THE DIGEST OR PANDECTS.

BOOK XXX.

TITLE I.

CONCERNING LEGACIES AND TRUSTS.

1. *Ulpianus, On the Edict, Book LXVII.* Legacies are equal in every respect to trusts.

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

It must be remembered that only those can bequeath property in trust who have testamentary capacity.

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

The following words of a testator: "Whoever of the parties above mentioned shall be my heir," or, "If Seius should be my heir," or, "If he should enter upon my estate," any trust subsequently bequeathed will not, for this reason, be conditional.

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

Where a testator is mistaken with reference to the name of a tract of land, and mentions the Cornelian, instead of the Sempronian Estate, the Sempronian Estate will be due. If, however, he should be mistaken with reference to the land itself, it will not be due. For if anyone, intending to bequeath a garment, bequeaths household goods, thinking that clothing is included in the term "household goods," Pomponius states that clothing will not be due; just as if anyone should think that electrun or brass was included in the term gold; or, which is even more absurd, if he thought that silver was included in the word clothing; for the names of things are unchangeable, those of men, however, are subject to alteration.

(1) Where anyone appoints an heir and makes a bequest as follows: "Whoever shall be the heir to my property in Gaul shall be charged with the payment of So-and-So," the legacy is considered to be due from all the heirs, as the property involved belongs to all of them.

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

Where a slave is left to be selected by the legatee, we can make a choice but once.

(1) Labeo says that when a certain article or slave is bequeathed as follows: "Who will be mine when I die shall be given by my heir," and the article or slave is held in common, the whole of it will be due.

Cassius states that Trebatius gave it as his opinion that only the share owned by the testator is due; which is correct.

(2) Where a tract of land owned in common is devised, without mentioning the share belonging to the testator, but where he merely says "mine", it is established that only his share will be due.

6. *Julianus, Digest, Book XXXIII.*

"Let my heir give Stichus, who will be mine when I die." It is evident that the testator rather intended to impose a condition, than merely to point out the slave; for the reason that if this clause was inserted merely for the purpose of designating the slave, it would have been framed as follows: "Stichus who is mine," and not, "Who will be mine". A condition of this kind should, however, be understood to mean only "if he shall be mine," in order that, if he should alienate him altogether, the legacy will be extinguished; but if he should alienate him partially, only that share of the slave will be due which belonged to the testator at the time of his death.

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

A master can reject a legacy bequeathed to his slave.

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

If a testator, after having bequeathed a tract of land, should dispose of a part of the same, it is held that only the remaining portion is due to the party to whom it was left; because even if an addition was made to said land the legatee would profit by the increase.

(1) If the following provision should be inserted in a will: "Let Lucius Titius, my heir, or Mævius, my heir, pay ten *aurei* to Seius," Seius can bring suit against whichever of the heirs he may select, and if he brings an action against one of them, and payment is made by him, the other will be released; just as where two debtors have promised to pay, both will be liable for the entire amount. But what if the legatee should only demand half of the amount from one of the heirs? He would be free to demand the remainder from the other. The same rule will apply where one of the parties has paid his share.

(2) Where a legacy was bequeathed as follows: "I bequeath eight litter-bearers, or a certain sum of money instead of each one, of them, whichever the legatee may desire," the legatee cannot claim a part of his legacy in slaves and the other part in money, because the legacy is left as an alternative; just as if fifty pounds weight of oil, or a certain sum instead of each pound, is bequeathed, for otherwise, a division might be allowed where only a single slave was bequeathed. Nor does it make any difference whether the sum is divided, or whether the entire amount is paid at once. And, in fact, where eight slaves have been bequeathed, or a certain sum of money instead of all of them, the heir cannot, against his will, be compelled to be liable for a portion of the bequest in money, and a portion in slaves.

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

Octavenus states that property in the hands of the enemy can be bequeathed, and the bequest will stand, under the law of *postliminium.*

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

Julianus holds that a choice cannot be made by a son under paternal control, without the consent of his father; nor before he has accepted the estate.

11. *Papinianus, Questions, Book IX.*

Where a legacy has been bequeathed to a son under paternal control, or a slave belonging to another, or an estate is left to him; it must be left in trust to the father or master, and only under these circumstances will the trust have any force or effect, unless it is left to those through whom the benefit of the estate or the bequest will accrue to the said father or master. Again, Julianus, induced by a very good reason, gives it as his opinion that a father, whose son has been appointed an heir, must surrender the estate even to a stranger, after having deducted the portion granted by the Falcidian Law; since he is responsible as the representative of his son, for the reason that the latter cannot be held liable in his own right, and the father cannot be liable as heir, but is considered to have been charged with the trust in the capacity of a parent.

Therefore, if the father was charged to deliver to his son, after his death, what came into his hands through a legacy or an estate bequeathed to his son, and the latter should die during the lifetime of his father, the father can retain this beyond all doubt, as the trust acquires its force from the person of the father.

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

If the same property should be bequeathed to me and to yourself, and on the day when the legacy was due, I should become your heir, Labeo says that I can acquire the property either for the reason that it was left to me, or because I am your heir. Proculus says, that if I should wish to whole of it to belong to me on account of the legacy which was bequeathed to me, I

must demand it on the ground of being heir to the legacy.

(1) Where anyone charges his heir to deliver to me, within three days after his death, certain slaves whom he had at Gades, by a will which he made at Rome just before he died, the legacy will be valid; and the shortness of the time provided will in no way prejudice the legatee.

(2) A rule of the Civil Law provides that, "We can bequeath a legacy to slaves belonging to those to whom we can also make a bequest."

(3) In the matter of legacies, the last instruments drawn up are valid; because, where previously executed, they can be changed either with reference to the day or the condition, or they can be entirely annulled. Where a legacy left under one condition is taken away by another, the last provision, by which it is taken away, must be considered. Sometimes, however, not the last, but the former disposition of the property is valid, for if I should say: "What I have left herein to Titius I neither give nor bequeath to him," what has been left to him by the will will not be valid; for it is held that the same clause by which legacies granted at a certain time are to be deferred has reference also to the provisions subsequently made. Therefore the desire of the testator establishes the validity of what he inserted in his will.

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

Where a slave, insufficiently described, was left to you, and the heir delivered Stichus to your slave, Neratius was of the opinion that if the delivery was made with the consent of the master, or he ratified the act, the heir will be released, just as if Stichus himself had been bequeathed.

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

Where it was inserted in a will that, "If I should make a bequest twice to a certain individual, my heir shall only pay him one legacy;" or "One legacy only shall be due;" and he bequeaths to the said party two separate sums of money, or two separate tracts of land, will both of them be due? Aristo says that it appears but one legacy will be due, for whatever is taken away is not held to have been given, according to the opinion of Celsus and Marcellus; which is correct.

(1) Papinianus, however, says, in the Nineteenth Book of Questions, that if a testator, after having left several legacies to the same person, asserts that he expects only one of them to be paid, and does this before completing his will, the other legacies should be considered as annulled by operation of law. Which one, however, should be considered to have been taken away, for this is not apparent? And he says it can be held that the smallest one should be paid.

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

Where a person intended to bequeath the fourth part of his property, he wrote the half. Proculus very properly said that the fourth could have been maintained to have been bequeathed, for the reason that it is contained in the half. The same rule will apply if the testator intended to bequeath fifty *aurei,* and wrote a hundred, for fifty will be due. Where, however, he intended to bequeath more, and wrote less, the bequest will be valid.

(1) Where anyone bequeaths a sum of money to his daughters, having in mind a posthumous daughter, and she should not be born, the entire sum will be due to the survivor.

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

Where the same property is bequeathed to two persons conjointly, and one of them is not in existence, I think that it is true that only a half is due to the survivor.

(1) Where an heir is charged with the payment of a legacy together with another who is not his co-heir, he who was appointed owes the entire legacy; for if the testator expressly charged

two heirs with the payment, and one of them does not enter upon the estate, the other who did would owe the whole amount, if the share of him who refused the estate should come into the hands of the heir who accepted it.

(2) Where a legacy is left to Titius and the posthumous child of the testator, and no posthumous child is born; Titius can claim the entire amount. If, however, the testator intended to bequeath equal shares to Titius and his own posthumous children, or even if he had expressed himself to this effect, the entire legacy will be due to Titius, if no posthumous child should be born.

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

Where a person made a bequest to his daughters and mentioned a posthumous daughter in some part of his will, he is held to have had the posthumous daughter in his mind at the time he made the bequest.

(1) Where anyone makes a bequest as follows: "If a daughter should be born to me, let my heir give her a hundred *aurei,"* and several daughters should be born, it is held that each one of them is entitled to the same bequest, which must be understood in this way, unless it is clear that the intention of the testator was otherwise.

(2) Where the bequest is made to one of several heirs, it is evident that the judge must award it as due in an action brought for partition; and it is established that even if the party should reject the estate, he will be entitled to recover a legacy of this kind.

18. *Julianus, Digest, Book XXXVII.*

He can, indeed, claim the entire legacy, even though he would have been himself improperly charged if he had not refused the estate.

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

Papinianus holds in the Book of Questions that where legacies have been left in such a way as to be of no effect, they can be confirmed by repetition; that is to say, by the following clause subsequently inserted in a codicil: "Let my heir pay him this, in addition;" and where something different is afterwards stated: "Let my heir be charged with the payment of the money which I have bequeathed, on the days which I have fixed, and not at the end of one, two, and three years;" for the testator did not do this for the purpose of confirming the bequests which were void, but merely to prolong the time of payment for those which were valid.

(1) The same authority states in the same place, with reference to a substitute appointed for a child under the age of puberty, that if the said child should be improperly charged with the payment of a legacy, his substitute must pay it, if anything more has been left in his charge, and the heir should die without becoming the successor of his father.

(2) Where property is bequeathed to several persons, and the shares are not designated, all will inherit equally.

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

Where a testator has two slaves, and bequeaths one of them in such a way that it cannot be ascertained which one he bequeathed, the legatee can make his choice.

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

If a flock of sheep was left, any increase which subsequently takes place will belong to the legatee.

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

Where a drove of cattle was bequeathed, and some of them die during the life of the testator,

and others are substituted in their stead, the drove is held to be the same. If the drove should be diminished to such an extent that only a single ox survives, it can be claimed, even though the drove, as such, has ceased to exist; just as in the case where a house which has been devised is burned, the land on which it stood can be claimed.

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

Where a person bequeaths a part of his property, as is the custom at present, it can be surrendered without the crops, unless the heir is in default.

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

It is established that what is not yet in existence can be bequeathed, for example: "Any child that the female slave, So-and-So, may bring forth;" or where a bequest is made as follows: "Let any wine which Way be produced on my land, or any increase of the flocks, be given by my heir."

(1) If I have only an usufruct, and bequeath it, the bequest will be Void, unless I should afterwards acquire the ownership of the property.

(2) Where anyone, after having made a will by which the Titian Estate was bequeathed, adds thereto another tract of land, which he intends to include with the same estate, the addition can be demanded by the legatee. The same rule prevails in the case of alluvium, especially if, when the testator executed his will, he made the addition from another field which belonged to him.

(3) It should be considered what the rule would be if, after having made a will, he took something from the Titian Estate, and added it to land belonging to another; would the legatee be entitled to claim the part which was deducted, just as if it had ceased to form part of the Titian Estate, since it is by our intention, and not by the nature of the property, that the disposition of a tract of land or a house is determined. The better opinion is that what is joined to another tract of land should be held to have been deducted.

(4) If I should bequeath a ship, and state expressly that it was mine, and that I have entirely rebuilt it and only the original keel remains, it can, nevertheless, be properly claimed by the legatee.

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

A son who has been appointed an heir can be absolutely charged with a legacy for the benefit of his father, nor does it make any difference whether or not he was under the control of his father at the time that the legacy vested. Therefore, if he accepts the estate by the order of his father, the legacy will be included in the Falcidian share to which he is legally entitled.

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

No more of a legacy is considered to belong to anyone than what remains after a deduction has been made of property given in order to comply with a condition.

(1) Where an heir is directed to give a certain article by way of legacy, and does not do so, because he was not obliged to deliver it to the legatee in the place where it was; and it should afterwards be destroyed without the fraud or negligence of the heir, the loss must be borne by the legatee.

(2) Where, however, a part of his estate is bequeathed, it is doubtful whether a portion of the property itself, or the estimated value of the same should be given. Sabinus and Cassius think that the value should be paid; Proculus and Nerva hold that a part of the property bequeathed should be delivered. It is necessary, however, to come to the relief of the heir, so that he himself may determine whether he prefers to give a portion of the property itself, or to pay its estimated value. But in matters of this kind, the heir will be obliged to give a portion of the

property which can be divided without any loss, but if it is naturally incapable of division, or if the division cannot be effected without loss, the estimated value of the property must, by all means, be paid by the heir.

27. *Paulus, On Plautius, Book IX.*

Moreover, the heir can give to the legatee the share which has been left him by delivering to him a certain part of the property, or one article alone, the value of which the legatee shall agree to accept, or the judge shall determine; in order that the legatee may not be forced to demand a share of all the property.

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

If I bequeath to my creditor what I owe him, I being protected against the debt by an exception, the legacy will be valid; for the reason that a release of the exception is held to have been made. This corresponds to what Aristo says, namely, that if my debtor bequeaths to me what is due from him to me in a prætorian action, the legacy will be valid; for the reason that a civil action is granted me instead of an honorary one.

(1) Marcellus holds, in the Twenty-eighth Book, that if you should bequeath to me what you owe me under a stipulation, the legacy will be valid, and the bequest will not be diminished on account of the Falcidian Law.

29. *Ulpianus, On the Lex Julia et Papia, Book VI.*

If, however, the claim is not rendered more advantageous to the creditor, either by modification, time, condition, or place, the bequest is void.

30. *Ulpianus, On Sabinus, Book XIX.*

A provision as follows: "Let my heir pay the money which I have bequeathed, and for the payment of which I have not set a time, at the end of one, two, and three years," this will not refer to all articles which may be bequeathed, but only to such as can be weighed, counted, or measured.

(1) And it only applies to those legacies for which time of payment has not been fixed; hence if the legacy was absolutely bequeathed, its time of payment will be prolonged by this addition.

(2) What if a hundred *aurei* in cash should be bequeathed to me, shall payment be made on stated days, or all at once? Servius and Labeo say that the legacy is due at once, in cash. Therefore, although this addition may be superfluous, so far as the force and effect of the legacy is concerned, still, it will apply in such a way as to make the legacy due immediately.

(3) But if the legacy should be left payable by the year or by the month, this provision will not apply, because this legacy has a beginning and an end.

(4) Where, however, a legacy is bequeathed under a condition, it can be said that the payment of the same at intervals will not be applicable, because the condition is considered uncertain.
(5) In accordance with this, Trebatius thinks that if a bequest is made to a person to be paid when he is twenty years of age, the provision above-mentioned, as commonly interpreted, does not apply.

