacy, adopted children who have been emancipated by their adoptive father, to share in his estate contrary to the provisions of the will, because they have ceased to be included in the number of his children.

(13) We must, however, remember that persons who belong to an adoptive family, or who have been emancipated by an adoptive father after the death of their natural father, where the latter died intestate, are not admitted to the succession by that part of the Edict under which children are called to the possession of their parent's property, but are nevertheless called by another part, that is to say, that by which cognates of the deceased are admitted. Under this part they are only admitted when no children, whether proper heirs or emancipated, stand in their way, and no other relatives on the father's side appear, for the Prætor first summons children who are proper heirs and those who are emancipated, then heirs-at-law, and then the nearest cognates.

(14) All these regulations were indeed approved of by the ancients, and have been somewhat amended by one of Our Constitutions, which We enacted concerning those persons who have been given in adoption to others by their own parents, for We have found some cases in which sons have lost by adoption the succession to their natural parents; but, as adoption is easily removed by emancipation, they have been called to the succession of neither of their father's. Having corrected this in Our ordinary manner, We have drawn up a Constitution in which We have stated that when a natural parent has given his son to be adopted by another, all the said son's rights shall be preserved intact, just as if he had remained under the control of his own father, and absolutely no adoption had taken place, except only in this instance, namely, that he may succeed to his adoptive father when the latter dies intestate.

But where he makes a will, the adopted son can, neither by the Civil nor the Prætorian Law, obtain any portion of his estate, either by demanding possession of it contrary to the provisions of the will, or by bringing a complaint of inofficiousness; for the reason that no obligation is imposed upon his adoptive father either to appoint him his heir, or to disinherit him, since he is not joined to him by any natural tie, not even where one out of three male children has been adopted in accordance with the Sabinian Decree of the Senate; and even in this instance, the fourth of the estate is not preserved for him, nor does any action lie to enable him to recover the same. He, however, whom a natural parent has taken to be adopted is excepted from the operation of Our Constitution, for, both rights, the natural as well as the legal, being united in this person, We have retained the former regulations in this species of adoption, just as in the case where the father of a family gives himself to be arrogated; and

these rules may be collected specially and separately from the terms of the aforesaid Constitution.

(15) Again, antiquity being partial to male descendants, called to the succession as proper heirs only those grandsons and granddaughters who are descended in the male line, and gave them the preference in rank over agnates; but computing grandsons born of daughters and great-grandsons born of granddaughters among cognates, placed them after the line of agnates, both with respect to the succession to their maternal grandfather or great-grandfather, and to that of their grandmother or great-grandmother either on the paternal or maternal side. The Emperors, however, could not suffer such an injury to nature to exist without providing a suitable remedy; and as the name of grandson and great-grandson is common to both descendants proceeding from the male as well as the female line so they, for this reason, granted them the same degree and rank in the succession.

But, that some benefit might be enjoyed by those who are sustained not only by the approval of nature but also by that of the ancient law, they were of the opinion that the share of the grandsons, grand-. daughters, and other descendants further removed whom We have enumerated above, should be diminished to a certain trifling extent; so that they might receive a third part less than their mother or grandmother would have received, or that their father or paternal grandfather would have obtained where the person for whose estate a demand is made is a woman; and where parties of this kind entered upon the estate, although they may have done so alone, the relatives on the father's side were not called. And likewise as a law of the Twelve Tables, where a son dies, calls the grandsons or granddaughters, great-grandsons or great-granddaughters in the place of the father to the succession of the estate of the grandfather; so the Imperial regulation summons them to take the place of their mother or their grandmother, when the deduction of the third part of the estate has been made as above set forth.

(16) But as there still remained a matter of dispute between the agnates and the grandchildren previously mentioned, the said father's agnates demanding for themselves a fourth part of the estate of the deceased by virtue of a certain Constitution, We have omitted this constitution from Our Code, and have not permitted it to be inserted therein from the Code of Theodosius. Moreover, in a Constitution which We have promulgated, We have entirely abrogated this rule, and have decreed that agnates cannot claim any part in the succession of a person who is deceased, in case such grandchildren by a daughter, or great-grandchildren by a granddaughter, or other descendants further removed, are still living; lest those who are related in the collateral degrees may have the preference over those descended in the direct line.

This Constitution of Ours We do now also decree shall be enforced in accordance with its scope and time; in such a way, nevertheless that, as the ancient law declared an estate shall be divided between sons and grandsons not *per capita* but *per stirpes*, so, likewise, We order a distribution to be made between sons and grandsons by a daughter, or between grandsons and granddaughters by a daughter and other descendants further removed, so that the respective offspring shall obtain the share of their mother, father, grandmother or grandfather without any diminution; and if there should happen to be one or two on one side and three or four on the other, the former shall be entitled to half of the estate, and the latter to the other half.

TITLE II.

CONCERNING THE LEGAL SUCCESSION OF AGNATES.

If there is no proper heir, nor any of those whom the Prætor or the Constitutions call at the same time with proper heirs, who can take the succession in any way; then, according to the Law of the Twelve Tables the estate belongs to the next of kin on the father's side.

(1) Agnates, as We have stated in the First Book, are cognates who are related through persons of the male sex, or quasi-cognates on the father's side; and therefore brothers sprung from the same father are agnates, and are also styled blood-relatives, nor is it necessary that they should have the same mother. Again, a father's brother is an agnate to the son of his brother, as, on the other hand, the latter is to the former. To the same class belong *fratres patrules*, that is to say, the issue of two brothers who are also designated cousins; and by this rule We can determine other degrees of agnation. Those children, also, who are born after the death of their father acquire the rights of consanguinity.

(2) The law, however, does not grant the inheritance to all agnates at once, but only to those who are next in degree when it has been positively ascertained that some person had died intestate. The right of agnation is also established by adoption; as, for example, between natural sons and those whom their father has adopted; (for there is no doubt that they are properly said to be related by blood). Moreover, if any other agnate, for example a brother or an uncle, or in a word, some one more remote in degree, should adopt anyone, there is no doubt that the latter will be included among his agnates.

(3) But among males alone can an estate be taken through the right of agnation, in this way and that to the most remote degree; for, with reference to females, it was formerly the rule that they could receive an estate by the right of consanguinity when they were sisters, but not when they were more distantly related; but males are admitted to their inheritances even where they are of the most remote consanguinity. For which reason the estate of a daughter of your brother, of your uncle, or of your paternal aunt belongs to you; but in former times, yours did not belong to them. This rule was prescribed because it seemed more convenient that estates should generally pass to males. However, since it was evidently unjust that women should be excluded in every instance, as if they were strangers, the Prætor admits them to the possession of the property under the section by which he promises the possession of the estate on account of closeness of relationship; although they are admitted by it only where there is no agnate and no cognate more nearly related in the way.

The Law of the Twelve Tables, indeed, did not introduce this by any means, but desirous of that simplicity which is favorable to the laws, it called to the succession reciprocally all agnates of both sexes and of every degree, in the same way as proper heirs. Intermediate jurisprudence, however, following the Twelve Tables, and preceding the Imperial Constitutions, with a certain degree of subtlety introduced the difference previously mentioned, and entirely excluded women from the succession of their agnates; all other kinds of succession being unknown, until the Prætors, correcting by degrees the harshness of the Civil Law, or supplying what was lacking, with humane intent included another class in their edicts; and having admitted the line of cognates on account of their near relationship, aided them by giving possession of the estate, and promised them that possession which is designated *unde cognati*. We, however, observing the Law of the Twelve Tables, and in this respect following in its footsteps, while commending the Prætors for their humanity do not think that they remedied the evil completely; for when the natural degree of kindred is the same, and the designation of agnates is bestowed without distinction upon both males and females, why should males be permitted to succeed to the estate of all agnates, but, on the other hand, entry upon the succession of agnates not be allowed to any woman at all, except a sister alone? Therefore, bringing everything back to the first principle, and reconciling the rule with the Law of the Twelve Tables, We have decreed by one of Our Constitutions that all legitimate persons, that is to say, all who are descended through the male line of either sex, shall, in case of intestacy, be called in like manner to the rights of lawful succession, according to their priority of degree, and they shall not be excluded for the reason that they have not the rights of consanguinity which full sisters enjoy.

(4) We have also considered it proper to add to Our Constitution that one degree only shall be transferred from the class of cognation to the succession instituted by law; that is, that not

only the son or daughter of a brother shall be called to the succession of their paternal uncle, as We have already stated; but that the son or daughter of a sister by the same father or mother (and no persons in an inferior degree to these) shall succeed to the rights of their maternal uncle; and that when a party dies who is the paternal uncle of the sons of his brother, and the maternal uncle of the offspring of his sister, those on both sides shall succeed in like manner just as if they all succeeded by law as descendants through males; that is, of course, where no brother or sister survives. For if the persons just mentioned as having the prior right are admitted to the succession, the lower degrees remain entirely excluded, for the reason that the estate must be divided not *per stirpes* but *per capita*.

(5) Where there are several degrees of agnates, the Law of the Twelve Tables expressly calls the next of kin; therefore, for example, it there is a brother of the deceased and the son of another brother or a paternal uncle, the brother has the prior claim; and although the law uses the singular number when designating the next of kin, still there is no doubt that where there are several of the same degree, all must be admitted; for while, properly speaking, the next of kin means the nearest of several degrees, there is also no doubt that although there may be only one degree of agnates, the estate belongs to all of them.

(6) Where anyone dies without having made a will, he is sought who was next of kin at the time when the party died whose estate is in question. But if he died after making a will, he is sought who was next of kin at the time when it was certain that no heir would appear to take under the will; for it is then that a party is properly understood to have died intestate. This in some instances is only established after a long time, during which interval it frequently happens that through the death of a nearer relative he becomes next of kin who was not such at the death of the testator.

(7) It was also formerly the rule that there could be no succession in this kind of an inheritance, that is, that if the next of kin who, in accordance with what We have stated, is called to the estate, either refused it or died before he entered upon the same, those next in degree were by no means admitted to it by legal right. And in this case again the Prætors, while correcting this matter imperfectly, did not leave it absolutely without remedy, but called these persons as belonging to the class of cognates, as their right of agnation was extinguished. We, however, desiring that there should be no lack of perfection in the law, have decreed by Our Constitution, which being induced by a sense of duty concerning the right of patronage We promulgated namely, that the succession to the estate of agnates shall not be refused to such persons; for it is exceedingly absurd that what has been opened by the Prætor to cognates should be closed to agnates; especially where a party belonging to a more remote degree succeeds to the burden of guardianship when those belonging to a superior degree are lacking, and hence that which obtains in the case of a burden was not allowed where an advantage could be secured.

(8) An ascendant, also, is called to a succession granted by law when, by a fiduciary contract, he emancipates his son or daughter, grandson or granddaughter, or other descendants in an inferior degree, which by one of Our Constitutions, is, under all circumstances, implied; so that the emancipations of descendants are invariably deemed to be made under a fiduciary contract; although the rule was different among the ancients unless the ascendant granted manumission by special fiduciary agreement.

TITLE III.

CONCERNING THE TERTULLIAN DECREE OF THE SENATE.

The Law of the Twelve Tables defined the rule which gave preference to the offspring of male so strictly, and to such an extent excluded those related to one another through females, that they did not even admit the reciprocal right of taking an estate by a mother and son or daughter; although the Prætor called such persons to the succession according to their proximity of relationship as cognates, by the proceeding for the possession of property

denominated *unde cognati*.

(1) These restraints of the law were afterwards modified, and the Divine Claudius was the first who granted a mother a lawful right to the estate of her children as a solace for having lost them.