(6) Again, this provision is not applicable where money is left which is in the testator's chest, or wine which is in his warehouse; because we have stated that it is not operative where any certain kind of property is bequeathed.

(7) Gallus Aquilius, Ofilius, and Trebatius have given it as their opinion that this rule not only applies to legacies previously made, but also to all those mentioned in the will, which is true.

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

This provision has reference also to all legacies which are afterwards confirmed by codicils.

32. *Ulpianus, On Sabinus, Book XX.*

Where anyone bequeaths money to be paid by his minor son, who is appointed his heir, "When he arrives at puberty," and he also charges the heir whom he substitutes with the payment of the same, and the son dies before reaching puberty, the substituted heir will not owe the legacy. Sextus and Pomponius, however, do not think that this is correct, where the repetition of the legacy has been stated as follows, for instance: "Let my heir pay upon the same day the legacy with which I have charged my son, and which I have ordered him to pay if he shall become my heir."

If, however, the repetition was made as follows, "Let my heir pay the legacies, with the payment of which I have charged my son;" the legacies appear to have been repeated unconditionally, and the designation of them has only been made by the testator. Therefore, this very legacy with reference to which inquiry is made will be due me.

(1) Where anyone has several slaves named Stichus, and bequeaths Stichus, and it is not evident which Stichus he meant, the heir must deliver the slave chosen by the legatee.

(2) If anything should be left to a portion of the people of a town, which is for the ornament or benefit of the entire community, it undoubtedly will be due.

33. *Paulus, Rules, Book III.*

Where the same property is left to several persons, or it is left to all conjointly; and one brings suit to recover it, and another brings an action for the same purpose under the will, he who founds his action on the will cannot recover any more than his share of the legacy.

If it should be left to each person separately, and it is perfectly evident that the testator intended, by depriving the first legatee of the bequest, to confer it upon the second; it is established that the last legatee will be entitled to all of it. If, however, this does not plainly appear, all the legatees will be entitled to equal shares of the bequest; unless, indeed, the testator himself manifestly indicated by his language that he intended one of them to receive the entire property, for then the value of the article should be given to one of them, and the article itself to the other. And he who first joined issue with reference to the legacy, or the trust, shall have the right to choose which he will prefer, the property itself, or the value of the same; still, after having chosen one he will not be permitted to abandon it, and select the other.

34. *Ulpianus, On Sabinus, Book XXI.*

It is evident that where the testator intended to transfer the legacy to another party, it will not be due to the first one named, even if the last mentioned is not capable of receiving it. If, however, the legatees were joint, or, being originally several, have afterwards been united, all of them together are classed as one and the same person.

(1) Where the same property is bequeathed several times by the game will, it cannot be claimed more than once; and it is sufficient if the property itself, or the value of the same, is acquired.

(2) Where the same property is bequeathed to me by the wills of two persons, I can demand it twice, and obtain the property by virtue of one of the wills, and the estimated value of the same by virtue of the other.

(3) Where no certain article is bequeathed, but a specified sum is mentioned several times in the same will, the Divine Pius stated in a Rescript that the heir must pay the said sum several times, if it is established by perfectly conclusive evidence that the testator intended to multiply the legacy.

The same rule has also been laid down by him with reference to a trust. The reason of this is evident, for as the identical thing cannot be delivered more than once, the same sum can be multiplied, if this should be the intention of the testator.

(4) This, however, ought only to be understood to be applicable where a certain amount of money should be left several times by the testator; as, for instance, a hundred *aurei,* which he has in his chest; for then I believe that it should be compared to the bequest of a tract of land.

(5) Where, however, a certain weight of gold or of silver has been left, Papinianus is of the opinion that it should rather be compared to the bequest of a sum of money, as no certain kind of property appears to have been bequeathed.

(6) Hence, if anything else which can be weighed, counted or measured has been left several times, it must be said that the same rule will apply; that is to say, it will be due several times, if such was the intention of the testator.

(7) If, however, I should purchase the property bequeathed to me, an action under the will will lie in my favor for the amount of the price which I have paid.

(8) And, with much more reason can this be said, where the same property is bequeathed to me by the wills of two different persons, but where one asked me to surrender the property itself to another, or something else in its stead; or where it was bequeathed under the condition of giving something in place of it; for I am considered to have been deprived of the property to the amount which I am compelled to Pay in order to obtain it.

(9) Where the property is bequeathed to several persons conjointly, it is settled that it is divided into shares from the beginning. The legatees have not only the right to a division in proportion to the number of persons to whom the legacy was left, but also those who are not entitled to it; as, for instance, where a bequest was made to Titius and to his slave, without granting the latter his freedom.

(10) Where a testator, by a will made while his son is under the age of puberty, bequeaths the same property to another which he had already left to me by will, Julianus says that the parties do not take the property concurrently. Therefore, in the meantime, he to whom the property has been bequeathed by the will of the father will be entitled to his share.

(11) Where the same property is bequeathed to two persons, one of whom is appointed heir, if the latter is charged with the payment of part of the legacy to himself, it will be held to be, to this extent, invalid ; and therefore, the share with which he was charged in his own favor will belong to his co-legatees.

(12) Hence, it must be said that where there are two heirs, one of whom is appointed for one-twelfth, and the other for eleven-twelfths of the estate, and a tract of land is bequeathed to them; one of the heirs will be entitled to eleven-twelfths of the land, and his co-heir to one-twelfth of the same.

(13) It is clear that if one of the legatees becomes the heir of the party charged with the payment of the legacy, this will render his coheir none the less entitled to half of it, for he will retain his share of the legacy in the same proportion.

(14) If a bequest is made to Titius in the following terms: "Let him have the Seian Estate, or the usufruct of the same for himself," there are two legacies, and it is at the option of the legatee whether or not he will only claim the usufruct.

(15) Where anyone makes a bequest as follows: "I do give and bequeath to Titius a certain tract of land, which he can have for his share," it seems to me that it can be said that he will be entitled to half of it; for it is held that by the mention of the land he did not refer to the entire tract, but to a part of the same, for a part is also properly designated a tract.

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

Where an heir is charged with the delivery of a slave belonging to another, and the slave is manumitted by his master, nothing is due on account of the legacy.

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

"I bequeath to Titia all my slaves who are weavers, except those whom I have bequeathed to another by this will. I bequeath to Plotia all my slaves, born in my house, except those whom I have bequeathed to another." As certain slaves born in his house were also weavers, Labeo says that since it cannot be ascertained which slaves who were weavers the testator did not bequeath to Titia unless it is known which ones he bequeathed to Plotia, and as this can not be ascertained, those must not be excepted from either legacy who belong to both classes, and therefore they are common to both legatees; for this is the rule of law where nothing is expressly excepted from either of two legacies.

(1) Where, however, a legacy was bequeathed in the following terms: "All my slaves, who are weavers, except those born under my roof," and again, "All the slaves born under my roof except the weavers," those who were both born under his roof and were weavers, will not be included in either legacy.

(2) It makes no difference whether a legacy is bequeathed "To Titius and Mævius," or "To Titius together with Mævius;" for in both these instances the legacy is held to have been bequeathed conjointly.

(3) If an heir should deliver Stichus to one of two parties to whom he was charged to deliver him, and, before proceedings were instituted against him by the other legatee, Stichus should die, the heir will not be liable, because it is understood that no blame attached to him.

37. *Ulpianus, On Sabinus, Book XXL*

Where property has been bequeathed in general terms, as, for example, a slave, Gaius Cassius says that care should be taken that neither the best nor the worst slave should be received by the legatee. This opinion is confirmed by a Rescript of our Emperor and the Divine Severus, who decreed that where a slave was bequeathed, the one who transacted the business of his master could not be selected.

(1) Where a testator had in mind a certain tract of land, and it is not apparent what his intention was with reference to it, the heir shall have the choice to give the tract which he prefers; or if the intention of the testator is clear, the tract itself can be claimed by the legatee. Again, if he bequeathed a piece of silver plate, and it is not clear which one he meant, the heir will also have the choice to give the one that he wishes.

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

A legatee cannot accept a part of his legacy and reject the remainder; his heirs, however, can do so, so that one of them can accept his share, and another reject his own.

(1) If we should conclude not to accept a legacy which was left to Us, the state of affairs will be the same as if the legacy had not been bequeathed; and therefore we say that if a tract of land is left to me, which is charged with servitudes in favor of my property, the servitudes will not be confused.

Moreover, if a slave is bequeathed to a person on account of whom the legatee can institute proceedings for theft, the right of action will remain unimpaired.

39. *Ulpianus, On Sabinus, Book XXI.*

Where a slave who has been bequeathed is in flight, or is absent in a distant country, the heir must exert himself to recover the property and deliver it. This also was stated by Julianus, for Africanus states in the Twentieth of his Letters on Julianus that, if the heir is compelled to incur any expense in this matter, he thinks that he should do so; and I hold that his opinion

should be adopted.

(1) The profits of the property should also be deducted in making the claim for the legacy, not only those, however, which the heir may have collected, but also such as the legatee could have collected; and this rule also applies not only to the labor of slaves, but also to the work of animals, as well as transportation by vessels. What has been stated with reference to profits must also be understood to apply to the rents of houses in cities.

With respect to the rate of interest on money, the custom of the country must be followed, and therefore the court must make an estimate and fix the rate of interest.

Moreover, if the heir is in default, he will also be liable for the destruction of the property, and its value must be paid; just as this is done in a stipulation where the property is lost after the party is in default. This rule also applies to the offspring of female slaves. Where a slave is bequeathed, the heir will be bound to surrender everything which he has acquired by means of said slave, whether it be an estate, a legacy, or anything else.

(2) If Titius should purchase property from me, and bequeath it to me before I deliver it to him, and then I deliver it and receive the price for the same; he is considered at first sight to have bequeathed it to me, and hence the legacy is void. But, as I am released from liability to an action on purchase, I can bring an action to recover the property which I delivered on the ground of its being a legacy. Still, if the price has not yet been paid to me, Julianus says that I am entitled to an action on sale to recover the price, and that, in addition, a suit under the will to recover the property which I sold and delivered will lie. He also adds that if the price had been paid to me, but I had not yet delivered the property, I would be free from liability on account of the right of action to which I would be entitled by virtue of the will.

(3) Julianus likewise stated that if the testator should devise to me a tract of land which he had purchased from someone else, the heir would be compelled to transfer to me the right of action to which he was entitled on account of the purchase; provided the property had not yet been delivered either to the deceased, or to his heir.

(4) Where anyone makes a bequest to another of the right to quarry stone on his premises, the question arises whether this legacy also passes to his heir. Marcellus denies that it does pass to his heir, unless the name of the latter was mentioned in the bequest.

(5) The heir is compelled to pay any taxes or tributes assessed on the land which was bequeathed, for sun-dials or for sewers, or for the right to conduct water.

(6) I know that the following case has been discussed. A certain person, who had two tracts of land bearing the same name, bequeathed the Cornelian Estate, and of the two thus designated one was of greater value than the other. The heir claimed that the least valuable one was bequeathed, and the legatee asserted that it was the one of greater value which was intended. It is generally understood that the one of lesser value was bequeathed, if the legatee should not be able to prove that the more valuable one was meant by the testator.

(7) It is established that even property belonging to another can be bequeathed, provided it can be obtained, even if its acquirement should be difficult.

(8) If, however, anyone should bequeath the gardens of Sallust which belonged to Augustus, or the Alban Estate which is set apart for the use of the Imperial household, he would be considered insane for having made such a bequest in his will.

(9) It is also established that the Campus Martius, or the Roman Forum, or any sacred building cannot be devised.

(10) If, however, lands belonging to the Emperor, and forming part of the Imperial domain or under the superintendence of the Imperial Steward, are devised, their appraised value will not have to be paid by the heir, as any commercial disposal of them cannot take place, except by

order of the Emperor, as they are not to be sold.

40. *The Same, Trusts, Book II.*

If, however, property belonging to another which the legatee has not control of in the way of trade, and which he has no right to possess, is left subject to a trust, I think that its estimated value will be due.

41. *The Same, On Sabinus, Book XXI.*

Now let us examine some other things in addition to what has been mentioned, and in fact all corporeal property, as well as rights and servitudes can be bequeathed.

(1) Property, however, which is joined to buildings cannot be disposed of by will, because the Senate, during the Consulship of Aviola and Pansa, decreed that this could not be done.

(2) Still, the question may be raised where pieces of marble or columns have been separated from buildings, whether the legacy does not become valid. And, indeed, if it was not valid from the beginning, it cannot become so subsequently, just as where property of mine was bequeathed to me and alienated after the will had been made, because the legacy had no force or effect in the beginning; but if it was bequeathed under a condition, the legacy can become valid, if, at the time when the condition was fulfilled, the property does not belong to me, or is no longer joined to the building; in accordance with the opinion of those who hold that I can purchase my own property under A condition, and that I can also promise it and bequeath it conditionally. Hence, the rule of Cato stands in the way of an absolute legacy left under such circumstances, but is not opposed to a conditional one; because it does not have reference to conditional bequests of this kind.

(3) It may also be asked whether the legacy will be valid where a party has two houses and devises one of them, and also leaves him to whom he devised the house something which was joined to the other. This question arises from the fact that we are permitted by the Decree Of the Senate and the Imperial Constitutions to transfer to one house property from another of which we are to remain in possession, that is to say, which is not to be sold. This Our Emperor and the Divine Severus stated in a Rescript. Therefore cannot I devise property attached to one house to the person to whom I have devised the other? This will be denied, for the reason that the party to whom the property is bequeathed will not be the future possessor of the same.

(4) Where a testator leaves the Sempronian House to two persons, and bequeaths to one of them the marble which is in it, for the erection of the Seian House, which he devised to him, it may not unreasonably be asked whether such a bequest will be valid, for the reason that the legatee is the owner of both houses.

What would be the case if a person should devise a house, after excepting the marble which he wished the heir to have for the purpose of building another house which still remained a part of the estate. The better opinion may be said to be that the exception will be void in either instance, but the legacy will be valid, and the appraised value of the property must be paid.

(5) If, however, anyone bequeaths a legacy of this kind for the purpose of constructing some public work, I think that it will be valid; and Papinianus, in the Eleventh Book of Opinions, relates that our Emperor and the Divine Severus decided that those who promised to erect some public work can remove materials from their city and country houses, and use them with that design, because they do not remove them for commercial purposes.

Let us, however, consider whether property can only be left to a city situated in the same territory, or whether it can be transferred elsewhere, to be used in some other city. I think that this should not be allowed, although it has been settled that materials can be taken from a house which a man owns and transported to another belonging to him in a different town.

(6) This Decree of the Senate has reference not only to Rome, but also to other cities.

(7) There is also a Rescript of the Divine Brothers extant which was issued in answer to a petition of Proclianus and Epitynchanus, which requested permission for the removal of property from their houses that they desired to sell for the purpose of discharging a public debt, and in which the right to sell said property was denied them.

(8) This Decree of the Senate applies to dwellings, as well as to baths and every other kind of buildings, such as porticoes, drinking houses, and restaurants.

(9) It is also forbidden by this decree to bequeath property which the legatee cannot deliver without detaching it from a building; that is to say, blocks of marble, or columns. The Senate decided that this also applied to tiles, to beams, and to doors, as well as to libraries attached to walls.

(10) If, however, the articles consist of lattices, or awnings, it can be bequeathed, but water mains and reservoirs are not included.

(11) Hydraulic machines, however, and pipes through which the water issues can be bequeathed, and especially if they are merely placed upon the real property.

(12) What then must be said with reference to statues? Where they are fastened to the walls it will not be lawful to remove them, but if they are separate, some doubt exists. The spirit of the Decree of the Senate must, however, be taken into consideration, and if the statues were placed in the house to remain there always, and as a portion of the same, they cannot be removed.

(13) Hence, it must be said that where pictures are attached to the walls, or small ornaments inserted into the latter, they cannot be bequeathed.

(14) Where, however, the testator had prepared certain ornaments for the purpose of removing them to another house, and bequeathed them, a doubt may arise as to whether the bequest is valid; and I think that it is.

(15) But when the testator fastens to his house the objects which he bequeathed, the legacy will be extinguished,

42. *The Same, Trusts, Book II.*

Whether the legatee was aware of this fact or not.

43. *The Same, On Sabinus, Book XXI.*

The Senate, therefore, does not permit anything which is attached to a house to be separately bequeathed. But if any of these objects did not form part of the house at the time of the death of the testator, the heir must pay their appraised value. If he should detach them for the purpose of paying a legacy, he will be liable to the penalties prescribed, even though he removed them, not for the purpose of selling them, but in order to discharge his obligation.

(1) Marcellus also says that if a husband builds a summer-house in the garden of his wife, which he received by way of dowry, he can remove the same if he can make use of it himself, without, however, causing his wife any loss; and that the Decree of the Senate will offer no obstacle to his doing so. Therefore, if no injury is suffered by his wife, through the removal of the house, it must be held that he can dispose of it by will, since he can remove it.

(2) The bequest of a legacy can be made dependent upon the will of a third party, but not upon that of an heir.

(3) Where one person has ransomed another from the enemy, he can bequeath him to himself; and a legacy of this kind will cause his release from the obligation of the pledge which the party who ransomed him possessed.

44. *The Same, On Sabine, Book XXII.*

A father can bequeath a slave belonging to his son, and who forms part of the *castrense peculium* of the latter, and if the son should die during the lifetime of his father, and his *peculium* remain in the hands of his father, the legacy will stand; for as the son did not avail himself of his right, the father is held by retroaction to have the ownership of the slave who formed part of the *peculium.*

(1) If anyone should bequeath property belonging to another which had already been bequeathed to him without his knowledge, and afterwards should learn of the legacy and wish to acquire it, the bequest will be valid; for the reason that where the legatee does not reject a bequest, it is held to have vested in him from the time when the estate of the testator was entered upon. If, however, he should reject it, the property is held to belong to the heir from the date of the rejection.

(2) Where anyone bequeaths drinking cups, and they have been melted down, or *vice versa*; and also where wool is bequeathed and clothing has been made out of it; Julianus says, in the Thirty-second Book of the Digest, that the legacy of all the above-mentioned articles is valid, and that whatever remains of them is due. I think that this opinion is correct, provided the testator did not change his mind.

(3) If, however, he should bequeath a silver dish, and it is melted down, and made into a cup, the cup will be due; provided the intention of the testator remains the same.

(4) If a house is built upon land which was devised, it will be due to the devisee, unless the testator changes his will.

(5) A party who bequeaths a note bequeaths the claim and not merely the material on which the writing appears. This is proved by a sale, for when a note is sold, the debt by which it is evidenced is also considered to be sold.

(6) However, even though a claim is bequeathed, what is due must be understood in the most favorable sense, so that the rights of action against the debtor may be assigned.

(7) Hence, where a slave is both bequeathed and directed to be free, in the meantime the legacy alone can take effect; for instance, suppose the grant of freedom was made for the purpose of defrauding a creditor, or if the slave is one who had already been sold into perpetual servitude, the rule will apply just as where a slave is given in pledge.

(8) Where a testator bequeaths a slave who is to have his freedom under certain conditions, it will be better for the heir to furnish the slave himself, rather than to pay his appraised value, for he must pay his true value. If, however, he should deliver the slave himself, and the condition should be fulfilled, he will sustain no injury, for his appraised value cannot be claimed where a free man is concerned.

(9) Where a testator who owns two tracts of land devises one of them to me, and the other to Titius, the devisee will not owe me his right to enter upon the estate, but the heir will be compelled to purchase this right and assign it to me.

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

If I should bequeath to you certain female slaves to be delivered by the substitute of a minor heir, and you purchase said slaves from the said heir, and alienate them before you know that they have been bequeathed to you, Neratius, Aristo, and Ofilius hold that the legacy will be valid.

(1) Where an heir is charged in general terms with the delivery of a slave, he is not obliged to warrant that he is sound, but he should warrant him not to be liable for theft or damages; because he should

provide a slave such as the legatee may be permitted to retain. The health of a slave, however, has nothing to do with the title to him, but the rule is applicable where a slave has committed a theft or some damage for which he is responsible, in order to prevent his master from retaining him; just as a tract of land may happen to be liable for debts so that its owner cannot hold it.

(2) Where, however, a certain slave is bequeathed, he should be delivered such as he is.

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

What has been stated with reference to a legacy also applies to a person who has promised to furnish either Stichus, or some other slave.

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

Where property is bequeathed which belonged to the testator, and the heir has possession of it, he ought not to delay, but should deliver it at once. If, however, the property is elsewhere than where it is demanded, in the first place it must be held that it shall be delivered where it was bequeathed, unless the testator wished otherwise; for if this was the case, it should be delivered in the place where the testator intended this should be done, or in that which it is probable he had in mind.

Julianus gave this opinion not only with reference to property owned by the testator, but where bequests are made of articles belonging to others. If, however, the property has been left in one place and fraudulently transferred by the heir to another, unless it is delivered where the demand is made, the heir will be condemned on account of his bad faith; but where there was no bad faith, the property shall be delivered in the place to which it was transferred.

(1) Where a legacy of articles which can be weighed, counted, or measured is demanded, and a specified quantity is bequeathed (as, for example, grain from a certain granary, or wine from a designated warehouse), the article must be delivered where it was left, unless the intention of the testator was otherwise. But, if the bequest was not of a certain kind of property, it must be delivered where the demand is made.

(2) Therefore, if Stichus should be bequeathed, and through the default of the heir should not appear, the latter must pay his appraised value; but where he was not at all to blame, the heir should provide for his restitution, and will not be compelled to pay his value. But if the slave of another who had been bequeathed takes to flight without the fault of the heir, the same rule will apply; for the heir can become liable for negligence with reference to the slave of another. The heir must, however, furnish security that if the slave should be caught, he himself, or his value will be delivered. This also applies to a slave captured by the enemy.

(3) But if Stichus or Pamphilus should be bequeathed, and one of them takes to flight, or is captured by the enemy, it will be held that if present, the slave must be delivered, or if absent, his appraised value must be paid. The choice of these two things is granted to the heir only when he is not guilty of delay in delivering him to the legatee. For this reason it is established that if one of the two slaves should die, the other must, by all means, be delivered, and perhaps also the price of the dead slave may be payable. Where, however, both slaves have taken to flight, security is not required of the heir, unless both of them come into his power; but where only one of them does, he must deliver either the slave himself whom he has recovered, or pay the appraised value of the one who is absent.

(4) The same rule applies where property belonging to another or to the estate is destroyed, without the fault of the heir, or it is not produced; for he will be obliged to do nothing more than give security. If, however, the property was destroyed through the fault of the heir, judgment must be rendered against him without delay.

(5) But let us consider in what way the neglect of the heir may be established; must that which resembles fraud be merely taken into account, or that also which is but slight negligence, or

must exact diligence be required from the heir? The latter I think to be the most correct opinion.

(6) Moreover, the same rule applies where land has been swallowed up by an earthquake, and Labeo says that its appraised value will not be due. This opinion is correct, if the catastrophe did not happen after the default of the heir; for if the legatee had received it, he might have sold the land.

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

Where the slave of the heir has misappropriated the property bequeathed, and sold it without the knowledge of his master, Atilicinus thinks that an action *in factum* should be granted the legatee, so that the master may be compelled to surrender his slave in satisfaction for the damage, or pay out of the *peculium* of the latter what he received by the sale of the property.

(1) Where one of the heirs killed a slave, it does not seem to me that his co-heir should be held liable in any respect, as it was not his fault that the act was committed, and the property is no longer in existence.

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

Where property is bequeathed to anyone when he attains the age of fourteen years, according to the rule in common use, the legatee must have fully completed his fourteenth year; and this Marcellus states was decreed by the Emperor.

(1) Therefore, where property is left to a legatee when he arrives at his fourteenth year, payable in three different instalments in one, two, and three years, and he has reached his seventeenth year at the time of the testator's death, the legacy should all be paid at once. Hence, if the legatee has attained his fifteenth year, we hold that the

legacy will be due after the lapse of two years; if he has reached his sixteenth year, it will be due a year afterwards; if some months are lacking before he reaches his seventeenth year, the legacy will be due after those months have elapsed.

This, however, will be the case if the testator thought that the minor was fourteen years of age when he made the bequest, when in fact he was more than that, and if he was aware of it, we must calculate that the payment of the legacy must be made three years after the date of the will.

(2) Again, this legacy is both conditional and dependent upon a certain time. It is conditional until the legatee has passed his fourteenth year, and afterwards it is dependent upon time.

(3) Therefore, if the legatee should die before attaining his fourteenth year, nothing passes to his heir. It is certain that if he dies subsequently, the property will pass to his heir. But if at the time that the will was made the son should be under fourteen years of age, I think that the periods of one, two, and three years, fixed for the payment, are to be computed from the time when the legatee reached the age of fourteen years, unless it is clearly proved that the intention of the testator was otherwise.

(4) If I should bequeath to Titius the sum of ten *aurei,* which I owe to someone else, and request him to pay it to my creditor, the trust is not valid so far as the creditor is personally concerned, because it is of no benefit to him; still, my heir can bring an action against the legatee, on the ground that it is to his interest for my creditor to be paid to prevent him from bringing suit. Therefore the legacy will be valid.

(5) Where a testator owes me ten *aurei* for which he gave a surety, a demand for the discharge of the trust cannot only be made by the heir, but also by the surety; for it is to the interest of the latter that I should be paid, rather than he should be sued, and then bring an action on mandate. It makes no difference whether he is solvent or not.

(6) Julianus asks, in the Thirty-ninth Book of the Digest, if a surety bequeaths to the creditor what he owes him, whether the legacy will be valid. He says that this in no way benefits the creditor, but that the debtor will be entitled to an action arising from the will, for it is to his interest to be discharged from liability, although he cannot be sued by the heir of the surety.

(7) But if the same surety makes a bequest to Titius, and charges him to pay his creditor, both the debtor and the heir of the surety fan bring an action against Titius, by virtue of the trust, because it is to the interest of both of them that the trust should be discharged.

(8) It should also be remembered that a party who is charged merely with the sale of a tract of land to someone cannot be required to give it to him, but only to sell it for a reasonable price.

(9) Where, however, the heir was charged to sell the property for a certain price, he is required to sell it for that price.

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

Where a slave belongs to several masters, and a legacy is left to him, he will acquire for each master a share of the legacy in proportion to his ownership of him.

(1) If a judge having jurisdiction of the settlement of an estate should decide that the heir did not conduct the case properly, or did not conduct it seriously, this will not prejudice the legatees to any extent. But what if the judge should render an unjust decision, and the heir should not appear? Any injury done to him will not prejudice the legatees, as Sabinus holds. Let us, however, consider if the judge should decide in favor of the substitute, whether he will be liable to the legatees, and, as this decision is just with reference to the substitute himself, can it not be said that he is liable to the legatees, for he cannot be so dishonorable as to allege that the judge decided in his favor through partiality. Hence the answer would be that he will be liable to both the legatees and the creditors.

(2) Where an heir enters upon an estate before slaves of their murdered master have been put to the question, or if he should not avenge the death of the testator, the claims of the legatees can be presented to the Treasury. But what if the Treasury should not accept the property? The burden of paying the legatees will then necessarily fall back upon the heir. If, however, the heir fraudulently presented an accuser of himself, in order that the estate might be adjudged to him, and be free from all claims, or if he did not defend himself as he should have done, he will not be released from liability, any more than a party who litigates collusively with reference to an estate.

(3) Where a certain number of coins is bequeathed, and it is not apparent what their denomination is, before anything else is done, the custom of the testator himself, and afterwards that of the neighborhood must be ascertained, in order to learn what he intended. And not only the intention of the testator, but also the rank of the legatee, or the affection with which he was regarded, and his wants must be considered; and the disposition of other sums by the same will, which either precede or follow the above-mentioned bequest, should also be taken into account.

51. *Papinianus, Questions, Book IV.*

If, however, the testator should bequeath certain specified coins, as, for instance, such as he has in his chest, or a certain piece of plate, it is not so much that a sum of money, as that the very coins themselves, or the articles are bequeathed, for these cannot be changed, and they should be appraised, just as if any other kind of property was involved.

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

Where all the slaves of the testator, together with their *peculium* are bequeathed to anyone, those slaves also are due who have no *peculium.*

(1) Where a son under the age of puberty is charged with a legacy dependent upon some

condition, and he becomes his father's heir, and afterwards dies, it can be said that the intention of the father who left the legacy to be discharged by his son under a condition, and charged a substitute absolutely with its payment, was that the legacy should be paid by the substitute without delay, if his son should die before the condition was fulfilled.

53. *Ulpianus, On Sabinus, Book XXV.*

But what if he left a larger amount to be paid by the substitute? The amount in excess would be what had been left to be paid by the substitute. This, in fact, would be included with the sum mentioned in the former will, and therefore would be due.

(1) If, however, the testator should repeat the legacy when he appointed the substitute; for example, if he had charged the minor to deliver a tract of land to me, and repeated this legacy charging the heir of the minor to deliver it to me and Seius; the effect of this repetition will be that only a portion of the land would be due to me.

(2) If anyone should appoint two heirs, and charge each one of them to deliver an undivided piece of property to the legatee, this is the same as if the legacy had been bequeathed by two different wills; for if a bequest is made to me and to my son or to my slave, by the same will, both legacies will undoubtedly be valid, as Marcellus has stated in his work on Julianus.

(3) Where the heir kills the slave that was bequeathed on account of some crime which the latter has perpetrated, that is to say, because he deserved death, it will, without doubt, be held that he is not liable under the will.

(4) If, however, he surrendered him in satisfaction for damage committed, will he be liable because he could make reparation ? I think that he will be liable.

(5) But if he should kill an animal that had been bequeathed, I think he would be liable, not only for the body of the dead animal, or any of its remains, but to also pay the value which it would have had if living.