(2) Subsequently, also, by the Tertullian Decree of the Senate passed in the time of the Divine Hadrian, thorough provision is made concerning this sad succession of a mother, but not of a grandmother; so that a freeborn mother having the right obtained from having three children, or a freedwoman having that obtained from having four, was admitted to the succession of sons or daughters who died intestate; even though she were under the control of a relative, provided of course that while she was under another's authority she should enter upon the estate by his order.

(3) The children of a deceased person who are proper heirs or hold the place of such, whether in the first or a more remote degree, are preferred to the mother, and by certain constitutions the son or daughter of a deceased daughter is preferred to the defunct's mother, that is to say, to their own grandmother.

Moreover, the father of either of these, but not the grandfather or great-grandfather, takes precedence of the mother; that is to say, when there is any contention with reference to the estate between them alone. The brother of a son or daughter of the same blood formerly excluded the mother, and the sister of the same blood also was admitted along with the mother; but where there was a brother and a sister of the same blood, and a mother who could be admitted to the succession through her children, the brother formerly excluded the mother, and the estate became the common inheritance of the brother and sister who shared it equally.

(4) But by a Constitution of Ours which We inserted under Our name in the Code, We have considered it proper that relief should be afforded the mother, taking into consideration her natural right as well as childbirth and the risk and frequent death resulting to her therefrom; so that We have thought it impious for an accidental circumstance to be admitted to her injury; for if a freeborn woman has not brought forth three children, or a freedwoman not brought forth four, she would be undeservably deprived of the succession of her children, for how has she done wrong in not having several children, but only a few? Therefore, We have conferred a full legal right upon mothers, whether they be freeborn or emancipated, even though they have not brought forth three or four children, but only one male or female child removed by death; so that even, where this condition exists they are entitled to the lawful succession to their children.

(5) And, as former constitutions treating of legal rights have, to some extent assisted the mother and to some extent oppressed her, and not given her the right to the whole estate; but have in certain instances, deprived her of the third part and bestowed it upon lawful heirs, and, in others, done the contrary; it has seemed to Us the proper and simplest way to give the mother superiority over all heirs-at-law, and to permit her to take the succession to her children without any diminution whatever; except in the case of a brother and sister, whether they are sprung from the same father, or have only the right of cognation; so that as We give her preference over all other heirs-at-law, so We grant succession to the estate at the same time to all brothers and sisters, whether they are heirs-at-law or not; with this limitation, however, that where there are only sisters who are either agnates or cognates, and the mother of the deceased man or woman survives, the mother shall have one half of the estate and all the sisters together the other half. But where any man or woman dies intestate, and a mother survives as well as a brother or brothers, or brothers along with sisters who have legal rights or only those arising from cognation, the estate of the deceased shall be divided among them *per capita*.

(6) But, inasmuch as We have considered the claims of mothers, We must also consider the claims of their offspring; and therefore they are notified that if they do not, within a year, ask

for guardians for their children, or neglect to petition for another guardian, instead of one who has been removed or excused, they shall deservedly be excluded from the succession of their children who die without having reached the age of puberty.

(7) A mother can be admitted to the succession of the estate of a son or daughter by the Tertullian Decree of the Senate, even though the child be illegitimate.

TITLE IV.

CONCERNING THE ORFITIAN DECREE OF THE SENATE.

On the other hand, however, it was provided by the Orfitian Decree of the Senate, enacted during the reign of the Divine Marcus, while Orfitus and Rufus were Consuls, that children should succeed to the estates of their mothers if they died intestate; and this lawful inheritance was granted either to a son or a daughter, even though they were subjected to the control of another, and they were preferred both to the blood-relatives and agnates of the deceased mother.

(1) But as grandchildren were not entitled by law to succeed to the estate of a grandmother by this Decree of the Senate, this matter was afterwards remedied by certain Imperial Constitutions, so that grandsons and granddaughters are at present admitted to such successions just as sons and daughters are.

(2) It should also be borne in mind that successions of this description permitted under the Tertullian and Orfitian Decree of the Senate are not annulled by forfeiture of civil rights, in accordance with the rule by which new estates created by law are not lost by such a forfeiture, but only such as are granted by the Law of the Twelve Tables.

(3) Finally, it must be noted that even children who are illegitimate are admitted to share in the estate of their mother by this Decree of the Senate.

(4) Where some of several lawful heirs fail to accept the estate, being prevented by death or some other cause from entering upon the same, their share vest in the others who do enter; and where those who enter upon it previously die, the estate still will belong to their heirs.

TITLE V.

CONCERNING THE SUCCESSION OF COGNATES.

After the proper heirs and those whom the Prætor and the Constitutions call along with them; and after those created heirs by law (to which class belong the agnates and those whom the aforesaid Decrees of the Senate as well as Our Constitutions have raised to the place of agnates), the Prætor calls the nearest cognates.

(1) In this category natural relationship is considered; for agnates who have suffered forfeiture of civil rights and those who are descended from them are not included among legal heirs by the Law of the Twelve Tables, but are called by the Prætor as belonging to the third class; with the exception only of brothers and sisters who have been emancipated, but not their children; and these the *Lex Anastasiana* calls to the lawful inheritance of a brother or sister together with those brothers who are still in the possession of their rights, but not entitled to equal shares with them, but subject to a certain diminution which can readily be ascertained from the terms of the Constitution itself; but at the same time it gives them priority over agnates of inferior degree, even though the latter may not have suffered any loss of civil rights; and it undoubtedly gives them preference over cognates.

(2) Those also who are related in the collateral line to persons of the female sex the Prætor admits to the succession in the third degree, by reason of close relationship.

(3) Children who belong to an adoptive family are admitted to share in the estates of their natural relatives in this same class.

(4) It is evident that illegitimate children are without agnation, since agnation is derived from the father, and cognation may be derived from the mother; and children of this description are considered to have no father. By the same rule they cannot be deemed blood-relatives of one another, because the right of consanguinity is a species of agnation; and then they are only cognates to one another, as they are related only on the mother's side; therefore, the possession of property accrues to all such children by the section in which cognates are entitled to succession on the ground of near relationship.

(5) In this place We are obliged to bear in mind that anyone is admitted to share in an estate by the right of agnation, even though he be removed as far as the tenth degree; whether We cite the Law of the Twelve Tables, or the Edict by which the Prætor promises to legal heirs the possession of property. The Prætor, however, grants the possession of property on the ground of closeness of relationship only to such as are related within the sixth degree, and in the seventh degree to a son or daughter of a male or female second cousin on the mother's side.

TITLE VI.

CONCERNING THE DEGREES OF COGNATION.

It is necessary to explain here in what way the degrees of cognation are computed, and, in the first place, We must take notice that one species of cognation is reckoned upward, another downward, and another transversely, which is also styled collaterally. The upward cognation belongs to parents, the downward one to children, the collateral one to brothers and sisters and those descended from them, as well as to uncles and aunts on both the paternal and maternal sides. Upward and downward cognation begin with the first degree, that which is collateral with the second.

(1) In the first degree the father and mother are upward; and the son and daughter downward.

(2) In the second degree the grandfather and grandmother are upward, the grandsons and granddaughters downward, the brother and sister collateral.

(3) In the third degree, the great-grandfather and great-grandmother are upward; the great-grandson and great-granddaughter downward; and the son and daughter of a brother or sister is collateral as well as the paternal and maternal uncle and aunt. The paternal uncle is the brother of the father called in Greek πατρως. The maternal uncle is the brother of the mother, properly called μητρως, among the Greeks, and both are styled indiscriminately θιος. The paternal aunt is the sister of a father, the maternal aunt the sister of a mother, both of them known as θιοα, are designated τηθις by some.

(4) In the fourth degree, a great-great-grandfather and a great-great-grandmother are upward, a great-great-grandson and a great-great-granddaughter are downward.

In the collateral line are included the grandson and granddaughter of a brother or a sister, and likewise a paternal great-uncle and a paternal great-aunt, that is to say, the brother or sister of a grandfather; and also a maternal great-uncle and a maternal great-aunt, that is to say, the brother and sister of a grandmother, and a male or female cousin, that is those who are the issue of brothers and sisters. But since more persons think that, properly speaking, those only can be called first cousins who are descended from two sisters, female cousins-german as it were, while those who are descended from two brothers are correctly designated *fratres patrueles* (and where daughters are born from two brothers they are called *sorores patrueles)* and the children of a brother and sister are properly named *amitini*. The children of your aunt on your father's side call you *consobrinus*, and you call them *amitini*.

(5) In the fifth degree, the great-great-great-grandfather and the great-great-great-grandmother are upward, and the great-great-great-grandson and great-great-great-granddaughter are downward. In the collateral line, are the great-great-grandson and the great-great

granddaughter of a brother and sister, and, likewise, a great-great-paternal uncle and a great-great-paternal aunt, that is the brother and sister of the great-grandfather and also a great-great-maternal uncle and a great-great-maternal aunt, that is the mother and sister of a great-grandmother; and the son and daughter of a *frater patruelis, soror patruelis, consobrinus, consobrina, amitinus* or *amitina* and also a *proprior sobrinus* and a *proprior sobrina*, who are the son and daughter of a paternal great-uncle or great-aunt, or of a maternal great-uncle or great-aunt.

(6) In the sixth degree, the great-grandfather and the great-grandmother of a great-grandparent are upward, the great-grandson and great-granddaughter of a great-grandchild are downward; and collaterally the great-great-grandson or great-great-granddaughter of a brother or sister, also an *abpatrus* and *abamita*, that is, the brother and sister of a grandparent's grandfather, and an *abavunculus* and *abmatertera*, that is the brother and sister of a grandparent's grandmother; likewise, *sobrini* and *sobrinæ*, that is the offspring of *fratres* or *sorores patrueles, consobrini* or *amitini*.

(7) It is sufficient to have shown up to this point in what way the different degrees of cognation are reckoned; for from those already given one can readily comprehend in what way We should calculate degrees which are more remote, as another generation always adds one degree; so that it is far more easy to answer to what degree a person belongs, than to indicate him by his proper title of relationship.

(8) The degrees of agnation are also counted in the same way.

(9) But as truth is much more readily fixed in the minds of men by sight than by hearing, We have deemed it necessary, after the enumeration of the various degrees to have them also written down in the present work, in order that young men may acquire perfect familiarity with the different degrees, both by hearing and by sight.

(10) It is certain that that part of the Edict in which the possession of an estate is promised on the ground of near relationship, does not refer to servile cognation, for relationship of this kind was not recognized by any ancient law. But by a Constitution which We have promulgated concerning the right of patronage (which right has been, up to our time, exceedingly obscure, clouded, and thoroughly confused); We have conceded, as the suggestion of humanity, that if anyone who has formed a servile connection should have a child or children, either by a free woman or by one of servile condition; or, on the other hand, if a female slave should have children of either sex by a freeman or a slave, and they should obtain their freedom, and those who are born of a slave mother should also obtain theirs; or in case the women are free, and the fathers are held in slavery and afterwards should be liberated; all children of this kind are entitled to the succession of their father or mother, the right of patronage being in his instance suspended; for We have summoned such children not only to the succession of their parents, but also reciprocally each to the succession of the other, calling them particularly under this law, whether those who were born in slavery and were afterwards manumitted are found alone, or whether they appear with others who were conceived after their parents were set free; and, also whether they are born of the same father and the same mother, or from different nuptials; similarly to those who are the issue of lawful marriage.

(11) Therefore, recapitulating all the points which We have already stated, it is apparent that those related in an equal degree of cognation are not always called to the succession together; and, moreover that the cognate who is next of kin does not always obtain priority; for as the first rank belongs to those who are proper heirs and such as We have already enumerated with the proper heirs, it is evident that a great-grandson or a great-great-grandson of the deceased has priority over his brother, father, or mother; although, as We have set forth above, a father and mother in other respects stand in the first degree of relationship, a brother in the second, while a great-grandson is in the third, and a great-great-grandson in the fourth; nor is it of any

consequence whether or not the party was under the control of the deceased because he was either emancipated, or the child of an emancipated person, or descended through the female line.

(12) Moreover, leaving out of the question the direct heirs and those whom We have declared should be summoned among them, an agnate who has a complete right of agnation, even in the most remote degree, generally takes precedence over a cognate who is more nearly related; for the grandson or the great-grandson of a paternal uncle takes precedence over a maternal uncle or aunt. When, therefore, We state that he who stands in the nearest degree of cognation is entitled to priority, or that those who are cognates are called to the succession equally; it means that no one ought to be preferred on account of being included among the proper heirs or those who are reckoned as such, or because of the right of agnation, in accordance with the rules which We have laid down; with the exception of a brother and sister who have been emancipated and called to the succession of their brothers and sisters; for even if they have suffered a loss of civil rights they are still preferred to other agnates of a more remote degree.

TITLE VII.

CONCERNING THE SUCCESSION OF FREEDMEN.

Let Us now examine the estates of freedmen. In former times it was lawful for a freedman to pass over his patron in his will with impunity; for a law of the Twelve Tables called the patron to the succession of the estate of a freedman only where the latter died intestate, without leaving any proper heir; and, therefore, even where the freedman died intestate, if he left a proper heir, his patron had no right to his property. If, in fact, the proper heir whom he left was one of his own children, there seemed to be no cause for complaint; but where the son had been adopted, it was evidently unjust that no right should survive to the patron.

(1) Hence this injustice of the law was subsequently remedied by an Edict of the Prætor. For if the freedman made a will, he was ordered to make it so as to leave his patron half of his estate; and if he left him nothing or less than half, possession of half his estate was granted to the patron in opposition to the provisions of the will; and if he died intestate, leaving an adopted son as his proper heir, possession of half of his estate was, in like manner, given to the patron as against his direct heir. All natural issue could, at one time, be made use of for the exclusion of the patron, not only such as he had under his control at the time of his death, but also such as had been emancipated or given in adoption, in case they were only appointed heirs to a certain part of the estate, or, having been passed over, brought an action under the Edict for possession of the property contrary to the provisions of the will; as having been disinherited they in no way excluded the patron.

(2) Subsequently, by the *Lex Papia*, the rights of patrons who had wealthy freedmen were extended. For it was provided that a full share should be due to the patron out of the estate of a freedman who left a hundred thousand sesterces, and had less than three children, whether he executed a will, or died intestate. When, therefore, a freedman left a son or a daughter as his heir, half of his estate was due to the patron, just as if he had died without leaving any son or daughter; when he left two heirs of either sex, a third part was due to the patron; but when he left three heirs, the patron was barred from the succession.

(3) But one of Our Constitutions which We have composed in the Greek language with a complete interpretation for the enlightenment of all persons, made a distinction in cases of this kind; so that if a freedman or freedwoman be less than *centenarii*, that is to say, if they have property that is worth less than a hundred *aurei* (for We have computed the sum stated in the *Lex Papia* in such a way that an *aureus* is reckoned as equal to a thousand sesterces) the patron shall have no place in their succession if they have made a will; but if they died intestate, without leaving any children, then the right of patronage which is derived from the Law of the Twelve Tables remains unaltered.

When they are more than *centenarii*, and have descendants, one or more in number, of either sex or any degree, as their heirs, or those entitled to possession of their property, We have granted them the right to succeed to their relatives, excluding the patrons along with their progeny; but if they died without children and intestate, We have called the patrons both male and female to the succession of the entire estate. Where, however, they made a will and passed over their male or female patrons, either because they had no children, or if they had disinherited them; or where a mother or maternal grandfather has passed over her or his descendants, so that their wills cannot be attacked as inofficious, then, in compliance with Our Constitution they obtain by possession of the estate contrary to the provisions of the will, not half, as was formerly the practice, but a third part of the estate of the freedman; or, by Our Constitution any deficiency is made up to them in case the said freedman or freedwoman left them less than a third of his or her estate; so free from encumbrance that no legacies or trusts are to be paid out of said part to descendants of either the freedman or freedwoman, but this burden is imposed upon their co-heirs.

In the aforesaid Constitution many other cases have been collected by Us which We have considered necessary for the establishment of this principle of law; so that not only patrons of both sexes, but also their descendants, together with their collateral relatives as far as the fifth degree, are called to the succession of the estates of freedmen, as may be ascertained from that Constitution; so that if there are any descendants of the patron or patroness, or of two or more of them, he who is next of kin is called to the succession of the said freedman or freedwoman, and the estate is divided *per capita,* and not *per stirpes*. The same rule is also applicable to those related in the collateral line; for We have made the rights of freeborn and liberated persons almost identical so far as succession is concerned.

(4) These are the regulations which should be set forth at present with reference to those freedmen who have obtained Roman citizenship; for there are no other freedmen, *dedititii* and Latins having both been abolished at the same time; for there were really never any successions established by law for the Latins, who, although they lived their lives as freemen, nevertheless, with their last breath lost their life and liberty, and their manumitters by the *Lex Junia* retained their property through a species of right of *peculium*, as in case of slaves.

Subsequently, however, it was provided by the Largian Decree of the Senate that the children of a manumitter, when not disinherited by name, should take precedence over the foreign heirs of the former in succeeding to the estates of Latins. To this was added an Edict of the Divine Trajan, which provided that the same slave who had obtained citizenship by having it hastily granted through the indulgence of the Emperor, his patron being unwilling or ignorant of the fact, should, while living, be considered a Roman citizen, but when dying, a Latin. But, on account of the changes in condition of this kind and other difficulties, We have declared in Our Constitution that the *Lex Junia*, the Largian Decree of the Senate, and the Edict of the Emperor Trajan shall, along with the Latins themselves, be abolished forever; and that all freedmen shall enjoy Roman citizenship, and by certain additional enactments of a praiseworthy character We have rendered the very means which were formerly used to obtain Latinity applicable to the acquisition of Roman citizenship.

TITLE VIII.

CONCERNING THE ASSIGNMENT OF FREEDMEN.

Finally, it must be observed that the Senate has decided with regard to the estates of freedmen, that although such estates belong equally to all the descendants of the patron who are of the same degree, nevertheless, it is permitted to the parent to assign a freedman to anyone of his descendants; so that, after his death he alone shall be considered the patron to whom the freedman has been assigned; and the other descendants who would have been admitted on equal terms to share in the said estate, if no such assignment had been made, shall have no right to the same; but shall only be entitled to their original right if he to whom the freedmen

was assigned should die without leaving any children.

(1) Not only is it permitted to assign a freedman, but also a freedwoman; and not only to a son or grandson, but also to a daughter or granddaughter.

(2) This power of assignment is given, moreover, to a man who has two or more children under his control, so that he may assign the freedman or freedwoman to any of those who are subject to his authority. Wherefore the inquiry has been made whether or not the assignment becomes inoperative, if he afterwards emancipates the person to whom he assigned the freedman? It has been established that it does become inoperative, because this coincides with the conclusion of Julianus and many others.

(3) It is a matter of no consequence whether the party makes the assignment by will, or without one; and patrons are permitted to do this by any words whatsoever, according to a Decree of the Senate enacted in the time of Claudius, while Suillus Rufus and Ostorius Scapula were Consuls.

TITLE IX.

CONCERNING THE POSSESSION OF PROPERTY.

The right to the possession of an estate was introduced by the Prætor for the purpose of amending the ancient law; and not only did the Prætor amend the ancient law in this manner with respect to the inheritances of intestates, as has previously been mentioned, but also concerning parties who died after having made a will; for if a posthumous stranger were appointed an heir, although, according to the Civil Law he could not enter upon the estate because his appointment was void, he, nevertheless, became the possessor of the property by honorary law, namely, through the aid of the Prætor; but a person of this kind in accordance with one of Our Constitutions is at present legally appointed an heir, this being, as it were, not unknown even to the Civil Law.

(1) Occasionally, however, the Prætor promises possession of the estate with the expectation of neither amending nor attacking the ancient law, but rather of confirming it; for he also gives possession of property in accordance with testamentary provisions to those who have been appointed heirs by a legally executed will. He also in case of intestacy calls to the possession of the estate the proper heirs and agnates, although, leaving possession of the property out of the question, the estate belongs to them by the Civil Law.

(2) Those whom the Prætor calls to the succession do not, however, become heirs merely by operation of law, as the Prætor cannot appoint an heir; for heirs become such only by reason of a legal enactment or some similar Constitution; as, for instance, by a Decree of the Senate and the Imperial Constitutions, but when the Prætor gives them possession of the property, they are placed in the position of heirs, and are called the possessors of the estate.

The Prætor has also established many other degrees in granting possession of estates, while contriving that no one shall die without a successor; for in compliance with what is good and equitable, he has enlarged the right of receiving estates, which, by the Law of the Twelve Tables has been restricted to extremely narrow limits.

(3) These are the possessions of estates by will: first, that which is given to children who have been passed over, and is called "contrary to the provisions of the will"; second, that which the Prætor promises to all legally appointed heirs, and, for this reason is called "in accordance with the provisions of the will". And after having first treated of wills he proceeds to the discussion of intestates; and, in the first place, gives possession of the estate called *unde liberi* to the proper heirs and to those included among the latter in accordance with his Edict; in the second place, to the heirs created by law; and, in the third place, to the ten persons whom he formerly preferred to a manumitted stranger. The ten persons are the following: father and mother; grandfather, and grandmother, on both the paternal and the maternal sides; son and

daughter, grandson and granddaughter, whether by a son or daughter; brother and sister, whether by the father's or the mother's side. In the fourth place he gives possession to the cognates who are next of kin; in the fifth, the members of the family most nearly related to the patron; in the sixth, to the patron and the patroness and their children and ascendants; in the seventh, to the husband and wife; in the eighth to the cognates of the party who granted the manumission.

(4) These are the matters introduced by Prætorian jurisdiction. None of them has been passed over by Us without attention, but, correcting all matters by Our Constitution, We have admitted the possession of estates both contrary to and in accordance with the provisions of the will and as being established through necessity; and also the possession of estates *unde liberi*, and *unde legitimi*, in case of intestacy. With good intentions and in condensed terms, We have shown that possession which occupies the fifth place in the Edict of the Prætor, that is to say, *unde decem personæ*, to be superfluous; for as the possession of estates previously mentioned gives priority to the ten persons over a stranger, the Constitution which We have enacted with reference to the emancipation of children has caused all ascendants to themselves become manumitters, by reason of the fiduciary agreement, so that the manumission itself includes this privilege, and the aforesaid possession of property becomes useless; and therefore having abrogated the previously mentioned fifth possession of property, We have introduced what was previously the sixth possession into its place, and established as the fifth that which the Prætor promises to the cognates who are next of kin.

(5) And as there was formerly in the seventh place that possession of property known as *tum quem ex familia*, and in the eighth the *unde liberi patroni patronæque et parentes eorum*, We have entirely abrogated both of these by the Constitution which We enacted concerning the right of patronage.