(6) Likewise, where the heir suffered a house which had been bequeathed to be taken possession of, to avoid threatened injury; I think that he will be held, for he ought to give security.

(7) Where the heir has interred a dead body in ground which was bequeathed, and by so doing rendered it religious, if he buried his father there when he could not bury him elsewhere, or could not do so as conveniently, he will not be liable under the will. Will he, however, be liable for the price of the land? If the testator desired to be buried in that place, the heir will not be liable under the will. But of the heir buried him there on his own responsibility, he will be obliged to pay the value of the land, if the assets of the estate are sufficient to enable this to be done; for where a testator devises land, he either intends to be buried elsewhere, or that the price of the land should be paid to the legatee.

(8) If the heir himself did not kill the slave, but forced him to commit some unlawful act, in order that he might be killed, or subjected to punishment by someone else; it will be perfectly just for him to pay the price. The value of the land, however, will not be due, if the slave committed the crime through his own evil disposition.

(9) If the slave that was bequeathed should be captured by the enemy, without fraud on the part of the heir; his delivery will not be required, but if this was done fraudulently it will be required.

54. *Pomponius, On Sabinus, Book VIII.*

Where legacies which imply disgrace, and an intention to insult the legatee rather than to benefit him, are inserted into a will; they are considered as not having been written, on account of the odium attaching to the testator.

(1) If a legacy is bequeathed to Titia, under the condition that she shall marry with the approval of Seius, and Seius should die during the lifetime of the testator, and she should marry, she will be entitled to the legacy.

(2) If a legacy has been bequeathed to you on condition that you manumit a slave, and the death of the slave prevents his manumission, you will, nevertheless, be entitled to the legacy, because it was not your fault that he did not obtain his freedom. Where, in the bequest of a legacy, only a part of the heirs are mentioned, the heirs will be charged with it equally, and if all of them are charged, each will be liable in proportion to his share of the estate.

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

No one can provide in his will that laws affecting it shall not apply to the same; for the reason that the obligation of the heir with reference to the payment of legacies cannot be affected by time, place, or condition.

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

Where a legatee makes a stipulation on account of a slave that has been bequeathed to him, the heir will not be obliged to produce the slave if he should run away. The heir will not be bound by such a stipulation, for the reason that the slave must be delivered just as he was when mentioned in the will, nor is any injury understood to have been inflicted upon the legatee by doing so.

57. *Ulpianus, On Sabinus, Book XXXIII.*

Where property which was encumbered was bequeathed by a trust, if the testator knew that it was encumbered, it must be released by the heir, unless the testator intended otherwise. If he did not know this, the debt must be assumed by the beneficiary, unless he can prove that if the testator knew that the property was encumbered he would have left something else, or if it is probable that something will remain after payment of the debt.

If, however, while it was not the intention of the testator that the burden of releasing the lien on the land should be borne by his heirs,

he evidently did not think of relieving them of their responsibility; the beneficiary of the trust can, by means of an exception on the ground of bad faith, compel the creditors, if they bring an Hypothecary Action against him, to assign their rights to him; and even though he may not have done this during the time prescribed by law, still, this privilege will be accorded him by means of the jurisdiction of the Governor of the province.

58. *Papinianus, Opinions, Book IX.*

I gave it as my opinion that where a house belonging to an estate was burned, and was rebuilt with the money of the heir, on account of a trust by which the said house was to be delivered to someone after the death of the heir, the amount of the expense should be deducted in accordance with the estimate of a reliable citizen, the age of the house having been taken into consideration:

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

Provided the fire did not take place through the negligence of the heir.

60. *Julianus, Digest, Book XXXIX.*

If the heir should have delivered the house without retaining anything, an action for the recovery of an indeterminate amount should lie in his favor, just as if he had paid more than he owed.

61. *Papinianus, Opinions, Book IX.*

It was my opinion that the necessary expenses incurred by the legatee for the repair of a

house, where he claims the legacy and the condition upon which it is dependent was afterwards fulfilled, should not be included in the calculation.

62. *Paulus, On the Edict, Book XLI.*

Where a female slave is bequeathed, together with her children, the slave alone will be due if there are no children; and the children alone, if the slave is dead.

63. *Celsus, Digest, Book XVII.*

If a testator should bequeath all his female slaves and the children born of them, and one of said slaves should die, Servius denies that her child is due, for the reason that it was bequeathed by way of accessory. I think that this opinion is incorrect, and that it is in accordance with neither the language nor the intention of the deceased.

64. *Gaius, On the Provincial Edict, Book XV.* Documents procured by the schemes of interested parties, in like manner, are invalid, where they have reference to estates or legacies.

65. *The Same, On the Edict of the Prætor, Concerning Legacies, Book I.*

Where a bequest is made as follows: "I give to Seius ten slaves, to addition to the ten which I have directly bequeathed to Titius."

Then if only ten are ascertained to belong to the estate, the legacy is void; but if more than that number remain after Titius has selected his ten, the legacy will be valid with respect to the others; but for no greater number than the ten which were bequeathed. If less than ten should remain, the bequest will be valid with reference to as many as are found.

(1) The bequest is conditional when expressed as follows, "I give Stichus to So-and-So, if he is willing to accept him," and it does not pass to the heir, unless the legatee is willing to take it; although, otherwise, where a legacy is bequeathed without the addition, "If he wishes to accept," it will be transferred to the heir of the legatee; for it is one thing in law where something is tacitly included, and another where it is expressed in words.

(2) If a house should be bequeathed, even though it has been gradually rebuilt, so that none of the original materials remain, we nevertheless say that the legacy will be valid; but if, after the house has been torn down, the testator should build another in its place, we must hold that the legacy is annulled, unless it should be proved that the intention of the testator was otherwise.

66. *The Same, On the Provincial Edict, Book XVIII.*

If the testator directed his heir to purchase or sell a piece of property for a reasonable price, the legacy is valid. But what if the legatee, from whom the heir was directed to purchase the tract of land, should be compelled to sell it through necessity, and was unable to find a purchaser; or, on the other hand, if it would be greatly to the advantage of the legatee for him to purchase the property, and the heir would not sell it to him, unless the testator had ordered him to do so?

67. *The Same, On the Edict of the Prætor, Concerning Legacies, Book I.*

Where a slave is bequeathed to one of several heirs, and is said to have maliciously committed some act against the estate, as, for instance, to have removed the accounts; he shall not be adjudged to the heir before being put to the torture, if the other heirs desire it. The same rule applies if he is bequeathed to a stranger.

(1) Where the same property is bequeathed to two heirs out of several who have been appointed for different shares, each of the heirs will be entitled to half of the legacy, and not in proportion to their shares of the estate.

68. *The Same, On the Provincial Edict, Book XVIII.*

Where a bequest is made to a son after the death of his father, there is no doubt that when his

father dies the legacy will belong to the son; and it makes no difference whether the legatee becomes the heir of his father or not.

(1) Where a legacy is bequeathed to a slave after the death of his master, if he remains in the condition of servitude, the legacy will belong to the heir of his master; and the same rule will apply if the slave should be ordered to become free by the will of his master, for the time of the bequest dates from the moment of the appearance of the heir; the result of which is that the legacy will be acquired by the estate, and afterwards will vest in him who is the heir; and, moreover, where someone is created either the proper or the necessary heir of the master by his will, then, because the time of the appearance of the heir and that appointed for the vesting of the legacy coincide, it is held to be more probable that the legacy should belong to the party to whom it was left than to the heir of him from whom the slave obtains his freedom.

(2) If the slave should be bequeathed absolutely, and ordered to be free under some condition, and the condition should not be fulfilled, the legacy will be valid; and therefore if the condition should be fulfilled the legacy will be annulled, but if it should fail the slave will belong to the legatee. Therefore, if, while the condition upon which the freedom of the slave depends is in suspense, the legatee should die, and the condition upon which the freedom of the slave was dependent should fail, the legacy will not belong to the heir of the legatee.

(3) If, indeed, the slave should be bequeathed conditionally, and ordered to be free after the expiration of a certain time, the legacy is absolutely void, because the day appointed will certainly arrive. Julianus also was of this opinion.

(4) For this reason he says that if a slave was bequeathed to Titius, and was ordered to be free after the death of Titius, the legacy is void, because it is certain that Titius will die.

69. *The Same, On the Edict of the Prætor Concerning Legacies.*

It is accepted that a legacy can be bequeathed to a slave who has himself been disposed of by will; because at the moment the estate is entered upon the slave is acquired by the legatee, and then the legacy follows him.

(1) Where an heir alienates a slave under a certain condition, and the condition is afterwards fulfilled, he can, nevertheless, be demanded by the legatee, and the legacy is not extinguished.

(2) If a testator should direct some of his heirs to pay a debt, his creditors will not be entitled to an action against them, but they can proceed against the remaining co-heirs, as it is to their interest that this should be done. In this instance, not only another party than the one to whom the testator ordered property to be given will be entitled to an action, but others besides; as, for example, if he should direct a dowry to be given to his son-in-law, or to the man betrothed to his daughter, in her name. For neither the son-in-law nor the betrothed will be entitled to an action, but the girl will be, as she has the greatest interest in the matter.

(3) Where a tract of land which was devised is charged with a servitude, it must be delivered in the condition in which it is. But if it is devised as follows, "In the best possible condition," it must be delivered free from all servitudes.

(4) Where a slave who was engaged in transacting the business of the testator is bequeathed, he should not be delivered before he renders his accounts; and if judicial proceedings are instituted to compel his delivery, the court shall also take his accounts into consideration.

(5) Where there is some doubt whether the property left is in existence, for example, if it should be uncertain whether a slave who has been bequeathed is living, it has been decided that a testamentary action can be brought, and it is the duty of the judge to compel the heir to furnish a bond by which he agrees to search for the property, and if he finds it, deliver it to the legatee.

70. *The Same, On the Provincial Edict, Book XVIII.*

If a slave belonging to Titius should steal something from me, and afterwards Titius, having appointed me his heir, should bequeath the said slave to you, it is not unjust that I should deliver to you the slave just as he was when in the hands of Titius; that is to say, that you should indemnify me for the theft which the slave committed while belonging to Titius.

(1) For, if a tract of land which was subject to a servitude for the benefit of certain land of mine should be left to you, it should not be delivered to you by me in any other way than subject to the former servitude.

(2) This case is not unlike the one where anyone purchases a slave from someone by the mandate of another, or gives back to the former owner a slave which he had purchased with the right to return him; for persons are not compelled to restore a slave under such circumstances, unless indemnity was promised for a theft committed by said slave either before the transaction was entered into or subsequently.

(3) Therefore, if a slave who was bequeathed steals something from the heir, after his acceptance of the estate, the latter will be obliged to deliver the slave in such a way that the legatee will receive from the heir the amount which he could have recovered from him by an action growing out of the crime committed by the slave.

71. *Ulpianus, On the Edict, Book LI.*

Where a house has simply been left to someone, and it is not stated what house, the heirs will be compelled to give to the legatee any house belonging to the testator which the legatee may select. If, however, the testator did not leave any house, the legacy is ridiculous rather than valid.

(1) Let us consider whether, where anyone delivers a slave by virtue of a legacy, he should furnish security against eviction, and, generally speaking, it must be held that whenever property given by a legacy has been delivered, and the possessor is evicted, the legatee can bring suit for it under the terms of the will. If, however, a demand is made for the property in court, it is the duty of the judge to require a bond, so that an action may be brought under the stipulation.

(2) Where money has been bequeathed, and the heir acknowledges that it is due, a reasonable time must be granted him in which to pay it; and he should not be compelled to bring the matter into court. The Prætor must fix a time for payment, in accordance with what is equitable and just.

(3) Where a man acknowledges that he is indebted, but gives a good reason why he cannot deliver what is due, he should be heard; for instance, where property belonging to another has been bequeathed, and he alleges that the owner of the same refuses to sell it; or where he says that an exorbitant price is demanded for the property; or where he declines to give up a slave belonging to the estate, because the said slave is either his father, his mother, or one of his brothers; for it is perfectly just that under these circumstances he should be permitted by the court to pay the appraised value of the property.

(4) Where a cup has been bequeathed to anyone, and the heir desires to pay the appraised value of the same, because he says it would be a hardship for him to be deprived of it, he cannot obtain this favor from the Prætor, because the condition of a slave is one thing, and that of other property is another, and the more indulgent course is adopted with reference to slaves, as we have previously stated.

(5) Where property belonging to a municipality, together with its municipal taxes, is bequeathed, let us consider whether the legacy is valid, and can legally be claimed. Julianus says in the Thirty-eighth Book of the Digest that, although land of this kind may belong to a municipality, still, because the party who bequeathed it had some right therein, the legacy will be valid.

(6) But if the testator had devised this land to others than to the municipality from which he had leased it, he is not considered to have left the ownership of the same, but only the right which he had in the rent of the land.

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

If anyone should bequeath the Cornelian Estate, with the exception of the vineyards which were there at the time of his death, and there are no vineyards there, nothing will be deducted from the legacy.

73. *Gaius, On the Edict of the Prætor, Concerning Legacies.*

Where an heir is directed to act in such a way that Lucius may obtain a hundred *aurei,* the heir will be compelled to pay that sum; because no one can act in such a way that I may obtain a hundred *aurei* unless he gives them to me.

(1) It is stated in a Rescript of Our Emperor that legacies bequeathed to villages, as well as those bequeathed to cities, are lawful.

74. *Ulpianus, Disputations, Book IV.*

Although Our Emperor and his father stated in a Rescript that, where property was ordered to be delivered by the appointed heir, this, according to the intention of the testator, also applied to the substitute; still, it must be understood in this way, only where it is clear that the intention of the testator was not otherwise. It can be ascertained in several ways whether; where his heir was charged with the payment of a legacy or trust, he was unwilling for the substitute to be charged with it. But what if he had charged the substitute with the delivery of other property to the beneficiary of the trust, or to the legatee, with which he had not charged the appointed heir? Or what course should be pursued if a good reason existed why the appointed heir should be charged with the legacy, and the substitute should not ? Or what should be done if he had substituted the beneficiary, to whom he had left property in trust, to be delivered by his appointed heirs?

It must therefore be said that the above-mentioned Rescript does not apply, except where the intention of the testator is obscure.

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

Where a legacy or a trust is left as follows: "If my heir should deem it proper, if he should approve of it, if he should consider it just;" the legacy or the trust will be due; since it was entrusted to him as to a man of character, and the validity of the bequest was not dependent upon the mere consent of the heir.

(1) Where, "what Titius owes," is left to me, and Titius does not owe anything, it should be noted that the bequest is void. And, also, if the amount is not stated, nothing will be due, for the good and sufficient reason that it is not apparent how much was bequeathed. For if I bequeath to Titius what I owe him, and do not mention the amount, it is settled that the bequest is void; but if I should bequeath to Titius ten *aurei* that I owe him, although I may not owe him anything, the false representation does not annul the legacy; as Julianus decided in the case of the bequest of a dowry.