For since We have established the succession of freedmen so as to correspond with the succession of freeborn persons — though We have restricted the former to the fifth degree only, that some distinction may exist between those who are freeborn and those who are set free — the possession of estates contrary to the provisions of the will, *unde legitimi*, and *unde cognati*, suffice to permit persons to claim their rights, and the entire complexity and inextricable confusion of these two kinds of possession of property is finally disposed of.

(6) Another species of possession of estates styled *unde vir et uxor,* and placed as ninth among the ancient possessions of property, which We have retained in all its force, and assigned to a higher place, namely the sixth; having entirely suppressed the tenth ancient possession of property, that is the *unde cognati manumissoris*, for reasons already mentioned, so that only six ordinary possessions now remain existing in full force.

(7) A seventh follows these, and this the Prætors introduced for the best of reasons; for by their Edict the possession of an estate is promised finally to those to whom it is provided by any law, decree of the Senate, or Constitution that it shall be granted; and this the Prætor has not derived from any fixed rule either with respect to the possession of estates arising from intestacy, or with respect to those derived from a will; but has established it as an ultimate and extraordinary measure to be applied as the case requires; that is to say for the benefit of those who come in either by will or intestacy, as authorized by laws or decrees of the Senate or in compliance with the new rules laid down in Imperial Constitutions.

(8) Therefore, when the Prætor had introduced many varieties of succession and disposed them in regular order, and as there are often persons of different degrees in every kind of succession; lest the actions of creditors might be delayed, and that there might be someone against whom they could have recourse, and not be able to obtain possession of the estate of the deceased too easily and in this way consult their own interests; the Prætor appointed a certain time within which to demand possession of the estate, and granted the term of one year to descendants and ascendants, both natural and adoptive, for the purpose of demanding

possession, and to all others the term of a hundred days.

(9) And if anyone has not demanded possession of the estate within this time, it accrues to other persons of the same degree; or, if there be none of these, it is promised by the edict of succession to the other degrees in their order, just as if the party who had precedence had not been included in that class. Therefore, where anyone has rejected the possession of an estate offered to him in this manner, there shall be no delay until the time fixed for that possession to expire has passed, but the others are immediately admitted by the same edict. Those days alone which are authorized by law shall be considered in demanding possession of an estate.

(10) Former Emperors have judiciously made provisions for this contingency, so that no one need exercise care in demanding possession of an estate; but he shall have the entire benefit of it if in any way whatsoever he discloses his intention of accepting it within the designated time.

TITLE X.

CONCERNING ACQUISITION BY ARROGATION.

There is another kind of general succession which was introduced neither by a law of the Twelve Tables, nor by the Edict of the Prætor, but by a rule adopted by common consent.

(1) For instance, when the head of a family gives himself in arrogation, all his property, both corporeal and incorporeal, and everything owing to him were formerly acquired absolutely by the arrogator; except those things destroyed by loss of civil rights, to which belong the obligations of service and the right of agnation. Use and usufruct also, although they were formerly included with the others, are forbidden by one of Our Constitutions from being lost by the lowest degree of forfeiture of civil rights.

(2) Now, however, We have limited the acquisition which was formerly obtained by arrogation, just as We have done that of natural parents; for nothing but an usufruct is acquired through children by either natural or adoptive parents in property which the children obtained from strangers, the entire ownership being reserved for them. Nevertheless, if an arrogated son should die while a member of the adoptive family, the ownership of the property also passes to the arrogator, unless other persons survive who by Our Constitution have a better claim than the father to such property as cannot be acquired by him.

(3) But, on the other hand, the arrogator is not liable by the strict terms of the law for anything that the party who gave himself in adop,tion owes; but an action may be brought against him in the name of the son, and if he refuses to defend him, the creditors are permitted by Our competent magistrates to take possession and lawfully dispose of such property as would have belonged to the son, together with its usufruct, if he had not subjected himself to the control of another.

TITLE XI.

CONCERNING THE PERSON TO WHOM PROPERTY IS TRANSFERRED ON ACCOUNT OF FREEDOM.

A new kind of succession has arisen through a Constitution of the Divine Marcus; for if those who have received freedom from their masters by a will under which no entry is made upon the estate, wish the property to be delivered to them in order that their freedom may be preserved, they shall be heard.

(1) This is set forth in a Rescript of the Divine Marcus to Popilius Rufus, in the following words: "If the estate of Virginius Valens, who, by will, bestowed freedom upon certain slaves, is in such a condition that it is required to be sold, there being no successor to him by reason of intestacy, he who has jurisdiction of the same must attend to your request; so that delivery may be made to you of the said estate in order to preserve enfranchisements, not only such as

are bequeathed directly, but also such as have been left in trust, if you provide sufficient security for the payment to creditors of the full amount to which each one is entitled. And those to whom liberty has been granted directly shall be free, just as if the estate had been entered upon, and those whom the heir has been asked to manumit shall obtain their freedom from you; provided also that if you do not desire the property to be delivered to you on any other condition, even those who have received their freedom directly shall become your freedmen; for We authorize this request of yours, if those whose condition is concerned consent. And in order that the advantage arising from this Our Rescript may not become unavailable for another reason, namely, through the Treasury wishing to claim the estate; those who have charge of Our affairs must remember that the cause of liberty takes precedence of Our pecuniary advantage, and that the estate must be seized in such a way that freedom shall be preserved for those who would have been able to obtain it if the estate had been entered upon in compliance with the terms of the will."

(2) Relief is granted by the said Rescript both to persons who are set free and to the deceased, so that the property of the latter is not seized and sold by creditors; for it is evident that if property is delivered for this reason the sale of it is hindered; as there is a defender of the deceased in existence and one who is indeed suitable, since he provides security for the payment of the full amount due to the creditors.

(3) The Rescript is applicable at once every time that freedom is granted by will. What then if a party dying intestate should bestow freedom by a codicil, and the estate not be entered upon because of intestacy? The advantage of the Constitution should here be applicable, for evidently if a man dies intestate and grants freedom by a codicil, no one can entertain a doubt that the grant is sufficient in law.

(4) The language shows that the Constitution applies when there is no successor by reason of intestacy; and, therefore, as long as it is uncertain whether there is one or not, the Constitution is not applicable, and as soon as it is evident that there will be none, the Constitution becomes operative.

(5) If he who is entitled to complete restitution rejects the estate, the Constitution can become operative and the transfer of property be made, even though the party may be entitled to full restitution. What then occurs, if complete restitution be made to him after the transfer for the purpose of preserving grants of freedom? Unquestionably it must be held that grants of freedom after they have once been bestowed shall not be revoked.

(6) This Constitution was introduced for the purpose of protecting grants of freedom; and therefore, if there are no grants of this description, the Constitution ceases to be applicable. What then, if a party in his lifetime bestows grants of freedom, or does so in anticipation of death, and the parties ask for a transfer of the estate to be made to themselves in order that no inquiry may be instituted as to whether this was, or was not done for the purpose of defrauding creditors; are they to be heard? It is preferable that they should be, although the terms of the Constitution are lacking on this point.

(7) But as We saw that there were many omissions in the aforesaid Constitution, another which is much more full has been enacted by Us, in which many cases are brought together, and the law of this kind of succession is thereby rendered perfectly complete; which anyone may ascertain from the perusal of the Constitution itself.

TITLE XII.

CONCERNING THE ABROGATION OF SUCCESSIONS WHICH FORMERLY AROSE THROUGH THE SALE OF AN ESTATE AND FROM THE CLAUDIAN DECREE OF THE SENATE.

There were formerly other general successions which antedated the one previously mentioned.

To these belonged the purchase of an insolvent estate introduced for the purpose of selling the goods of a debtor, which was attended by numerous formalities and was employed when ordinary judgments were in use; but as, in later times, extraordinary judgments have prevailed the purchase of insolvent estates fell into disuse along with ordinary judgments; and creditors are only permitted to take possession of property by an order of court and to dispose of the same as seems advantageous to them; which will more manifestly appear from the larger Books of the Digest.

(1) There was also a wretched species of general acquisition derived from the Claudian Decree of the Senate, where a free woman frenzied by love for a slave lost her own liberty by this Decree of the Senate, and her property along with it; but We, thinking this to be unworthy of Our times, have determined that it shall be abolished in Our dominions and not be inserted in Our Digest.

TITLE XIII.

CONCERNING OBLIGATIONS.

Now let us pass to the discussion of obligations. An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our state. The principal division of all obligations resolves itself into two classes; for they are either civil or prætorian. Civil obligations are such as are created by statute, or at all events are approved by the Civil Law. Prætorian obligations are such as the Prætor has established by virtue of his jurisdiction, and these are also styled honorary.

Another division is made into four classes, for they arise either from contract, quasi-contract, an illegal act, or a quasi-illegal act.

First, let us examine those arising from contract. Of them there are also four kinds, for they are created either by means of the property, by words, by writing, or by consent; and these We shall treat of one by one.

TITLE XIV.

IN WHAT WAY AN OBLIGATION IS CONTRACTED BY MEANS OF THE PROPERTY.

An obligation is contracted by means of the property, for example where delivery is made of an article to be returned in kind. An obligation of this description has reference to articles which can be weighed, counted, or measured, as for instance, wine, oil, grain, money, copper, silver, and gold. For these things we deliver by counting, measure or weight, with the understanding that they shall belong to the parties receiving them, and that not the identical articles but others of the same nature and quality shall be returned to us; whence the article is styled *mutuum*, because it is given by Me to you in such a way that it becomes yours through having been mine. From this contract the action-at-law which is designated *condictio* arises.

(1) He also who accepts something not owing to him from a party who gives it by mistake is bound with reference to the property, and an action for recovery is granted to the latter when he proceeds to obtain restitution; hence a suit in the terms, "If it appears that he is obliged to give", can be brought, just as if he had received an article returnable in kind. Wherefore a ward, to whom something not due him has been given by mistake, and without the consent of his guardian, is not liable in an action to recover what is not due, any more than he would be if an article returnable in kind had been given him. This species of obligation, however, does not appear to be derived from a contract, since he who gives with the intention of paying wishes rather to terminate a transaction than to originate one.

(2) He, also, to whom anything is given for the purpose of making use of it, that is to say, he to whom it is lent, is bound by reason of the property, and is liable to an action on loan as well. He, however, greatly differs from one who receives a loan to be returned in kind; for the property is not given him to become his own, and hence he is bound to return the identical

article. Where he who receives property to be returned in kind loses what he received by any accidental circumstance, whatsoever, as, for instance, by a fire, the ruin of a building, a shipwreck, or the attack of thieves or enemies, he still remains subject to the obligation. But he who receives property to be made use of is obliged to exercise the most scrupulous diligence in caring for it, and it is not enough to employ the same diligence as he is accustomed to do with respect to his own property, if a more careful person would have been able to preserve it; but he is not responsible in case of extreme violence or misfortunes which could not have been avoided, provided the accident did not take place through his negligence; but, otherwise, if you prefer to take the property loaned with you on a journey, and you lose it through an attack of enemies or thieves, or by shipwreck, there is no question that you are bound to make restitution. Property then is, strictly speaking, understood to be loaned when it is given to you to be used without any compensation being taken by way of hire or under any contract entered into for that purpose. Where, on the other hand, compensation exists, it is understood that the use of the property is hired to you, for a loan for use ought to be gratuitous.

(3) Moreover, he with whom any property is deposited is bound by the same and liable to an action of deposit, being obliged to restore the very same thing which he receives. But he is only responsible where he commits fraud, and not on account of neglect, that is to say slothfulness and want of care; so that he is secure who has lost by theft property which he had guarded with slight diligence, because a party who entrusted his property to a negligent friend ought to impute his loss to his own rashness.

(4) A creditor, also, who has taken a pledge is also liable on account of the property, and may be forced by an action of pledge to make restitution of the article received. But for the reason that a pledge is given for the advantage of both, namely tor the debtor's in order that the money may be lent to him the sooner, and for the creditor's that what he lends may be the more secure; it has been held that it is sufficient if the latter uses exact diligence in the preservation of the property; and if he has done this and has lost the same by some accident, he is safe, and not barred from bringing suit for the loan.

TITLE XV.

CONCERNING VERBAL OBLIGATIONS.

A verbal obligation is contracted by a question and answer, when we stipulate for something to be given to us or done for us. From this proceed two actions-at-law, a personal action for recovery, where the stipulation is certain, and an action on contract where it is uncertain. A stipulation is called by this name for the reason that among the ancients *stipulum* signified firm, being derived perhaps from *stipes*.

(1) In a transaction of this kind the following words were formerly used: "Do you agree?" "I do agree." "Do you promise?" "I do promise." "Do you pledge your faith?" "I do pledge my faith." "Do you bind yourself?" "I do bind myself." "Will you give?" "I will give." "Will you do so-and-so?" "I will do so-and-so." But whether the stipulation is stated in Latin, Greek, or any other language, does not matter, if both the contracting parties understand it; nor is it necessary for both of them to make use of the same language, but it is sufficient if a suitable answer is made to the question; and, moreover, two Greeks may contract an obligation in the Latin language. These solemn words, however, were indeed formerly used, but afterwards the Leonine Constitution was promulgated, which dispensed with the verbal formality, and required that only the meaning and intention should be understood on both sides, no matter in what language they were expressed.

(2) Every stipulation is made either absolutely, with reference to a certain time, or under some condition. It is made absolutely, for example, "Do you agree to give five *aurei?*" and they can be demanded without delay. With reference to a certain time, when the stipulation is made with a day mentioned on which the money is to be paid, as, for instance: "Do you agree to pay

ten *aurei* on the next *Kalends* of March?" What We stipulate to do at a certain time is in fact due immediately, but cannot be demanded until the day arrives; nor indeed can it be demanded on the very day provided for by the stipulation, because the entire day should be granted to the discretion of the party who is to make payment; for it is not certain that it has not been paid on the day on which it was promised until that day has gone by.

(3) But if you stipulate as follows: "Do you agree to pay me ten *aurei* every year as long as I live?" the obligation is understood to be absolute and continuous, because it cannot be due for a time; but the heir, if he brings suit, will be barred by an exception on the ground of contract.

(4) A stipulation is made under a condition when the obligation is deferred until some event takes place, so that the stipulation becomes operative if something is, or is not done; as, for instance: "Do you agree to pay me five aurei if Titius becomes Consul?" and where a man stipulates as follows: "Do you agree to make payment if I do not go up to the Capitol?" it will be just as if he had stipulated that he should be paid when he dies. Under a conditional stipulation there is only a hope that a debt will become due, and we transmit that hope to our heir, if death seizes us before the condition is fulfilled.

(5) Places are also inserted in a stipulation, as, for example: "Do you agree to pay at Carthage?" which stipulation, although it seems to be made absolutely has, nevertheless, so long a time attached to it as the party promising would need in order to pay the money at Carthage; therefore, if anyone stipulates at Rome: "Do you agree to make payment at Carthage to-day?" the stipulation is void, as the promise given in reply is impossible.

(6) Conditions which relate to past or present time either render the obligation invalid immediately, or do not defer it at all, as, for example: "Do you agree to make payment if Titius has been Consul, or if Mævius is living?" For if these things are not true, the stipulation is worthless; but if they are true, it becomes valid at once; for such matters as are certain in the nature of things do not postpone an obligation, although they may be uncertain so far as Our knowledge of them is concerned.

(7) Not only can property be the object of a stipulation, but deeds, also as where We stipulate for some act to be performed or not performed; and it is best to add a penalty to stipulations of this kind, so that the amount involved in the stipulation may not be uncertain, and it may become necessary for the plaintiff to prove the amount of his claim; and, therefore, where anyone stipulates for something to be done, a penalty ought to be added thus: "If it is not done in this way, do you agree to pay ten *aurei* by way of penalty?" But if he stipulates by one and the same statement that certain things are to be done, and certain others are not to be done, a clause of this description should be added: "If anything is done in violation of this contract, or anything is done which is not in compliance with it, do you agree to pay ten *aurei* by way of penalty?"

TITLE XVI.

CONCERNING TWO PARTIES TO A STIPULATION OR PROMISE.

Two or more individuals may be parties to a stipulation or a promise. As to the stipulation, if after the question has been put by all the promisor answers: "I agree"; for instance when two persons are making a stipulation separately the promisor answers, "I agree to pay either of you"; or if he has first agreed to pay Titius, and afterwards binds himself when another interrogates him, there are two distinct obligations, and it is not considered that there are two parties to one stipulation.

Two or more parties can bind themselves by a promise as follows: "Mævius, do you agree to pay five *aurei?* Seius, do you agree to pay the same five *aurei?*" and each answered separately: "I do agree."

(1) In obligations of this description the entire amount is due to each contracting party, and each person who makes the promise is bound for all; nevertheless, in each obligation, only one matter is included, and where either party receives the debt, or the other pays it, the obligation of all is discharged, and all persons are released from liability.

(2) Of two parties making a promise one may be bound absolutely, and the other with reference to a certain time or under some condition; and neither the date nor the condition offers any bar to an action brought against him who bound himself unqualifiedly.

TITLE XVII.

CONCERNING THE STIPULATION OF SLAVES.

A slave has a right of stipulation dependent upon the standing of his master; but an estate usually represents the person of the defunct, and therefore whatever a slave belonging to the estate contracts for before the estate is entered upon, he acquires for the latter; and by this means it is also acquired for whoever afterwards becomes heir to the same.

(1) Whether a slave stipulates for his master, for himself, or for a fellow-slave, or without designating anyone, he acquires for his master. The same rule applies in the case of children who are under the control of their father, with reference to transactions by means of which they can make acquisitions for him.

(2) But when the object of the stipulation is something to be done, the person of the stipulating party is in every instance the only one to be considered; for example, where a slave stipulates that he shall be permitted to pass or drive through the premises of another; for only he himself and not his master is the only one who is not to be prevented.

(3) A slave who is owned in common acquires by stipulation for each of his masters according to his interest in him, unless he has made the stipulation by command of one of them, or expressly for one of them; for then he makes the acquisition for that one alone. When what a slave owned in common stipulates for cannot be acquired by one of his masters, it is wholly acquired by the other; for example, where the property for which he has stipulated belongs to one of them.

TITLE XVIII.

CONCERNING THE DIVISION OF STIPULATIONS.

Some stipulations are judicial, some are prætorian, some conventional, some common, that is to say, both prætorian and judicial.

(1) Stipulations entirely judicial are such as originate from the mere office of the judge, as security against fraud, or where a fugitive slave shall be pursued or restitution of his value be made.

(2) Prætorian stipulations are such as originate from the mere office of the Prætor, as, for example, such as relate to impending damage or to legacies. Prætorian stipulations must be understood to include also those of the ædiles, for they are also jurisdictional.

(3) Conventional stipulations are those arising from the agreement of both parties, that is neither from an order of the judge nor from an order of the Prætor, but from the agreement of those who make the contract; and there are as many kinds of these, I might almost say, as there are of matters concerning which contracts may be made.

(4) Common stipulations are such, for instance, as declare that the property of a ward shall be secure; for the Prætor orders that security shall be given him for this purpose, and sometimes the judge also orders this when it cannot otherwise be accomplished; and in the same class is included the stipulation for ratification.

TITLE XIX.

CONCERNING INOPERATIVE STIPULATIONS.

Everything which is subject to our ownership, whether movable or belonging to the soil, can become an object of stipulation.

(1) If, however, anyone has stipulated for something which, in the nature of things does not exist, or cannot be given; as, for instance, for Stichus who is dead, but who he thought was living, or for a hippocentaur which cannot exist, the stipulation will be of no effect.

(2) The rule is the same where anyone stipulates for sacred or religious property which he believes to be profane, or for public property destined for the perpetual use of the people, as a forum, or a theatre, or for a freeman whom he believed to be a slave, or for something which is not an object of commerce, or for the gift of his own property; nor will the stipulation be in abeyance because the public property may become private, or a freeman may be reduced to slavery, or the stipulator may be able to obtain a commercial right to the property, or what belongs to him may cease to be his, but the stipulation immediately becomes void.

On the other hand, although property may in the first place have been legally the subject of a stipulation, still if it should afterwards be included among those things above mentioned without the act of the party making the promise, the stipulation becomes invalid. Moreover, a stipulation like the following is void from the beginning, namely: "Do you promise to give Lucius Titius when he shall become a slave?" and others of the same kind, for things which by their nature are exempt from our ownership can in no way become the subjects of an obligation.

(3) If a man agrees that another shall give or do something, he will incur no obligation; for instance, if he agrees that Titius shall pay five *aurei;* although he will be bound if he agrees that he will make Titius pay them.

(4) Where any man stipulates for someone who is not subject to his control, his act is void. It can, however, be contrived that payment shall be made to someone who is a stranger; for example, if someone stipulates as follows: "Do you agree to pay me or Seius?" so that the obligation is made for the benefit of the stipulator, and yet he may legally pay Seius even though he is unwilling; and the release from liability takes place by operation of law, while the party has an action of mandate against Seius.

Where, however, anyone has stipulated for ten *aurei* to be paid to himself and to another to whose authority he is not subject, the stipulation will be valid; though it has been questioned whether the entire sum mentioned in the stipulation is due to him or only half of it; but is now decided that he is entitled to no more than half of the same. If you have entered into a stipulation for some one under your control, you can acquire the benefit of it for yourself, for the reason that your statements are, as it were, those of your son; just as the statements of your son are understood to be yours with respect to such things as can be acquired for yourself.

(5) Moreover, a stipulation is inoperative where anyone does not respond when asked a question; for example, if he stipulates for ten *aurei* to be paid by you and you promise five, or *vice-versa;* or if he stipulates absolutely, and you promise under a condition, or *vice-versa;* provided, however, that you make a statement as follows, in answer to the person stipulating under a condition or for a particular time: "I agree to do this for to-day"; for if you merely answer, "I promise", you are considered to have bound yourself in a few words for the day or under the condition stated; as it is unnecessary when making the answer that everything mentioned by the stipulator should be repeated.

(6) Moreover, a stipulation is void if you make an agreement with respect to a person who is under your control, or if he makes an agreement with respect to yourself. A slave, however, not only cannot bind himself to his master, but he cannot do so to anyone else, but sons of a

family can bind themselves to others.

(7) It is evident that a person who is dumb can neither stipulate nor promise. This also applies to one who is deaf; for the reason that he who stipulates should hear the words of the party making the promise, and he who promises those of him who stipulates. It is apparent from this that we are not speaking with reference to one who hears with difficulty, but of one who does not hear at all.

(8) An insane person cannot transact any business because he does not understand what he is doing.

(9) A ward can lawfully transact any business, provided his guardian intervenes whenever his consent is necessary, for example, where the ward obligates himself; for he can obligate another to himself without the consent of his guardian.