(2) If the testator had said, "I bequeath the ten *aurei* which Titius owes me," the legacy will undoubtedly be void, for a great deal of difference exists between a false representation and a false condition, or cause. Hence, if I should bequeath to Titius ten *aurei* which Seius owes me, the legacy will be void if he owes me nothing, because he should be my debtor. If, however, he did owe me, and I should collect the debt during my lifetime, the legacy will be extinguished; and if he should remain my debtor, my heir will only be compelled to assign to him his right of action.

(3) If anyone should stipulate "To give Stichus, or ten *aurei,* whichever I may choose," and

bequeaths what was due to the legatee, his heir will be required to assign his right of action to the legatee, and the latter will have the right to choose Stichus or the ten *aurei,* whichever he may prefer.

(4) Hence, if he should bequeath Stichus, while he owed him either Stichus or the ten *aurei,* an action for an indeterminate amount will lie in favor of the legatee against the heir, as Julianus stated in the Thirty-third Book of the Digest; and by means of this action he can compel the heir to institute proceedings; and if, after having brought suit, he should recover Stichus, the heir must deliver him to the legatee, but if he should pay the ten *aurei,* he will recover nothing. Therefore, it is in the power of the debtor to determine whether he to whom Stichus was bequeathed shall be a legatee or not.

76. *Julianus, Digest, Book XXXIV.*

If anyone should stipulate to deliver Stichus or Pamphilus, and then should bequeath Stichus to Sempronius, and Pamphilus to Mævius; the heir is understood to be required to pay the value of Stichus or Pamphilus to one of the legatees, and to assign his right of action to the other.

77. *Ulpianus, Disputations, Book V.*

Where money is deposited with anyone, and afterwards he is charged, as trustee, to pay the said money to the beneficiary, the trust must be executed, according to a Rescript of the Divine Pius; as it is held that the heir was requested to pay the money to the debtor. For if the debtor should be sued by the heir, he can avail himself of an action on the ground of bad faith, which renders the trust valid; and since this is the case, every debtor can be charged with a trust.

78. *The Same, Disputations, Book VIII.*

Where a legatee is charged with a trust, he is only bound to carry it out if the property bequeathed comes into his hands.

79. *Julianus, Digest, Book V.*

Where anyone, by his will, orders ten *aurei* to be paid to Titius and Seius, these words are in no way ambiguous; as the testator, when he mentioned ten, is understood to have said that ten *aurei* should be given to each of the legatees.

80. *Marcellus, Notes On the Digest of Julianus, Book XXXII.*

A man who left an estate of only thirty *aurei* bequeathed thirty to Titius, twenty to Seius, and ten to Mævius.

Massurius Sabinus holds that Titius is entitled to fifteen, Seius to ten, and Mævius to five *aurei;* provided, however, that each legatee contributes his share of the Falcidian fourth in proportion to what was bequeathed to him.

81. *Julianus, Digest, Book XXXII.*

Where an heir has been charged to deliver a tract of land under a condition, and while the condition is pending leaves it to a third party under another condition, and then the condition prescribed by the former will is fulfilled, and afterwards the condition under which the heir bequeathed said property is complied with; the ownership of the same is not lost by the first legatee.

(1) Where property is bequeathed to a slave owned in common by two masters, one of them can accept the legacy, and the other can reject it; for, in this instance, a slave owned in common occupies the place of two separate and distinct slaves.

(2) "I give and bequeath Stichus to Sempronius; if Sempronius does not manumit Stichus

within a year, I give and bequeath the said Stichus to Titius." The question arose, what effect did this have in law? I answered that, in the meantime, Sempronius would be entitled to the entire slave, and if he should manumit him within a year, the slave will become free, but if he does not do this, the entire slave will belong to Titius.

(3) Where a testator devises a tract of land, with the exception of the building, by the term "building" is understood either the edifice or the soil upon which it was erected in addition. If he excepts only the building itself, the entire tract of land can, nevertheless, be claimed by the terms of the legacy; but if the heir files an exception on the ground of bad faith, he can obtain permission to live in the house as well as acquire a right of way through the land to obtain access to it.

Where, however, the ground was excepted, the land with the exception of the house can be claimed, and a servitude will, by operation of law, attach to it for the benefit of the house; just as where an owner bequeaths one of two tracts of land and subjects the other to a servitude in its favor.

The probability is, however, that in a case of this kind, the testator had also in view the ground on which the house was built, and without which it could not stand.

(4) If a freedman should appoint his patron heir to seven-twelfths of his estate, and other persons heirs to the remainder, and make his bequest as follows: "I charge whoever of the above-mentioned persons will be my heirs, along with my patron, to deliver such-and-such slaves to Titius, which slaves I think to be worth twenty *aurei* apiece;" it must be understood that the co-heir of the patron is the only one charged with the legacy, and therefore that Titius can only claim five-twelfths of the slaves.

But the following addition: "Whom I think to be worth twenty *aurei* apiece," does not change the condition of the bequest, if allowance be made for the proportion due under the Falcidian Law, for in order that this may be done, the true value of the slaves must, nevertheless, be deducted, when they are appraised.

(5) "I give and bequeath a tract of land to Titius, if he pays ten *aurei* to my heir." If my heir owes Titius ten *aurei,* and Titius gives him a receipt for the amount, he can claim the land.

(6) If Titius, to whom Stichus was bequeathed, should die before he learned that the legacy belonged to him, and should bequeath the same slave to Seius, and the heir of Titius does not reject the legacy, Seius can claim Stichus as his property.

If the head of a household should charge his minor son with the delivery of a tract of land, which he left to Titius, and should charge a substitute in the same manner for the same person, and the minor should become the heir of his father, whether Titius claims the legacy or rejects it, he cannot demand anything from the substitute, even though the son should die before reaching puberty; for when a legacy is bequeathed a second time, and the substitute is charged therewith, it should be considered that the legacy is only repeated.

(7) Wherefore, if the son was absolutely, and the substitute conditionally, charged with the legacy, the case will be the same as if the son alone was charged with it. And, on the other hand, if the son was charged with it conditionally, and the substitute absolutely, and the minor should die before the condition was fulfilled, the legacy will be valid solely by virtue of the substitution.

(8) A bequest made as follows: "I give and bequeath a tract of land to Lucius and Titius, or to one of them," is valid, and if both of them live, it will be due to both, but if only one lives, he will be entitled to it.

(9) Where a slave who is to be free under a condition is bequeathed under another condition, and while the condition of the bequest is pending, the other condition upon which his liberty is dependent fails to be carried out, the legacy is valid; for, as a conditional grant of freedom

annuls the legacy if the condition is fulfilled; so also the legacy cannot be annulled before the time when it is to take effect shall have arrived.

(10) Where a minor son is charged with the legacy of a slave, and his substitute is directed to set him free, and the minor arrives at puberty, the slave can be claimed by the party to whom he was bequeathed. If, however, the minor should die, the slave will obtain his freedom. There would be much more reason for this to be observed, if the slave had been bequeathed conditionally in charge of the minor, and, while the condition was pending the son should die before reaching the age of puberty.

82. *Julianus, Digest, Book XXXIII.*

The obligation attaching to a legacy is not always extinguished where the property vests to the legatee on the day prescribed, but it must vest in him in such a way that he cannot be deprived of it. Let us suppose that certain property that has been left to me absolutely, has been delivered to me by the heir upon the day appointed, and that the heir was also charged to deliver the said property to another subject to a certain condition; I can undoubtedly bring an action under the terms of the will, because the circumstances are such that I shall lose the ownership of the property if the condition is fulfilled. For, if Stichus is due to me under a stipulation, and he is bequeathed to someone else under a condition, he will become mine, because of the consideration; still, if the condition is fulfilled, I will be entitled to bring an action based on the stipulation.

(1) If I have acquired, by prescription, some property belonging to a person who is absent on public business, and it is bequeathed to me before I have been deprived of it by a better title, and then, afterwards, I should be deprived of it in this way, I can legally bring an action under the will and compel the said property to be delivered to me.

(2) Where a tract of land has been bequeathed to me, and I have acquired the mere ownership of the same without the usufruct, and the vendor afterwards forfeits his civil rights, the usufruct will belong to me.

If I bring an action under the will, the court will render a judgment of the amount that I have lost through litigation.

(3) Marcellus: The same rule will apply if I purchase a part of said land, and the said part is either bequeathed or given to me; for I have a right to bring suit for a part.

(4) Julianus: If the children born of Pamphila are bequeathed to me, and I have bought Pamphila, and she has a child while under my control; it cannot be held that I am entitled to said child, for a valid consideration, simply because I purchased its mother. The proof of this is, that if I should be evicted I will be entitled to an action against the vendor on the ground of purchase.

(5) Where a testator, having Gaius and Lucius his debtors for the same sum of money, made a bequest as follows: "Let my heir give to Sempronius what Gaius owes me, and to Mævius what Lucius owes me," he imposes upon his heir the necessity of assigning his rights of action to one of his legatees, and the amount of the claim due from them to the other. If, however, the testator, during his lifetime, had given a receipt to Gaius, the legacy bequeathed to Sempronius and Mævius will necessarily be void.

(6) Where Stichus and Pamphilus were bequeathed to me by two different wills, and I have received Stichus under the terms of another will, I can bring an action under the first to recover Pamphilus; for if Stichus and Pamphilus had been bequeathed to me by one will, and I had obtained Stichus for a good consideration, I could, nevertheless, claim Pamphilus.

83. *Marcellus, Digest, Book XIII.*

Titius bequeathed to you a share in Stichus, and Seius bequeathed to you the remaining share

in Stichus, you can then claim him by virtue of both wills.

84. *Julianus, Digest, Book XIII.*

A bequest of this kind, "Let my heir pay a hundred *aurei* to Titius, if Titius will furnish my heir with security that he will pay a hundred *aurei* to Mævius," will be valid; just as where a legacy is bequeathed to anyone and he delivered it to another in compliance with the terms of a trust.

(1) The following legacy is valid for the same reason: "Let my heir pay a hundred *aurei* to Titius, if Titius gives him security to construct a public work of this value in the City."

(2) If Sempronius should appoint Titius his heir, and direct him to transfer a tract of land belonging to his estate to Mævius, after the lapse of two years; and Titius should then charge his heir to deliver the same land at once to Mævius, and Mævius receives the price of the land from the heir of Titius, and he afterwards wishes to claim the land under the will of Sempronius; he will be barred by an exception, if he is not satisfied with the price paid for said land.

(3) Where a slave was bequeathed by someone in general terms, and it was the legatee's fault that he did not receive Stichus when the heir wished to deliver him, and Stichus should die, the heir can avail himself of an exception on the ground of bad faith.

(4) Where a house, in whose favor another house belonging to the heir was charged with a servitude was delivered to the legatee without the servitude, I held that the latter can bring an action under the will, because he did not receive the entire legacy.

And, indeed, if the legatee should receive from the heir a slave, who had become disabled, he can very properly bring an action under the will.

(5) Where a man, not being aware that a slave had been bequeathed to him by a will, purchases the said slave from the heir, and then, after having ascertained this, he brings an action under the will and recovers the slave, he should be released from liability to suit on account of the sale; because this proceeding is one of good faith, and hence includes an exception on the ground of fraud.

If, however, the price having been paid, he should bring suit under the will, he ought to recover the slave, and he can recover the price by an action on purchase, if he is deprived of him by a better title. But if he should proceed by an action on purchase, and should then ascertain that the slave had been bequeathed to him, and bring suit under the will; the heir cannot be released unless he refunds the price, and surrenders the slave to the purchaser.

(6) Where a father promised a hundred *aurei* as dowry for his daughter, and afterwards bequeathed the same amount to her, the heir will be protected by an action on the ground of bad faith, if the son-in-law institutes proceedings on account of the promise of the deceased, and the daughter brings suit under the will; for they should agree with one another to be content with one of these actions.

(7) Where a bequest is made as follows: "Let my heir pay ten *aurei* to So-and-So, if he returns my promissory note to my heir," a condition of this kind has the effect of releasing my heir from the debt. Wherefore, if the note is in existence, the creditor will not be understood to have complied with the condition, unless he gives the heir a receipt. If, however, the note is not in existence, he is held to have complied with the condition, if he releases the heir. It makes no difference whether the note was destroyed at the time that the will was made, or subsequently, or after the death of the testator.

(8) If Stichus, who belongs to Titius, is bequeathed to Titius and Mævius, Mævius will be entitled to a half interest in Stichus, for Titius is entitled to half of said slave even though he may not be allowed to receive a legacy.

(9) "Let my heir give to Titius, Stichus, or Pamphilus, whichever one he chooses." If the heir should say that he wishes to give Stichus, and Stichus should die, he will be released; but if he should mention at any time which one he wishes to give, he cannot change his mind.

(10) A legacy was bequeathed as follows: "Let my heir transfer to Titius the Cornelian Estate and the slaves who are on said estate, and who will be mine at the time of my death." A female slave who ordinarily remained on said estate, at the time of the testator's death had fled, and brought forth a child. I asked whether she herself and her child are included in the legacy. I answered that the slave seems to have been bequeathed, even though she has taken to flight, and even if she was a fugitive, she is considered to have been on said estate at the time of the testator's death. Consequently, as the child follows the condition of the mother, it is included in the legacy, just as if it had been born on the estate.

(11) If either Stichus or Pamphilus, whichever one of them the legatee prefers, was bequeathed to Titius, and the testator gave Pamphilus to Titius, Stichus is still subject to the obligation.

(12) Where a legacy was bequeathed as follows: "I do give and bequeath to Titius and Mævius each a slave," it is established that they do not have joint rights in the same slave, just as they would not have if the bequest was in the following terms: "I give and bequeath a slave to Titius, and another slave to Mævius."

(13) Where a person to whom a legacy was bequeathed, before he decides what action he will make use of to recover his legacy, dies, leaving two heirs, and both of them appear to accept the legacy at the same time, they cannot receive it unless they agree as to the course to be pursued; as for instance, where one of them wishes to bring a real, and the other a personal action. If, however, they should agree, they will be entitled to the property in common, and they should agree either voluntarily, or by the direction of the court.

85. *Paulus, On Plautius, Book XI.*

A tract of land was devised to two persons conjointly; one of them, by a personal action, obtained the appraised value of half the property, the other, if he desired to bring suit for all the land, can be barred by an exception on the ground of bad faith with reference to half of it; because the deceased wished the legacy to come into their hands only once.

86. *Julianus, Digest, Book XXXIV.*

If a slave whom you had given in pledge is bequeathed to you by some other party, you will be entitled to an action under the will against the heir if the pledge is released.

(1) If one of the heirs of a testator is charged to deliver Stichus to Mævius by way of legacy, and then all his heirs are charged by a codicil to deliver the same Stichus to him, and, before the codicil is opened, Mævius should receive the appraised value of the slave, he cannot legally obtain the slave under the codicil, because the testator intended he should receive the legacy but once.