(10) What We have stated with reference to wards is only true concerning those who have already a certain degree of intelligence; for an infant, and one who is almost an infant do not differ greatly from an insane person, because minors of this age have no intelligence; nevertheless, a more liberal interpretation of the law has granted minors just emerged from infancy, for their benefit, the same capacity as those who have nearly arrived at puberty. A child who has not arrived at puberty and is under the control of his father cannot be bound even with his father's consent.

(11) When an impossible condition is added to the obligation the stipulation is void. A condition is considered impossible where nature opposes its accomplishment, for instance, if anyone should say: "Do you agree to pay if I touch heaven with my finger?" but if he stipulates as follows: "Do you promise to pay if I do not touch heaven with my finger?" the obligation is understood to have been contracted absolutely, and therefore a demand can be made for payment at once.

(12) Moreover, a verbal obligation made between persons who are absent from one another is invalid; but as this affords ground for litigation between parties who are contentious, and who, perhaps after a certain time, make allegations of this kind and insist that either they or their adversaries were not present; a Constitution of Ours which We have addressed to the advocates of Cæsarea has been published by Us for the prompt disposal of such actions, in which We have decreed that documents which set forth that the parties were present are to be believed in every instance, unless he who makes use of such impudent statements can prove by the most conclusive evidence, either in writing or by reliable witnesses, that either he or his adversary was somewhere else during the entire day on which the instrument was drawn up.

(13) In former times no one could stipulate that something should be paid to him after his death, any more than he could after the death of the party with whom the contract was made. Nor could anyone under the control of another stipulate that this should be done after the death of the latter, because he is understood to speak with the voice of his father or master. Again, if anyone stipulated as follows: "Will you pay on the day before I die, or on the day before you die?" the stipulation was inoperative. But since stipulations are valid through the consent of the contracting parties, (as has already been stated) We have determined to introduce a necessary amendment into this part of the law, so that the stipulation is valid whether it contains the terms, "after the death", or "on the day before the death" of him who makes the stipulation or promise.

(14) Again, when anyone stipulates as follows: "Do you agree to pay to-day if a ship shall hereafter arrive from Asia?" the stipulation is void, because the terms are preposterous. But since Leo of renowned memory held that this same stipulation, designated as preposterous, should not be rejected when relating to dowries, We have determined to invest it with full force, so that an expression of this kind in a stipulation is not only valid with reference to dowries but also with reference to all other matters.

(15) A stipulation expressed as follows was considered valid among the ancients and is so still; for example, if Titius should say: "Do you promise to pay when I shall be dying, or when you shall be dying?"

(16) We can also legally stipulate for something to be paid or performed after the death of another party.

(17) If it is stated in some instrument that a certain party has made a promise, it is held to be the same as if answer had been made to a former question.

(18) Whenever several things are included in one stipulation, he who makes the promise is bound for all of them, if he simply answers, "I promise to pay"; but if he agrees to pay one or a certain number of the sums, an obligation is contracted for all those which he agreed to pay; for among several stipulations one or a certain number are deemed to be perfected; since we should stipulate for things one by one, and answer with reference to them in the same manner.

(19) No one, as has already been stated, can stipulate for another, for obligations of this description have been devised so that any one may acquire for himself whatever is for his own advantage; but where something is given to another no advantage accrues to the party making the stipulation. If anyone wishes to do this it is evident that he must stipulate for a penalty; so that, if the act should not be done as agreed upon, the stipulation for the penalty may be for his benefit, even if he has no interest in the transaction; for when anyone stipulates for a penalty it is not considered what his interest may be but what is the amount stated in the condition of the stipulation. Therefore, if anyone stipulates for payment to be made to Titius, his act is void, but if he adds by way of penalty: "Do you agree to pay me so many *aurei* if you do not pay?" then the stipulation becomes binding.

(20) But if one party stipulates for another and he himself is interested, it has been settled that the stipulation is valid; for if a party who has begun to administer the guardianship of a ward, relinquishes the administration to his fellow-guardian, and stipulates that the property of his ward shall be secure, the obligation is binding; as it is to the interest of the stipulator that what he agreed to shall be performed, since he would be liable to the ward for any improper management of his affairs. Therefore, also where anyone stipulates for payment to be made to his agent the stipulation will be good; and if he stipulates for something in which he is interested, to be given to his creditor, so that, for example, no penalty may attach, or land encumbered may not be sold, the stipulation is valid.

(21) On the other hand, he who has promised that a third party shall perform some act is not considered liable, unless he himself has agreed to a penalty.

(22) Moreover, no one can stipulate that property shall become his under any condition by which it may actually do so.

(23) Where the party making the stipulation means one thing and he who makes the promise another, no obligation is contracted, any more than if the answer had no reference to the question; as, for instance, where some one stipulated that the slave Stichus was to be delivered by you, and you had Pamphilus, whom you thought was called Stichus, in your mind.

(24) A promise made for a dishonorable consideration is void, as for instance, where a man agrees to commit murder or sacrilege.

(25) When anyone has made a stipulation under a certain condition, his heir can bring suit after the condition has been fulfilled, even though the party has died before that time. The same rule applies to the promisor.

(26) Anyone who stipulates for an article to be delivered this year or this month, cannot legally bring suit until the entire year or month in which delivery can be made has elapsed.

(27) If you stipulate to give a tract of land or a slave, you cannot bring an action immediately,

but only after a sufficient time has elapsed for delivery of the same to have been made.

TITLE XX.

CONCERNING SURETIES.

Other parties often bind themselves for one who makes a promise, and these are called sureties; and men are accustomed to accept them in order that sufficient security may be provided for them.

(1) They can be taken for obligations of any description, that is to say with respect to property, or with reference to contracts entered into either verbally, in writing, or by consent. Nor does it make any difference whether the obligation for which the surety is bound is a civil or a natural one; so that he can be held liable even on account of a slave, whether he who accepts the surety from the slave is a stranger, or the master of the former with reference to what is due to him naturally.

(2) Not only is a surety personally liable but he also leaves his heir obligated.

(3) A surety may bind himself either previously or subsequently to the contraction of the obligation.

(4) Where there are several sureties, they are each liable for the entire amount without reference to their number; and, therefore, the creditor is free to demand the entire debt from any of them he wishes. But in accordance with an Epistle of the Divine Hadrian, the creditor is compelled to bring suit for his proportion against each one of those who are solvent at the time when issue is joined; and therefore if any one of the sureties is not solvent at that time, this increases the burden of the others. But if the creditor has recovered the entire debt from one surety, the loss is sustained by this one alone, if he in whose behalf he became surety is not solvent; and he must blame himself for this, since he could have had recourse to the Epistle of the Divine Hadrian, and have demanded that an action be brought against him for his share alone.

(5) Sureties cannot be bound so as to owe more than the party for whom they are liable; for their responsibility is an accessory to the principal obligation, and the accessory cannot amount to more than the principal matter; but, on the other hand, they may bind themselves so as to Owe less. Therefore, if the debtor has promised to pay ten *aurei*, the surety may lawfully obligate himself for five, but he cannot do this for the opposite. Again if the debtor unreservedly makes promise of payment, the surety may give his promise under some condition; but he cannot do the opposite, for the words less and more are understood to have reference not only to the amount but also to the time; for to make payment immediately is worth more, and to do so after a certain time is worth less.

(6) When a surety has made payment for his principal he is entitled to an action of mandate against him for recovery.

(7) A surety is accepted in Greece in the following terms: τη εμη πιστει κελειω, "I order upon my credit," λεγω, "I say", "I wish", or βουλομαι, "I desire"; and even if he employs the term φημι, it will have the same effect as if he had said λεγω.

(8) It must be borne in mind that it is the general practice with regard to the stipulations of sureties that whatever is declared in writing to have been done is held to have been done; and therefore it is settled but if anyone states in writing that he has become a surety, everything is deemed to have been legally complied with.

TITLE XXI.

CONCERNING OBLIGATIONS IN WRITING.

Formerly an obligation was entered into in writing which was said to have been made by entries, but these are at present no longer employed. It is evident that if anyone declares in writing that he owes money, which has never been paid to him, he cannot avail himself of the exception of non-payment after a long time has elapsed; for this has been decided time and again. So it happens that even now since he cannot defend himself, he is bound by the writing; and out of this a right of personal action arises of course in the absence of any verbal obligation. The long time formerly attached to this exception by virtue of certain Imperial Constitutions embraced the period of five years; but to prevent creditors from being exposed to lose their money fraudulently by lapse of time, the term has been abridged by one of Our Constitutions, so that an exception of this kind is not at present available beyond the limit of two years.

TITLE XXII.

CONCERNING OBLIGATIONS BY CONSENT.

Obligations arise from consent in purchases, sales, leases, hiring, partnerships and mandates.

(1) Therefore an obligation is said to be contracted by consent in these ways, because neither written documents nor the presence of the parties is at all required, nor is it necessary that anything should be given in order to establish the validity of the obligation; but it is sufficient if those who are transacting the business give their consent.

(2) Hence contracts of this kind are entered into between persons who are absent, for instance by letter or by messenger.

(3) In like manner, in contracts of this description each party is bound to the other for whatever one should do for the other in accordance with the principles of rectitude and equity, while, on the other hand, in verbal obligations one party stipulates and the other promises.

TITLE XXIII.

CONCERNING PURCHASE AND SALE.

A contract of purchase and sale is made as soon as the parties agree on the price, although the price may not yet have been paid, and even no earnest given, for what is given under the name of earnest, is merely proof that a contract of bargain and sale has been concluded. It is necessary, however, to understand that these rules are only applicable to purchases and sales which are made without writing; for with reference to them no innovation has been introduced by Us. With respect to those, however, which are entered into by writing, We have decreed that a purchase and sale are not complete, unless a bill of sale has been drawn up, either in the hands of the contracting parties or in that of someone else, but, at all events, signed by both of them; but if made by a notary it will not be good unless accepted as complete and executed by the parties; for if anything is lacking in it, there is ground for a change of mind, and either the vendor or the purchaser may withdraw from the contract without incurring any penalty.

Still, We have afforded them an opportunity to withdraw without loss only where nothing has already been given by way of earnest; for if this has been done, then whether the sale has been concluded in writing or without it, he who refuses to carry out the contract, if he is the purchaser, loses what he has given; and if he is the vendor, he shall be forced to pay double the amount, although nothing may have been stated with reference to earnest.

(1) Moreover, a price should be fixed, for there can be no sale without a price; and the price should be certain. If, on the other hand, it should be agreed upon between certain parties than an article shall be purchased at the price placed upon it by Titius, it was a matter of great doubt among the ancient authorities whether a sale of this kind was valid or not; but a

decision which We have made has determined the matter in this way; that whenever a sale has been agreed upon "for a price such as he shall fix", the contract shall stand under the the following conditions, namely, that if he who is mentioned shall establish the price it shall be paid in every instance in accordance with his estimate, and the property shall be delivered, so that the sale shall be accomplished; the purchaser being entitled to an action of purchase and the vendor to an action of sale. But if the party mentioned is either unwilling or unable to fix the price, then the sale shall be void, because no price was determined upon; and as this principle has been established by Us with regard to sales, it is not absurd to extend it to leasing and hiring.

(2) The price must also consist of money, for whether it could consist of other things, for instance, whether a slave, a tract of land, or a garment could be the price of other property was formerly seriously disputed. Sabinus and Cassius hold that the price can consist of something else, whence it is commonly stated that a purchase and sale is effected by an exchange of property, and that this kind of purchase and sale is of very great antiquity; and they cited the Greek poet Homer in their arguments, who, in a certain part of his work states that the army of the Achæans obtained wine in exchange for other things.