(2) Where a slave is bequeathed, and the condition of said slave and of everything relating to him personally are in suspense, and the legatee should refuse the legacy, the slave is considered never to have belonged to him; and if he should not reject him, he is understood to be his from the day of the acceptance of the estate.

In accordance with this rule, and the rights of those interested in property which the slave either received by delivery or stipulated for, as well as with reference to whatever was bequeathed or given to him, his condition will be determined; and also whether the business he transacted was for the benefit of the heir, or the legatee.

(3) Where all the heirs of a testator are charged with the delivery of a tract of land, which belonged to one of them, he to whom it belonged is not required to furnish more than his

share, and the others will be liable for the remaining shares.

(4) If a house is left to him on whose ground the building stands, the legacy will be valid, even though he is the owner of the land; for by this means he obtains a release from the servitude and profits by the gift of the house.

87. *Papinianus, Questions, Book XVIII.*

A father having appointed his son, over whom he retained control, heir to a portion of his estate, also left him a legacy. It would be a very great hardship, as some authorities hold, that his right to the legacy should be denied if he rejected his father's estate, for the will should not be considered as attacked by one who, for good reasons, refuses to be involved in the affairs of an estate which may be insolvent.

88. *Marcianus, Institutes, Book VI.*

If, however, the father intended that the son should not have the legacy unless he accepted the estate, then an action should not be granted him against his co-heir for the recovery of the legacy, as is held by Aristo; since the estate did not appear to be solvent to the son himself.

This is the case, even if the testator did not make the acceptance of the estate conditional, as it is clearly established what his intention was.

89. *Julianus, Digest, Book XXXIII.*

For an emancipated son, if he rejects the estate, cannot be prevented from claiming the legacy from the heir. The Prætor, by permitting those children who are under the control of their father to reject his estate, makes it plain that he intends to grant them the same right so far as they are personally concerned, to which they would have been entitled if they had had free power to enter upon the estate.

90. *Papinianus, Questions, Book XVIII.*

But what if the legacy was bequeathed as follows: "I bequeath this to my son in addition" ? There is no doubt that inquiry must be made as to the intention of the testator. This instance is not unlike the former one relating to previous knowledge of the son, unless it is clearly proved that the intention of the father was otherwise.

(1) It is evident that if several sons have been appointed heirs, an action to recover the legacy will be refused to him who declined to accept the estate.

91. *Julianus, Digest, Book XXXVI.*

The question arose whether a son under paternal control, who himself had a son, should be appointed heir; as both of them are under the control of another, for can a son be charged with a legacy for the benefit of his own son? I answered that as a son can be charged with a legacy in favor of his father, it follows that he can be charged with one for the benefit of his brother, or his son, or even for the benefit of his father's slave.

(1) Where freedom is granted to a slave at once, a legacy can be bequeathed to him either absolutely or conditionally. But where freedom has been bestowed upon him under some condition, it can at certain times be valid, and at others, even if bequeathed absolutely, it may be void; for if the condition of freedom was such that it could be fulfilled immediately on the death of the testator, before the estate was entered upon (for instance, "Let Stichus be free if he pays ten *aurei* to Titius, or ascends to the Capitol"), the legacy will be valid.

Moreover, conditions like the following: "If he pays the heir ten *aurei* if he should ascend to the Capitol after my estate has been accepted," the legacy will be void. Where, however, a necessary heir has been appointed for the entire estate, those conditions which could be complied with before the estate was entered upon render the legacy invalid.

(2) Where a testator appointed two heirs, and bequeathed Stichus to one, and ten *aurei* to Stichus, if Stichus becomes free during the lifetime of the testator, he will be entitled to the entire legacy; and a proof that it vests in the said slave personally is established by the fact that if the heir to whom the slave had been bequeathed should not enter upon the estate, he can recover the entire legacy from the other heir.

(3) Where a legacy is bequeathed to a slave, who himself is bequeathed, and he is sold by the testator, the legacy will belong to the purchaser.

(4) Where a slave is left to Titius, and the legacy is bequeathed to the same slave, the legatee can be charged with the trust, "Either to deliver the slave to someone, or to transfer to him the property which is bequeathed to the slave." And, even more than this, Titius can be charged with the trust with reference to the slave himself, even after he shall become free.

(5) If anyone should bequeath Stichus, and then sell or manumit him, and subsequently should leave him a legacy by a codicil, either the manumitted slave or the purchaser will be entitled to the legacy.

(6) If you should be appointed an heir by a party who has charged you to deliver a slave, and some individual should bequeath a legacy to the said slave; and, during the lifetime of the person who bequeathed me the slave, the day for the transfer of the legacy to the slave arrives; that legacy is at once acquired by the estate. Hence, even though the person who bequeathed me the slave should die, the legacy left to the slave will not belong to me.

(7) Where a slave is claimed by virtue of a will, he should be delivered to the plaintiff in the same condition in which he was at the time issue was joined in the case. And, as the offspring of a female slave, as well as the crops of the land which have been obtained, in the meantime, are included in this action; therefore any property which meanwhile has been acquired by the slave either by bequest or inheritance must be delivered to the plaintiff.

92. *Julianus, Digest, Book XXXIX.*

Where one of several heirs purchases a tract of land which has been left in trust, the price having been determined by the income from said land on account of the debts due from the estate; the party entitled to the land under the terms of the trust, being present, and consenting, it is settled that not the land itself, but the value of the same should be delivered.

Marcellus states in a note, "If the heir should prefer to deliver the land, I think that he should be heard."

(1) Julianus: Where money is bequeathed to Titius, and he is charged by a trust to manumit a slave belonging to another, and the master of said slave is unwilling to sell him; he will, nevertheless, be entitled to his legacy, because it was not his fault that the property bequeathed by the trust was not delivered. For if the slave should die, he will not be deprived of his legacy.

(2) Just as it is conceded that a trust can be imposed upon anyone who is entitled to an estate as the lawful heir, or to prætorian possession of it, so he who, by law, has a right to the estate of a boy under the age of puberty, or to prætorian possession of the same, can be legally charged with a trust.

93. *Ulpianus, Trusts, Book I.*

A trust of this kind will only be valid where the minor dies under the age of puberty; if, however, he should die after having reached puberty, the trust will vanish.

94. *Julianus, Digest, Book XXXIX.*

It is clear that if a father should disinherit his son while under the age of puberty, the heir-at-law cannot be compelled to discharge the trust, unless he was also the heir of the father.

(1) Where a master was asked to deliver to another person an estate to which his own slave had been appointed heir, and he sold the slave; the question arose whether he into whose hands the estate came through the purchase of the slave, that was appointed heir, can be compelled to surrender it. I said that a person who sold his own slave that had been appointed heir could be compelled to discharge the trust, as he had received the price of the estate which he was asked to surrender.

He, however, into whose hands the estate came through the purchase of the slave that had been appointed heir, can, after investigation, be forced to discharge the trust; that is to say, in case the original master of the slave was not solvent.

(2) Where Stichus, or Damas, was bequeathed to someone, and the legatee was given his choice, and he was charged to deliver

Stichus to someone else; and although he may have preferred to demand Damas he will, nevertheless, be required to deliver Stichus, in accordance with the terms of the trust. Even if Damas is of greater value, he will be compelled to furnish Stichus; or if he is of less value, he will also legally be required to deliver him; since it was his fault that he did not, in accordance with the terms of the will, obtain the slave who was the object of the trust.

(3) Where a slave is manumitted by will, and does not receive either a legacy or the estate, he cannot be compelled to discharge a trust. Neither can he do so who is requested to manumit a slave that was bequeathed to him; for a person can only be compelled to pay money by virtue of a trust who receives something of the same kind, or similar to it, by the will.

95. *Ulpianus, Trusts, Book I.*

Nevertheless, it should be considered where a slave who was manumitted was asked to furnish something in lieu of labor, whether a trust of this kind will be valid. This can by no means be admitted, because services of this description cannot be imposed on a freedman, and if imposed, they cannot be exacted; even though the testator may have provided for it in his will.

96. *Julianus, Digest, Book XXXIX.*

A certain individual made the following bequest in his will, or codicil: "I desire forty *aurei* to be paid to Pamphila, as is hereinafter stated; so many of which are due to me from Julius; and so many which I have invested in camp equipage; and so many which I have in cash." The testator died several years afterwards being still of the same mind, but all the sums which he mentioned had been employed for other purposes.

I ask whether the trust must be discharged. I answered that it was very probable that the testator had intended rather to point out to his heirs where they could readily obtain forty *aurei,* without interfering with the remainder of his estate, than to have inserted a condition in a trust which in the beginning had been absolute; and therefore that Pamphila was entitled to the forty *aurei.*

(1) Whenever property without an owner reverts to the Treasury under the Julian Law, the legacies and trusts which the heir, to whom they were left, was compelled to pay and discharge, must be paid and discharged by the Treasury.

(2) If a slave is bequeathed to you, and you are requested "To deliver to Titius property equal to the value of the slave," and then the slave should die, you will not be compelled to deliver anything by reason of the trust.

(3) Where an heir appointed for a certain share of an estate is charged, as follows: "Take a certain sum as a preferred legacy, and distribute it among those who have received legacies by the will," he must take in this manner what was conditionally bequeathed, after the condition has been complied with, and, in the meantime, he will

be required to give security either to the heir, or to the parties to whom the conditional legacies have been left.

(4) Where a slave, who is to be free under a certain condition, is ordered to pay money to someone, he who is entitled to it can be requested to deliver the said money to another party. For, as the testator can grant freedom to his slave absolutely, by means of a codicil, and in this way dispose of the condition, why should he not have the power to take away the same money by means of a trust?

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

If Stichus should be bequeathed to me, and I should be charged, "To deliver either Stichus, or Pamphilus, my slave," and I lose anything on account of the legacy through the operation of the Falcidian Law, I shall be obliged to give my slave Pamphilus entirely to Titius, or that share in Stichus which I have received by way of legacy.

98. *The Same, Digest, Book LII.*

A slave who has been taken by the enemy can legally be bequeathed, for this is derived from the right of *postliminium;* since, just as we can appoint a slave who is in the hands of the enemy our heir, so also, we can bequeath him as a legacy.

99. *The Same, Digest, Book LXX.*

Where Stichus was bequeathed to a master, and a bequest was also made by the testator to one of the slaves of the former, giving him the choice between Stichus and another slave, I hold that only half of Stichus would belong to the aforesaid master, because the said slave, if manumitted, could select Stichus.

100. *The Same, Digest, Book LXXV1I.*

If Sempronius should charge his heir Titius with a legacy in my favor, and Titius should bequeath the same property to me subject to the same condition, and the condition should be complied with, I can still claim the legacy under the will of Sempronius.

101. *The Same, Digest, Book LXXVIII.*

If Stichus is bequeathed by will to one of my slaves, and I reject the legacy; and afterwards, a codicil having been produced, it becomes apparent that Stichus was bequeathed to me also, I can, nevertheless, claim him.

(1) Where a legacy is left to a person who is in the hands of the enemy, and he dies while there; the legacy will be of no force or effect, although it can be confirmed by the right of *postliminium.*

102. *The Same, Digest, Book LXXXI.*

Where a minor of twenty years manumits his slave without the required legal investigation, and afterwards bequeaths a legacy to said slave, and the latter, having been sold, obtains his liberty; he cannot receive the legacy, for it is of no force or effect as it was bequeathed without the grant of freedom.

103. *The Same, Digest, Book LXXXIII.*

Fraud is held to have been committed in the case of an implied trust, whenever the trustee is not requested to perform any act either by a will, or by a codicil, but merely binds himself by a private agreement, or by a memorandum, that he will discharge the trust in favor of a party who is not entitled to profit by it.

104. *The Same, On Urseius Ferox, Book I.*

Where all the heirs of a testator were charged with a legacy as follows: "Let whoever becomes

my heir be charged with the payment of a hundred *aurei* to Titius." It was afterwards inserted in the will that only one of his heirs should pay Titius the money. The question arose, must the remaining heirs pay the entire hundred *aurei,* or what is left after deducting the share of the estate belonging to the one above mentioned? The answer was that it was more advisable for the remaining heirs to pay the hundred *aurei,* since the meaning of the words is not opposed to this opinion, and the intention of the testator agrees with it.

(1) Where the following was inserted in a will: "Let my heir pay a hundred *aurei* to Lucius Titius, if he surrenders to him a note by which I have promised to pay him a certain sum of money." Titius died before delivering the note to the heir; and the question arose whether his heir would be entitled to the legacy?

Cassius gave it as his opinion that if there was, in reality, a note, the heir of the legatee would not be entitled to the legacy, because, as the note was not returned, the time for the legacy to vest had not arrived. Julianus remarks that, if there was no note in existence at the time when the will was executed, there was one reason why the legacy would be due to Titius, and that is because an impossible condition is not considered to have been imposed.

(2) Sabinus says that property which belongs to the enemy can be bequeathed, if, under any circumstances, it can be purchased.

(3) Where property was bequeathed to Attius, as follows, "Let whoever becomes my heir be charged to pay ten *aurei* to my heir, Attius," Attius can claim the ten *aurei,* after the deduction of his share from the amount.

(4) Likewise, where an heir has been ordered to pay ten *aurei* and retain a tract of land for himself, he must pay that sum after having deducted his share.

(5) Finally, it is established that where a legacy has been bequeathed as follows, "Let whoever becomes my heir be charged to pay my heir ten *aurei,"* the shares of all the heirs will be equal, for the reason that each of them is held to be charged for his own benefit, as well as for that of his co-heirs.

(6) Where anyone appoints an heir as follows, "Whenever his mother shall die," and then a second heir is appointed as his substitute, and the latter is charged with a legacy in favor of the one who was conditionally appointed, and the first one dies during the lifetime of his mother, and afterwards, the day on which the legacy is to vest arrives, the question arises whether his heir will be entitled to the legacy. The better opinion is that he will be entitled to it, whether the substitute was charged to pay it to the first heir absolutely, or under the condition that he should not become his heir; for the condition was fulfilled at the time of the death of the appointed heir.

(7) Where a father-in-law was appointed heir to his son-in-law, and part of the estate was bequeathed to another, Sabinus gave it as his opinion that after the dowry had been deducted, he would be liable for the share of the estate included in the legacy; just as if a sum of money had been due to the father-in-law from the son-in-law, and after this was deducted, he had surrendered the estate.

105. *The Same, On Minicius, Book I.*

Where a legacy was bequeathed as follows: "Let my heir be charged with the payment to Cornelius of what Lucius Titius owes me," the heir is not required to transfer anything under this legacy, but his right of action against the debtor.

106. *Alfenus Verrus, Epitomes of the Digest by Paulus, Book II.* Where the following was inserted in a will: "Let my heir be charged with a hundred *aurei,"* but did not add "the payment of," it is settled that the legacy will be due.

107. *Africanus, Questions, Book II.*

Where several heirs are charged with the payment of a bequest, which one of them is directed to pay as a preferred legacy ? It is said that it is in the power of those to whom the legacy was bequeathed to choose whether they will bring suit against the heirs singly, or only against the one who was directed to pay the preferred legacy; hence the latter must give security to his co-heirs for the purpose of indemnifying them.