Authorities of a different school were of an opposite opinion, and thought that exchange of property was one thing, and purchase and sale another; otherwise, when property is exchanged it could not be determined what was sold and what was paid by way of price; for reason does not tolerate that both should appear to be sold and paid by way of price. But the opinion of Proculus, who declared that exchange was a special kind of contract and distinct from sale, very properly prevailed; as it is supported by other verses of Homer, and established by more substantial reasons, which former emperors admitted, and is set forth at greater length in Our Digest.

(3) When, however, the contract of bargain and sale has been perfected (which we have already stated is done just as soon as the price has been agreed upon, when the transaction is concluded without writing); the risk of the property sold immediately attaches to the purchaser, even though the property has not yet been delivered to him; and, therefore, if a slave dies, or is injured in any part of his body; or a house is consumed entirely or partially by fire; or a field has entirely or partly washed away by the force of a river, or is reduced in size or diminished in value by an inundation, or through trees being overthrown by a hurricane, the loss falls upon the purchaser, who is required to pay the price, although he has not yet obtained the property; for the vendor is secure where anything has happened without fraud or negligence on his part.

And, also, if the quantity of land be increased by means of alluvion after the sale, this belongs to the purchaser, for the benefit should belong to him who incurs the risk. But if a slave who has been sold should abscond or be stolen in such a way that neither fraud or negligence attaches to the vendor, it must be ascertained whether the vendor undertook the safe-keeping of said slave until delivery; for if he did so the risk is certainly his, but if he did not, he will not be liable; and we understand that this same principle applies to animals and other property. At all events, however, the vendor must assign his right of action for recovery to the purchaser; since he who has not yet delivered the property to the purchaser is still unquestionably the owner. The same rule also applies to actions for theft and wrongful damage.

(4) A sale may be contracted either under some condition or absolutely; under a condition as, for example, "If Stichus pleases you before a certain day he shall be purchased by you for so many *aurei*".

(5) Anyone who knowingly purchases land which is sacred, religious, or public, (as, for instance, a forum or a portico), does so to no purpose, even though, having been deceived by the vendor he buys it as private or profane property; and he will be entitled to an action of

purchase because he could not obtain it, and may recover indemnity to the amount that it would have been worth to him not to have been deceived. The same rule applies where a party buys a freeman as a slave.

TITLE XXIV.

CONCERNING LEASING AND HIRING.

Leasing and hiring greatly resembles purchase and sale, and is governed by the same rules of law. For as buying and selling is contracted where the parties have agreed upon the price, so also is leasing and hiring understood to be contracted when the hire has been determined upon; and an *actio locati* will lie for the benefit of the party who leases the article, and an *actio conducti* for the benefit of the party who hires it.

(1) We must also understand that what We have previously stated with reference to leaving the price to the judgment of another party also applies to cases of leasing and hiring, where the amount of compensation is left to the judgment of another. For which reason, if anyone gives clothing to a fuller to be pressed and cleaned, or to a tailor to be mended, no compensation having been stated at the time, but the owner intending to pay subsequently whatever shall be agreed upon; it is considered that leasing and hiring has not, properly speaking, been contracted, but an *actio præscriptis verbis* is granted on this account.

(2) Moreover, as formerly the question commonly arose whether a contract of purchase and sale was concluded by an exchange of property, so, also, it was asked with reference to leasing and hiring, when anyone gave you some property to be used or enjoyed and in turn received from you some other article to be used or enjoyed. It has been established that this is not a leasing and hiring but a peculiar kind of contract; as, for instance, where one party who has an ox, and his neighbor also has one, and it is agreed between them that each shall lend the other ox for the term of ten days for the purpose of doing his work, and an ox dies while in the possession of the other party; no action for leasing or hiring nor one for a loan will he, for the reason that the loan was not gratuitous; but an *actio præscriptis verbis* must be brought.

(3) Purchase and sale, as well as leasing and hiring, so nearly resemble one another, that in some instances, the question arises whether a purchase and sale or a leasing and hiring is contracted; as, for example, in the case where lands are delivered to certain parties to be enjoyed perpetually, that is, as long as the rent or income is paid to the owner for them they cannot be taken away from a lessee or his heir, or from anyone to whom the lessee or his heir may sell them, give them, bestow them as a dowry, or alienate them in any other way. But as a contract of this kind was considered doubtful among the ancients, and thought by some of them to be a lease and by others to be a sale; a law was enacted by Zeno which established the peculiar nature of the contract of *emphyteusis* as not resembling either a lease or a sale, but to be upheld by its own covenants; and if anyone entered into it, it should be sustained just as if such was the actual nature of the contract; but where no agreement was made concerning the risk, then, if the property was entirely destroyed, the resulting loss must fall upon the owner, but if the loss was only partial, it should attach to the party in possession of the land. This rule We sanction.

(4) The question also arises, if when Titius made a contract with a goldsmith to make rings for him out of his own gold, of a certain weight and form, and to receive for instance ten *aurei*, whether it shall be considered that a contract of purchase and sale, or one of leasing and hiring has been entered into. Cassius declares that there is a contract of purchase and sale with respect to the material, but one of leasing and hiring with respect to the labor; still, it has been decided that the contract is merely one of purchase and sale. But if Titjus should provide his own gold and compensation be agreed upon for the labor, no doubt exists that this is a leasing and hiring.

(5) The person hiring the property should comply in every respect with the terms of the contract; and if anything has been omitted from the same, he should provide it in conformity with uprightness and equity. When a man has either given, or promised compensation for the use of clothing, silver, or a beast of burden, he should take such care of the same as the most diligent head of a family would take of his own property; and if he does so, and loses the article by any accident, he will not be bound to replace it.

(6) Where a party who hires property dies during the existence of a contract, his heir succeeds to the lease on the same terms.

TITLE XXV.

CONCERNING PARTNERSHIP.

We are accustomed to form a partnership either with respect to Our entire property, which the Greeks especially designate as κοινοπραξια; or with respect to one particular kind of business, as, for instance, the buying and selling of slaves, oil, wine, or grain.

(1) And, indeed, if no specific agreement is entered into with reference to the division of profit and loss, equal participation in both is presumed. Where, however, the division of the same is stated, it must be observed; for there has never been any doubt that a contract is valid when two parties have agreed with one another that, for example, two thirds of the loss and profit shall belong to one, and the remaining third to the other.

(2) A question has arisen whether a contract like the following shall be deemed binding; for instance, where Titius and Seius have agreed with one another that two thirds of the profits shall belong to Titius, and that he shall be liable for one third of the losses; and that two thirds of the losses shall be assumed by Seius, who shall be entitled to one third of the profits. Quintus Mucius thought that an agreement of this kind was opposed to the nature of partnership, and therefore should not be considered valid. Servius Sulpicius, whose opinion has prevailed, held the opposite, because the labor of certain persons is often so valuable in a partnership that it is only just that they should be admitted into it on the most favorable conditions; for no doubt whatever exists that a partnership may be formed with the understanding that one of the parties shall furnish money and the other shall not furnish any, and still the profits be divided between them; because the labor of one is often as valuable as money. The law has been established so conclusively against the opinion of Quintus Mucius, that it is even permissible for one party to take a part of the profits and not be liable for any of the losses which Servius held consistently with his opinion; but this must be understood in such a way that if profit results in one transaction and loss in another, only what remains after a set-off has been made shall be understood to be profit.

(3) It is settled that if the share is stated in only one instance, as, for example, with reference solely to the profit, or to the loss, and is omitted in the other, the same share is understood to be included in the one which has been omitted.

(4) A partnership lasts as long as those who compose it are in common accord; but when any of them has renounced it, it is dissolved. Evidently, however, if anyone slily renounces a partnership with a view to obtaining some advantage exclusively for himself; as for example, if a partner in the entire capital when left an heir by some one renounces the partnership with the intention of enjoying the advantage of the estate alone, he can be forced to contribute this profit. If, however, he should gain some advantage which he did not designedly secure it belongs to him alone. On the other hand, everything which is acquired from any source after the partnership has been renounced, is conceded to him alone to whom the renunciation was granted.

(5) Moreover, a partnership is dissolved by the death of a partner, because he who enters into a partnership contract chooses a certain person for himself; and even if a partership is formed by the consent of several, it is dissolved by the death of one, although the rest may survive,

unless it was otherwise agreed when the partnership was formed.

(6) Again, if a partnership is formed for a certain purpose, and that purpose is accomplished, the partnership is terminated.

(7) It is evident that a partnership is also terminated by confiscation, that is, if all the property of one of the partners is confiscated; for when another takes his place, he is considered as dead.

(8) Moreover, if any one of the partners, oppressed by the weight of his debts, surrenders his property, and it is then sold to discharge bis public or private obligations, the partnership is terminated; but in this instance if the parties still consent to remain in partnership, a new partnership is considered to begin.

(9) Whether one partner is liable to another in an action of partnership, if he commits fraud, like him who consents to become a depositary, or whether he is liable for negligence, that is to say, for want of care and neglect, was formerly a question; but it has now been established that he is liable on that ground. Negligence, however, should not be determined by the most exact diligence; for it is sufficient for a partner to bestow upon the common business the same diligence which he employs in his own affairs; for he who takes a careless partner should only complain of himself.

TITLE XXVI.

CONCERNING MANDATE.

A mandate is contracted in five ways, namely: where anyone gives it to you only for his own benefit; or for his and yours; or solely for that of someone else, or for his and that of another; or for yours and that of another; but if the mandate is given you for your benefit alone it is worthless, and from it no obligation or action arises between you.

(1) A mandate arises for the benefit of the mandator alone, for instance, where anyone commissions you to transact his affairs, or purchase land for him, or become security for him.

(2) It is for your benefit and that of the mandator, where, for example, he commissions you to lend money at interest to someone who borrows it for his own business; or when, while you are about to bring an action arising from suretyship against him he engages you to proceed against the principal at his own risk; or appoint you to stipulate at his risk that what he owes you shall be paid by a party whom he designates for that purpose.

(3) A mandate is created for the benefit of someone else, for instance, when he engages you to attend to the business of Titius, or to purchase a tract of land for Titius, or to become his surety.

(4) It is for his advantage and that of another, where, for instance, a person engages you to transact business common to himself and Titius, or to purchase land for him and Titius, or to become surety for him and Titius.

(5) It is for your benefit and that of another where, for example, he employs you to lend money at interest to Titius; but if you are to lend money without interest, the mandate is for the advantage of the other party alone.

(6) A mandate is solely for your own advantage where he engages you to invest your money in the purchase of land rather than to loan it at interest; or, on the other hand, to loan it at interest, rather than to invest it in the purchase of land. A mandate of this kind is rather advice than a commission, and, for this reason, is not obligatory; because no one is bound by a mandate on account of advice, although it may not be for the benefit of the party to whom it is given, since every one is free to decide whether or not the advice is advantageous. Therefore, if you have money idle at home and someone advises you either to purchase certain property or to loan the money, he is, nevertheless, not liable to you for mandate; although it may not be

for your benefit to have purchased the property, or to have made the loan.

These principles are so well established that the question has arisen whether a party is liable for mandate who has employed you to lend money at interest to Titius; but the opinion of Sabinus was adopted, that the mandate in this instance is binding, because you would not have lent the money to Titius unless you had been commissioned to do so.

(7) A mandate also is not obligatory which is contrary to good morals, as where Titius employs you to commit a theft, or do some damage or injury; for although you may be liable to punishment on account of an act of this kind, you still have no cause of action against Titius.