(1) Where anyone bequeaths a slave to whom he has left a legacy, without granting him his freedom, "If he should be his slave when he dies," there is no doubt whatever that the legacy will be valid at some future time, because, on the death of the slave, the legacy which is left to him will belong to the person to whom the slave himself was bequeathed.

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

Where a slave, who is bequeathed, is said to have taken to flight during the lifetime of the testator, the heir must restore him, but the expense, and the risk attending the pursuit must be borne by the party to whom the slave was bequeathed; as the heir is not compelled to deliver the property bequeathed except in the place where it was left by the testator.

(1) If the property left me by will, which you are obliged to deliver, should be given by anyone else to my slave, I will still be entitled to an action based on the will; and, above all, if I should not be aware that the property had become mine. Otherwise, the result would be that, even if you should give the said property to my slave, you would release yourself without my consent, which under no circumstances is to be admitted; since you cannot release yourself from liability without my consent, even by making payment in this manner.

(2) Where a slave was bequeathed to Titius, the question arose whether the right to make the choice of the slave to be given would belong to the heir, or to the legatee. I answered that it would be more equitable to hold that he should be entitled to the choice who has the power to make use of whichever action he chooses, that is to say the legatee.

(3) The gift of a legacy expressed in the following terms: "I bequeath to So-and-So, or So-and-So, whichever of them first ascends to the Capitol," Africanus says will be valid; for the manifest reason that where an usufruct is bequeathed to freedmen, and the ownership of the property to whichever of them survives, the legacy will be valid. He thinks that the same opinion should be given with reference to the appointment of an heir.

(4) Titius charged you with a bequest of Stichus to me, concerning whom I have already entered into stipulation with you. If the stipulation was not founded on a valuable consideration, it was held that the legacy would be valid. If, however, the delivery of the slave was founded on two valuable considerations, then it is preferable to hold that the legacy is void, for the reason that no one loses anything, and the same property cannot be delivered twice.

(5) Where, however, you already owe me Stichus under the terms of the will of Titius, and Sempronius has charged you, his heir, with the delivery of the same slave to me as a legacy, and has requested me to deliver the said slave to a third party, the legacy will be valid, because I am not to retain the slave. The same rule will apply where he bequeathed me a sum of money; and it will be still more applicable if a trust was established by a former will.

Likewise, if there was ground for the application of the Falcidian Law under the terms of the first will, what has been deducted on account of it I can acquire by virtue of the second.

(6) Again, if I should become the heir of the owner of a certain tract of land, and he should not prove to be solvent, and you are directed to deliver said land to me; your obligation will continue to exist, just as it would do if I had purchased the land.

(7) Where it is provided by a will, "Let my heir pay to Seius ten *aurei* more than I have bequeathed to Titius," there can be no doubt that Titius will be entitled to his legacy, and that there will be no more than ten *aurei* due to Seius. For it is customary to make a bequest in the

following terms: "I bequeath so much to Lucius Titius, and as much more to his wife and children."

(8) Where property is bequeathed to a person to whom nothing was previously left, with the addition, "This much more," there is no doubt whatever that what has been bequeathed in this manner is due. There should be even less doubt if I should stipulate with a person who owes me nothing as follows: "You promise to pay me ten *aurei* more than you owe me," that ten will be due.

(9) Where a slave belonging to another is bequeathed to someone, and ordered to be free, it is held that he can be claimed by the legatee, for his grant of freedom is of no effect. It is absurd that the legacy should be rendered void, which would be valid if only the slave had been bequeathed.

(10) Where an individual had five *aurei* in his chest, and bequeathed them, or promised in a stipulation, "The ten *aurei* which I have in my chest," the legacy or the stipulation will be valid; but only five *aurei* will be due under either.

Moreover, it seems hardly reasonable that the five *aurei* which are lacking should be claimed under the will; for in this instance certain property which is not in existence is considered to have been bequeathed. If, however, at the time of the testator's death, the entire amount should be in his chest, and it should subsequently be somewhat diminished, the heir alone must undoubtedly bear the loss.

(11) Where a slave is bequeathed, and the heir is in default, his life and any diminution in value which he may sustain will be at the risk of the heir; so that if he is disabled when delivered, the heir will, nevertheless, be liable.

(12) Where anything has been left to you, and you are charged, as trustee, to deliver it to me, if you do not receive anything else under the will, it is held that you will only be liable where you have been guilty of bad faith in not claiming the legacy, otherwise, I will be to blame; just as is the case in contracts of good faith, if the contract is for the benefit of both parties, he who should deliver the property is responsible for negligence, but where it is for the benefit of only one, the trustee is only responsible for fraud.

(13) A man gave certain jewels to Titius by way of pledge, and appointed his son his heir, and then disinherited him; and finally provided in his will: "I ask you, Titius, and I charge you to sell the jewels which I gave to you in pledge, and after having deducted all that is due to you, to pay the balance to my daughter." Under this provision, the daughter can claim the trust from her brother, so as to compel him to assign to her his rights of action against the debtor. In this instance, he is understood to be the debtor, who in the first place was the creditor, that is to say, for the balance of the price of the pledge remaining after payment of the debt.

(14) It should not be considered surprising if, in a case like that above mentioned, one party should be charged with a trust, and another bound by it; for when the following is inserted into a will, namely, "I ask you, Titius, to receive a hundred *aurei,* and manumit such-and-such a slave, or to pay a certain sum to Sempronius," this does not seem to have been properly expressed; still, it should be understood to mean that the heir must discharge the trust, as well as pay the money to Titius, and therefore that Titius himself will be entitled to an action against the heir, and will be compelled to grant the slave freedom, or pay the sum to Sempronius which he was asked to do.

slave, and the person to whom he was given should manumit him, the heir will be responsible for his value, even though he was not aware that the slave had been bequeathed to him.

(2) Where a legacy was bequeathed as follows, "I give and bequeath to Titius, together with Seius," the legacy is left to both of the parties, just as there are two legacies where a tract of land is devised with the Formian House.

(3) Where anyone by his will directs something to be done which is contrary to law or good morals, the provision will not be valid; for example, if he should direct something to be done which was in violation of a certain law, or against the Prætorian Edict, or should order some dishonorable act to be performed.

(4) The Divine Severus and Antoninus stated in a Rescript that an oath inserted in a will which was opposed to the general tenor of the laws, or the authority of some special enactment, is of no force or effect.

113. *The Same, Institutes, Book VII.*

A bequest can be made to the slave of another as follows, "As long as he remains a slave," or, "If he should become the slave of Titius," which was also held by Marcellus.

(1) If anyone should grant freedom to his slave after the lapse of a certain period, and, in the meantime, should charge his heir to furnish him with subsistence until he obtained his freedom; the Divine Severus and Antoninus stated in a Rescript that the wish of the testator must be complied with.

(2) If anyone should charge his heir with the payment of a legacy of a hundred *aurei* to someone, and charge a substitute with two hundred *aurei* to be paid to the same person, and afterwards should again mention the bequests in general terms, he is held to have referred to the said three hundred *aurei.*

(3) If, however, a father should make a pupillary substitution for his son under the age of puberty, and should refer to the legacy to be discharged by the substitute, and the minor becomes his heir, and dies before reaching puberty, the repetition of the legacy will not be valid, because it was the intention of the deceased that it should be due but once.

(4) Where a child under the age of puberty is charged with a legacy under the condition, "If he should arrive at puberty," and the legacy is repeated in a substitution, it will also be due from the substitute; for the condition is not considered to be repeated which would render the legacy void.

(5) Foolish wishes of deceased persons relative to their interment (for instance, where they desire unnecesary expenses to be incurred for clothing, or other things to be used at their funerals), are not valid; as Papinianus states in the Third Book of Opinions.

114. *The Same, Institutes, Book VIII.*

A son under paternal control, who is a soldier or who has been discharged from the service, even though he may die intestate, can charge his father with a trust, for the reason that he can make a will.

(1) If a freedman should die intestate, he can charge his patron with a trust to the extent of the share of his estate to which his patron is entitled; because if he should execute a will, he can only leave his patron the amount allowed by law.

(2) Where a man dies intestate, and knows that his property will revert to the Treasury, he can charge the Treasury with a trust.

(3) The following case is discussed by Marcellus in the Twelfth Book of the Digest. A certain individual charged a person with a trust to whom he had bequeathed a tract of land, directing him to transfer the said land to Sempronius after his death; and he also charged the same legatee to pay Titius a hundred *aurei.* The question arises, what is the law in this instance? Marcellus says that if the testator left Titius a hundred *aurei* to be paid out of the profits which the legatee if living could have collected, and the latter died after a time sufficient for the sum of a hundred *aurei* to be obtained from the profits, Titius will be entitled to that amount. But if the legatee should die immediately after having received the legacy, the trust created for the benefit of Titius will be extinguished because it is settled that one cannot be

compelled to deliver more than was bequeathed to him.

(4) If, however, the trust for the benefit of Titius was to be discharged before the death of the legatee, Marcellus says that the sum provided by the trust must immediately be paid to Titius, but that he will be required to give security to refund any surplus which there might be, and this security will be operative if the legatee should die before a hundred *aurei* are obtained from the profits. It can, however, hardly be maintained that the testator intended that the bequest should be paid out of the profits before the legatee had been able to collect them.

The legatee should certainly be heard if he desires to deliver the entire tract of land, provided the beneficiary furnishes security for its return, for it would be absurd to compel the legatee to pay a hundred *aurei,* especially if the land is only worth that much, or very little more. This is the practice at the present time.

(5) Where anything is bequeathed to someone in accordance with law, or some interest or right is left which cannot be enjoyed or held on account of some defect or qualification attaching to the thing bequeathed, or for any other good reason, and another party can hold said property, the legatee will be entitled to receive from the heir the appraised value of what it would ordinarily sell for.

(6) A person cannot be charged by will to appoint someone else as his heir. The Senate plainly decided that such a provision was to be considered just as if a testator had charged his heir to surrender the estate.

(7) But what if an heir should be charged to deliver a fourth part of the estate, after the death of the testator? I think the better opinion is the one which Scævola mentions in his notes, and which was adopted by Papirius Fronto, namely, that such a trust is valid, and has the same effect as if he had been charged to deliver the entire inheritance; and it should be delivered to the extent that the estate of the testator will permit, in accordance with the ordinary rule of law.

(8) Where an heir is charged with the emancipation of his children, he is not compelled to do this, for the paternal authority is not to be estimated in money.

(9) Houses which are to be demolished cannot be devised directly, or left under the terms of a trust, and this was decreed by the Senate.

(10) Where a trust is left to a slave belonging to another, without the grant of his freedom, and he becomes free, it must be said that he can be permitted to receive the trust.

(11) The Divine Severus and Antoninus stated in a Rescript that where a brother was charged to deliver the estate to the nephews of the deceased conditionally he cannot, before the time for the discharge of the trust has arrived, deliver it to them, even with their own consent, while they are still under the control of their father, as he can do when the time fixed for the discharge of the trust has expired, and the heirs have become their own masters; or where, if one of the children should die before this, delivery cannot be made to all of them.

(12) The same Emperors stated in a Rescript that it is not necessary for the estate of a mother to be delivered to her children before the time prescribed for the discharge of the trust arrives. But the heir can furnish them with the ordinary bond, or if he cannot do so, the children can be placed in possession of the estate for the purpose of preserving the trust, so that they hold possession of it by way of pledge, and not as owners, without the right to dispose of it, but retaining it merely in the capacity of pledgees, just as a father acquires the profits of property through his son, and a master through his slave.

(13) Where an heir is charged to deliver an estate under the terms of a trust, and dies without issue, the condition is considered to have failed to take place, if his children survive him, and no inquiry is made as to whether they claimed their rights as heirs.

(14) The Divine Severus and Antoninus stated in a Rescript that where a testator forbids by will any of his estate to be sold, but gives no reason for making this provision, and no one is found with reference to whom this disposition was inserted in the will, the provision is held to be of no force or effect; just as if the testator had left a mere direction, because such a precept cannot be inserted in a will.

But where testators make a similar provision with a view to the benefit of their children, their descendants, their freedmen, their heirs, or any other persons whomsoever, it must be carried out; still this cannot be done in such a way as to defraud creditors or the Public Treasury. For if the property of the heir should be sold in order to pay the creditors of the testator, the trust beneficiaries must also be subject to the same rule.

(15) Where a father, after having appointed his son by whom he had three grandsons his heir, charged him by a trust not to sell a certain tract of land, in order that it might remain in the family; and the son, having died, appointed two of his children heirs and disinherited a third, and bequeathed the said tract of land to a stranger, the Divine Severus and Antoninus stated in a Rescript that it was evident that the said son had not complied with the wishes of the deceased.

(16) But if, as Marcellus holds, he had disinherited two of his children, and appointed only one of them his heir, and had devised the said land to a stranger, the disinherited child could claim the trust. This would also happen if, while living, he had emancipated his children, and afterwards sold the land.

(17) Where all the children are appointed heirs to unequal shares of an estate, those who are appointed for the smaller shares cannot claim the benefit of the trust, so as to receive equal portions of the estate, and not the shares to which they are entitled; for although the testator left the land to but one of his children, it is a fact that he left it to be kept in the family.

(18) In like manner, if he only appointed one heir, and did not bequeath any legacy, the children who were disinherited cannot claim anything, *so* long as the property remains in the family.

(19) Sometimes, a slave is bequeathed and dies without any loss to the heir, or he is left in trust, as, for instance, if the slave of another, or even the slave of the testator should be bequeathed to several legatees as well as separately, so that each one will have an interest in the entire legacy; but this only occurs when the slave dies without the heir being to blame.

115. *Ulpianus, Institutes, Book II.*

Moreover, where a bequest is made as follows: "I wish you to give; I require you to give; I think that you should give," a trust is created.

116. *Florentinus, Institutes, Book XI.*

A legacy is a deduction from an estate whereby a testator desires that something should be given to a person which otherwise would have entirely belonged to the heir.

(1) An heir cannot be charged with a legacy for his own benefit, but you, as his co-heir, can be charged with one for his benefit. Therefore, if a tract of land is devised to a person who is appointed heir to half of the estate, and there are also two heirs who are strangers, the sixth part of the said tract of land will belong to the heir to whom the land was left, because he cannot claim half of it from himself; and with respect to the other half held by his co-heir he cannot claim more than the third part conjointly with the two strangers. The strangers, however, will have a right to claim half of the land from the heir to whom it has been devised, and each of them a third from the other heir.

(2) Where a slave belonging to another is appointed an heir, he cannot be charged with a legacy of himself, either entirely or partially.

(3) A legacy can lawfully be bequeathed to a slave who forms part of an estate, even though it has not been entered upon, because the estate represents the person of the deceased who left it.