(8) He who executes a mandate ought not to exceed its terms; as, for example, where anyone commissions you to purchase land, or to become surety for Titius for a hundred *aurei*, you should neither purchase for a larger sum, nor become security for a greater amount; otherwise, you will not be entitled to an action of mandate against him; so that, as held by Sabinus and Cassius, you would bring suit to no purpose, even if you wished to do so for only a hundred *aurei*. Authors of the other school hold that you have a right to bring suit up to a hundred *aurei;* and this opinion is certainly the more liberal one. When, however, you purchase for a smaller sum you will undoubtedly have a cause of action against him, since he who directs land to be bought for himself at a hundred *aurei*, it is evident, directs that it shall be purchased at less, if this can be done.

(9) Moreover, where a mandate, properly contracted, is revoked before the business has been transacted, it is of no effect.

(10) Also where the death of either party takes place before the execution of the mandate has been begun, that is, either of him who gave it, or of him who undertook it, the mandate becomes void. But for the sake of convenience, it has been established that if the party who gave the mandate dies, and you, being ignorant of the fact, proceed to execute it, you can bring an action of mandate; otherwise, a just and excusable ignorance would be a source of injury to you. In like manner, it has been decided that if debtors, after the steward of Titius has been manumitted, pay him through ignorance, when he is a freedman, they are released; while, on the other hand, by a strict construction of the law they could not be released, because they have paid another than the one to whom they should have discharged the debt.

(11) Every one is at liberty not to accept a mandate; but when it is accepted it should be executed, or renounced as soon as possible, so that the mandator may either dispatch the business himself or do so by someone else; for if it is not renounced so as to leave him every facility for accomplishing it, an action of mandate will still lie, unless some just cause arose either for not renouncing it, or for renouncing it inopportunely.

(12) The execution of a mandate may be deferred to a certain time or be made under some condition.

(13) In conclusion, it must be noted that a mandate, unless it is gratuitous, is included in some other class of bailments; for where a compensation is mentioned, it at once commences to be a leasing and hiring. And, generally speaking, in whatever instances the transaction relates to a mandate or deposit where the execution of it is without compensation, it is then understood to be a leasing and hiring, if a remuneration is stated; and therefore if you take clothing to a fuller to be pressed or cleaned, or to a tailor to be mended, no compensation being agreed upon or promised, an action of mandate can be brought.

TITLE XXVII.

CONCERNING OBLIGATIONS ARISING FROM QUASI-CONTRACTS.

After having enumerated the different kinds of contracts, let Us consider those obligations which are not understood to properly arise from contracts, but, nevertheless, because they do

not partake of the nature of an illegal act are considered to arise "as it were from a contract".

(1) Therefore, whenever anyone attends to the affairs of another while he is absent, rights of action reciprocally arise between them which are designated those of "business transacted"; but a direct action lies in favor of the owner of the matter in question as against the party who transacted the business; and a contrary action also lies in favor of the latter. It is evident that, properly speaking, these do not arise from any contract, since actions of this kind can be instituted when anyone has meddled with the affairs of another without authority, and for this reason those whose business has been transacted are made liable without being aware of the fact.

This rule has been adopted for public convenience, so that when persons are compelled by some sudden emergency to travel in foreign countries — no one being entrusted with the transaction of their business during their absence — their affairs may not be neglected; for certainly no one would take charge of them if he did not have any right of action to recover what he had expended for that purpose. But just as he who has transacted the business of another advantageously places the owner of the same under an obligation; so, on the other hand, he also is bound to render an account of his administration; and in this instance he is alleged to render it in compliance with requirements of the most exact diligence, nor will it be sufficient for him to have employed the same diligence which he is accustomed to make use of in his own business, if someone else who was more prudent could have discharged his duties in a better manner.

(2) Guardians, also, who are liable to an action of guardianship cannot properly be understood to be bound by a contract, for no contract exists between a guardian and a ward; but for the reason that they are evidently not liable on account of criminality, they are considered to be so upon a quasi-contract. In this instance, likewise the actions are reciprocal; for not only is the ward entitled to an action of guardianship against his guardian, but, on the other hand, the guardian has a contrary action of guardianship against the ward, either when he has expended anything for the benefit of the latter, or has become liable for him, or has encumbered his own property to his creditor.

(3) Moreover, where property is held in common by several persons and no partnership exists; for example, where it has been bequeathed or given to them jointly, and one of them is liable to the other in an action for a division of property held in common because he alone has collected the crops from said property, or because his associate alone has incurred necessary expenses for the benefit of the same; he is not, strictly speaking, considered to be bound by a contract, (since no agreement was entered into by them) but as he is not liable for any illegal act, he is considered to be bound by a quasi-contract.

(4) The same principle applies with reference to a party who is liable to his co-heir in an action for partition of the estate.

(5) The heir, also, is not actually liable upon a contract for the payment of legacies (as it cannot properly be said that the legatee has transacted any business with either the heir or the deceased) and still, for the reason that the heir is not liable on account of a criminal act, he is considered to be indebted under a quasi-contract.

(6) Moreover, he to whom another by mistake pays a debt which he does not owe is held to be liable under a quasi-contract, for to such an extent is he not properly to be considered bound under a contract, that if we examine the genuine reason, he may be said, as We stated above, to be liable through the dissolution rather than through the making of a contract, for he who pays money with the intention of discharging a debt appears rather to pay it in order to terminate a contract than to enter into one; nevertheless, the party who receives the money is bound just as if it had been loaned to him for consumption, and therefore is liable in a personal action for recovery.

(7) In some instances, however, where a debt which is not due is paid by mistake there can be no recovery; for, the ancients declared that in every case where the sum claimed in an action was increased by denial, there could be no recovery where money was paid which was not due; as, for example, under the *Lex Aquilia*, or in actions for a legacy.

The ancients, however, intended this principle only to be applicable to such legacies as were expressed in definite terms, and were bequeathed to anyone by condemnation; but one of Our Constitutions has invested all legacies and trusts with a similar character, and has likewise extended this increase to all of them; but this was not done for the benefit of all legatees, but only with regard to such legacies and trusts as have been left to holy churches and other venerated places honored by the spirit of religion or piety, and if these are paid when they are not due they cannot be recovered.

TITLE XXVIII.

THROUGH WHAT PERSONS AN OBLIGATION CAN BE ACQUIRED FOR OUR BENEFIT.

The different kind of obligations which arise from contracts or quasi-contracts having been explained, We must now observe that property can be acquired for your benefit not only through yourselves, but also through those persons who are under your control, for example, through your slaves and children; in such a way, however, that while anything that is acquired through your slaves is entirely yours, whatever is acquired by virtue of an obligation through your children whom you have under your control is divided, according to the rule governing the ownership and usufruct of property as prescribed by Our Constitution; so that the father has the usufruct of whatever property is obtained in any way by an action-at-law, but the ownership of the same is preserved for the son; provided the father brings the action according to the terms of Our New Constitution.

(1) Again, acquisitions are made for you through freemen and the slaves of others whom you possess in good faith; but only in two instances, namely, where they acquire anything by their own exertions, or by means of your property.

(2) Property is also acquired for you in the same way, in these two instances through a slave in whom you have the usufruct or the use.

(3) It is certain that a slave owned in common acquires property for his masters in proportion to their rights of ownership, with this exception, that where by stipulating or by receiving by delivery, expressly for one of them, he acquires for him alone; for example, where he stipulates as follows: "Do you agree to pay my master Titius?" Moreover, if the slave has stipulated by the order of one of his masters, it was established after Our decision that he makes the acquisition only for him who ordered him to do so, as above stated, although formerly this was doubted.

TITLE XXIX.

IN WHAT WAYS AN OBLIGATION IS DISSOLVED.

Every obligation is dissolved by the payment of what is due; or where a party gives one thing instead of another with the creditor's consent. Nor does it make any difference who makes the payment, whether he who owes the debt or another for him; for he is discharged by the payment of another, whether that payment was made with the knowledge of the debtor or whether he was ignorant of it, or even if it was made against his will. Again, if the principal pays, those also who have become sureties for him are likewise discharged; and the same rule applies where, on the other hand, the surety makes payment; for not only is he himself discharged but the principal as well.

(1) An obligation is also extinguished by a release which is a fictitious payment. For if Titius wishes to remit what is due to him

on a verbal obligation this can be done by permitting his debtor to speak as follows: "Do you admit that you have received what I promised you?" and by Titius answering "I do". This acknowledgment can also be made in the Greek language, provided it is expressed as is usually done in Latin. As We have stated, only verbal obligations can be dissolved in this way, but no others; for it seemed consistent with reason that an obligation incurred by words could be dissolved by means of other words. Nevertheless, what is due for some other cause can be turned into a stipulation, and be extinguished by a release, and just as a debt can be legally paid in part, so also can the release of a debt be made in part.

(2) A stipulation has been devised which is ordinarily designated the Aquilian, by means of which obligations of every kind are converted into stipulations and are then discharged by a release. For the Aquilian stipulation effects the novation of all obligations, and was expressed in the following language by Callus Aquilius: "Whatever you are obliged or shall be obliged to give me, or to do for me, for any reason, at the present, or at some future time; and for whatever cause I have, or shall have an action, a petition, or a prosecution against you; and whatever property belonging to me you have, hold, possess, or have possessed, or by means of fraud have brought it about that you no longer possess, and no matter what sum each of these things may be worth, Aulus Agerius has stipulated and Numerius Negidius has bound himself to pay said sum of money". Again, on the other hand, Numerius Negidius asked Aulus Agerius: "Do you acknowledge that you have received all for which I have this day obligated myself by the Aquilian stipulation?" And Aulus Agerius replied: "I have it, and I have entered it as received".

(3) Moreover, an obligation is extinguished by novation; as, for example, if what you owe to Seius is stipulated by him to be paid by Titius; for by the intervention of a new person a new liability arises, and the first one is dissolved by being transferred to the last; so that sometimes, although the last stipulation may be void, still the first one is dissolved by virtue of the novation; for instance, if Titius should stipulate with a ward, without the consent of his guardian, that he shall pay what you owed him, for in this case the property is lost; as the original debtor is discharged, and the subsequent obligation is void. This principle does not apply where anyone stipulates for payment by a slave; for then the original debtor remains liable, just as if no one had made a stipulation afterwards.

But if you make a stipulation with the same person that you did before, novation only takes place where there is something new in the subsequent stipulation; for example, if a condition, or a time for payment, or a surety is either added or omitted. What We have stated with reference to a novation occurring where a condition is added, must be understood in this way, namely; that We declare a novation to have been made if the condition is fulfilled, but, on the other hand, if it fails, the original obligation remains in force. But although it was established among the ancients that a novation occurred when the second obligation was entered upon with the intention of bringing it to pass; still a doubt arose as to when it was to be deemed that this was done with a view to causing a novation; and some authorities introduced certain presumptions in some cases, and others in others; and therefore We have promulgated a Constitution, which expressly sets forth that novation can only take place when it has been expressly stated by the contracting parties that they have come to an agreement with respect to a novation of the original obligation; otherwise the latter shall stand, and the second one shall be added thereto; so that an obligation will arise from each transaction, according to the terms of Our Constitution, which you may ascertain more fully by the perusal of the same.

(4) In addition to this, such obligations as are contracted by consent are dissolved by change of mind; for if Titius and Seius agree that Seius shall have the Tusculan estate for the sum of a hundred *aurei;* and then, before the contract is executed, that is before the price has been paid or the land transferred, it should be agreed between them to withdraw from this purchase and sale they are reciprocally released from liability. This same rule applies to leasing and hiring as well as to all contracts entered into by consent, as has already been stated.