(4) Where real property is devised, it should be delivered in the same condition in which it was left. Therefore, whether it owes a servitude to land belonging to the heir, or the latter owes it a servitude, and even though these servitudes may have been extinguished through confusion of ownership, the former right must be restored, and if the legatee does not permit the servitude to be imposed, and claims the legacy, he can be opposed by an exception on the ground of bad faith. Where, however, the servitude is not restored to the land entitled to it, an action under the will will remain in favor of the legatee.

117. *Marcianus, Institutes, Book XIII.*

Where any property is left to a city the bequest will all be valid, whether it is left for distribution, or to be expended in labor, in provisions, in the instruction of children, or for any other purpose.

118. *Neratius, Rules, Book X.*

Where a trust is expressed in the following terms: "I require; I desire; that you give," it is valid, or where it is expressed as follows, "I wish my estate to belong to Titius; I know that you will deliver my estate to Titius."

119. *Marcianus, Rules, Book I.*

Where a slave is forbidden by the testator to render an account, it does not follow that, by not being obliged to do so, he can obtain for his own benefit what may be in his hands; but, in order to avoid a too rigid examination being made, that is to say, that the slave may not be held accountable for negligence, but only for fraud. Therefore, his *peculium* is not considered to have been bequeathed to a manumitted slave merely for the reason that he is prohibited from rendering an account.

120. *Ulpianus, Opinions, Book II.*

Nothing is stated by which an heir is prevented from selling houses belonging to an estate, although annuities may have been left to be derived from their rent, provided the right to the legacy remains Unimpaired.

(1) Where all the parties to whom a trust has been bequeathed consent to the sale of the property, no further demand can be made under the terms of the trust.

(2) Where a tract of land has been unconditionally devised, and its profits have been acquired by the legatee after acceptance of the estate, they will belong to him, and the tenant interested in said profits will be entitled to an action against the heir under his lease.

121. *Marcianus, Rules, Book I.*

If anyone should bequeath a legacy to Titius and Mævius, one of them will be permitted to accept the legacy without the other. For when the Prætor *says, "I* order that the unborn child, together with the other children, shall be placed in possession of the estate," even though there are no other children, the unborn child will be placed in possession.

122. *Paulus, Rules, Book III.*

A bequest can be made to a town for the purpose of honoring or ornamenting it. In order to ornament it, for instance, where a legacy has been left for the purpose of building a forum, a theatre, or a racecourse ; to honor it, for example, where the bequest was made to provide for the compensation of gladiators, comic actors, and participants in the games of the circus, or where it was made to be divided among the citizens, or to meet the expense of banquets. And further, whatever is left for the support of persons who are infirm through age, such as old

men, or boys and girls, it is held to have been done for the honor of the town.

(1) "Let Lucius Titius and Gaius Seius be charged with the payment of ten *aurei* to Publius Mævius." Gaius Seius did not present himself as heir. Sabinus says that Titius alone will owe the entire legacy, for Seius is considered not to have been included in the bequest. This opinion is correct, that is to say, Titius will be liable for the entire ten *aurei.*

(2) Where a tract of land has been devised to someone under the following condition, "If he should pay a hundred *aurei* to my heir," and if the land should only be worth as much as the legatee is ordered to pay to the heir, he cannot be compelled to execute the trust with which he was charged, since he is not considered to have acquired anything by the will where he must pay out as much as he received.

123. *Marcellus, Opinions.*

Lucius Titius, who left his two children his heirs, inserted the following provision into his will: "Whichever my children shall be my heir, I charge him, if he should die without issue, to transfer to his brother two-thirds of my estate when he dies." The brother, at the time of his death, appointed his brother heir to three-quarters; and I ask whether he complied with the terms of the trust. Marcellus answered that what the testator owed his brother under the will of Lucius Titius can be demanded by him in proportion to his interest in the estate; unless it can be proved that the intention of the testator was otherwise; for there is little difference between this case and one where a creditor becomes the heir of his debtor.

It is clear, however, that the co-heir should be heard, if he can prove that the testator, when he appointed his brother heir, intended that he should be content with the appointment, and relinquish the benefit to be derived from the trust.

(1) The following provision was inserted into a will: "Let my heir deliver such-and-such property to Gaius Seius, and I charge Seius, and I trust to his good faith for the delivery of all the property abovementioned, without delay."

I ask whether this creates an implied trust, as the testator did not indicate in his will the person to whom he wished the property to be delivered. Marcellus answered that if Seius had tacitly given his promise for the purpose of defrauding the law, he could in no way derive any benefit from the words written by the testator. For the law must not be thought to have been any the less evaded, because it is uncertain whose advantage the testator had in view.

124. *Neratius, Parchments, Book V.*

If heirs who are expressly mentioned are charged with the delivery of property, it is more reasonable to suppose that they are charged with equal portions, because the enumeration of the persons has the effect to make them all equally liable for the payment of the legacy, for, if they had not been expressly mentioned, they would be liable only for their respective shares in the estate.

125. *Rutilius Maximus, On the Lex Falcidia.*

Where an heir is ordered to deliver an estate, and reserve a hundred *aurei* for himself, and his patron demands possession of the estate contrary to the provisions of the will, the legacies, as well as the amount reserved, will be diminished in proportion to what was obtained by the patron.

126. *Paulus, On Pupillary Substitutions.*

The substitute of a disinherited son cannot legally be charged with a legacy. Therefore, the heir-at-law of a disinherited son cannot be charged with a trust, because heirs-at-law are only compelled to discharge the duties of a trust where they have also been appointed heirs.

If, however, one of the children should take advantage of the Edict of the Prætor, by which

possession is promised in opposition to the provisions of the will, and the appointed heir should also demand possession contrary to its provisions, the substitute of the first of the children must pay the legacies, just as if a patrimonial estate had come Into the hands of the son for whom he was substituted, and as if the son had received from his father that to which he was entitled and had acquired through possession of the estate under the Prætorian Law.

(1) Where a posthumous child is charged with a legacy as follows, "If he becomes my heir," and no posthumous child should be born, the substitutes can enter upon the estate; and it must be held that they owe the legacies for which the posthumous child would have been responsible, if it had been born.

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

The posthumous child of a brother can be charged with a trust. For, with reference to trusts, the intention of the deceased is also considered ; and the opinion of Callus, who holds that the posthumous children of others can become our heirs at law, prevails.

128. *Marcianus, Institutes, Book II.*

If a guardian marries his female ward in violation of the Decree of the Senate, she can take under his will, but he cannot take anything under hers; and this is reasonable, for parties who contract forbidden marriages are guilty of an offence, and deserve to be punished. The woman, however, should not be considered to be to blame who has been deceived by her guardian.

THE DIGEST OR PANDECTS.

BOOK XXXI.

TITLE I.

CONCERNING LEGACIES AND TRUSTS.

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

A legacy dependent upon the will of a third party can be granted in the form of a condition; for what difference does it make where a bequest is made to me, "If Titius should ascend to the Capitol," or "If he should be willing"?

(1) Where, however, a legacy is bequeathed to a male or female ward, dependent upon the judgment of his or her guardian, and no condition or time is provided with reference to the legacy, as it is established that where a legacy is bequeathed by will dependent upon the judgment of a third party, it is understood to have been left to the discretion of a good citizen, and when this is done what was inserted in the legacy fixes, as it were, an amount proportionate to the value of the estate.

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

Whenever several articles are specifically mentioned in a legacy, there are several legacies. Where, however, only one kind of property, as furniture, silver plate *peculium,* or certain utensils are bequeathed, there is but one legacy.

3. *The Same, On Plautius, Book IV.*

Where a bequest is made as follows: "Let my heir be charged to deliver such-and-such property, if he does not ascend to the Capitol," the legacy is valid, although it is in his power either to ascend, or not to ascend to the Capitol.

4. *The Same, On Plautius, Book VIII.*

The better opinion is that no one can accept a portion of a legacy, and reject the remainder of the same.

5. *The Same, Questions, Book VII.*

Where two legacies are bequeathed, it is established that one can be rejected, and the other accepted. If, however, one of such legacies is subject to some liability, and should be rejected, the same cannot be said. Suppose, for instance, that Stichus and ten *aurei* were bequeathed to someone, and he was charged to manumit the slave. If there was ground for the application of the Falcidian Law, a fourth would be deducted from each legacy, and therefore, if the slave should be rejected, the burden of the deduction would not be avoided, but the legatee would be compelled to relinquish half of the sum of money.

6. *The Same, On the Lex Falcidia.*

Where a flock is bequeathed, a portion of the same cannot be rejected, and a portion accepted; because there are not several legacies, but only one. Where a *peculium,* or clothing, or silver plate, or other articles of this kind are bequeathed, we hold that the same rule will apply.

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

If ten *aurei* are bequeathed to Titius and another party who cannot legally receive them, as the heir is obliged to pay both the legatees, where one cannot receive the legacy, only five *aurei* shall be paid to Titius.

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

Where anyone bequeaths a slave belonging to his heir or to someone else, and the slave takes to flight, the heir must furnish security that he will be restored; but if he should take to flight

during the lifetime of the testator, he must be brought back at the expense of the legatee; and if he should escape after the death of the testator, he must be brought back at the expense of the heir.

(1) Where a legacy is bequeathed as follows: "I leave ten *aurei* to Sempronius, or, if he is unwilling to accept them, I leave to him my slave, Stichus," in this case there are two legacies, but the legatee must be content with one.

(2) Where anyone makes a bequest as follows: "I bequeath ten measures of wine from such-and-such a cask," even though less than ten may be found therein, the legacy is not extinguished, but the legatee will only receive what is contained in the cask.

(3) When a doubt arises as to which one of two persons a legacy should be given, as for instance, if it should be left to Titius, and two friends of the testator of that name appear and claim the legacy, and the heir is ready to pay it, and both of them are prepared to defend the heir, the latter must elect to whom he will pay the legacy, and by whom he will be defended against the other.

(4) If a legatee and certain parties claiming to be substitutes for the latter demand the payment of a certain sum of money, which has been bequeathed, and the heir is ready to pay it if both of them are prepared to defend him, he should select the one to whom to make payment, in order that he may be defended by him, and it neither appears to be guilty of fraud, the legacy should in preference be paid to the one to whom it was first bequeathed.

(5) If I bequeath to anyone a certain part of an estate, the Divine Hadrian stated in a Rescript that neither the value of any manumitted slave, nor the funeral expenses of the deceased, could be deducted from the legacy.

9. *Modestinus, Rules, Book IX.*

Where only a portion of the property of the deceased is bequeathed, as, "Such-and-such articles of my estate which will belong to me when I die", the dowry and the value of the manumitted slaves must be deducted from the assets of the estate.

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

Where a tract of land is specifically devised, any addition made to it after the will has been drawn up will also form part of the legacy, even if the words, "Which will be mine," are not added; provided that the testator did not hold this property separate from the estate, but had united it to the first tract of land devised in its entirety.

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

Labeo says that a slave who is to be liberated by the heir under a certain condition cannot receive a legacy without the grant of his freedom while this is in abeyance under the terms of the will, for the reason that he is the slave of the heir.

If, however, the heir inserted in his own will the same condition under which the slave was to obtain his freedom by that of the testator, the legacy will be valid. But if the slave should be ordered to be free while the heir is in default, it has very properly been decided that a legacy can be bequeathed to the slave without the grant of his freedom; because it would be superfluous to give him his freedom which he could not obtain under the will of the heir, but could obtain under that of the testator.

(1) "Let Stichus, or Pamphilus, whichever one my heir may choose, be given to Titius, provided he makes his choice upon the day on which my will shall be published."

If the heir does not say whether he prefers to give Pamphilus or Stichus, I think that he will be bound to give Stichus or Pamphilus, whichever one the legatee may select. If he says that he prefers to give Stichus, and Stichus should die, he will be released. If one of the two slaves

should die before the time when the legacy vests, the survivor will remain subject to the obligation. Moreover, when the heir has once stated which one he prefers to give, he cannot change his mind, and this opinion was also held by Julianus.

12. *Paulus, On Vitellius, Book II.*

Where money left by a legacy is not found among the property of the testator, but his estate is solvent, the heir will be compelled to pay the amount bequeathed out of his own pocket, or by selling some of the assets of the estate, or by obtaining it from any other source that he pleases.

(1) Where a legacy is bequeathed as follows, "Let my heir, when he dies, pay ten *aurei* to Lucius Titius," as the bequest is to take effect at an uncertain time, it does not pass to the heirs of the legatee if he should die during the lifetime of the heir of the testator.

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

Where a man has two debtors who jointly owe him the same sum of money, that is to say, Titius and Mævius, and he makes a bequest as follows, "Let my heir pay to Mævius what Titius owes me, and let him pay to Seius what Mævius owes me," he binds his heir by these words; for when the latter assigns to Mævius his right of action against Titius, Mævius is held to have been released by his act, and therefore the heir will be liable to Seius.

(1) Where a testator who has one debtor bequeaths the amount which he owes to him to two legatees separately, the heir is bound to satisfy both of the latter, one of them by assigning his right of action to him, and the other by paying him the money.

14. *Paulus, On Vitellius, Book IV.*

Where the same slave is bequeathed and ordered to be free, the favor shown to freedom takes precedence of the legacy. If, however, the slave is bequeathed in another part of the will, and it is clearly shown that it was intended to deprive him of his liberty, the legacy will take precedence on account of the intention of the deceased.

(1) Where a slave belonging to another is appointed an heir, it is established that his freedom can be conferred upon him after the death of his master for whom he acquired the estate.

15. *Celsus, Digest, Book VI.*

Where anyone charges his two appointed heirs as follows: "Let my heirs either deliver Stichus or ten *aurei,"* one of the heirs cannot tender five *aurei* to the legatee, and the other tender him half of Stichus, for it is necessary for Stichus to be entirely given, or the ten *aurei* to be paid.

16. *Paulus, Digest, Book VI.*

If a legacy is bequeathed to either Titius or Seius, "Whichever one my heir may prefer," the heir, by giving the legacy to one of them, is released from liability to both. If he gives the legacy to neither, both can demand it of him, just as if the property had been bequeathed to one alone; for as two creditors can be created by a stipulation, so two legatees can be created by a will.

17. *Marcellus, Digest, Book X.*

Where anyone bequeaths ten *aurei* to Titius, and charges him to pay the same to Mævius, and Mævius should die, the legacy will benefit Titius, and not the heir, unless the testator merely selected Titius as his agent.

The same rule applies if you suppose a case of the bequest of an usufruct.

(1) Where an heir is charged to pay ten *aurei* to one of the freedmen of the deceased, and he did not indicate to which one it should be paid, the heir will be obliged to pay it to all the freedmen.

18. *Celsus, Digest, Book XVII.*

I can bind my heir to pay you a legacy in such a way that if, when I die, Stichus should not be your slave, he will be compelled to deliver him to you.

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

If he to whom Stichus or Pamphilus is bequeathed, thinking that Stichus has been bequeathed to him, should demand this slave, he will not have the right to exchange him for another, just as where an heir, having been charged with the delivery of one or the other of these slaves, gives Stichus, not being aware that he was allowed to give Pamphilus, he cannot recover anything from the legatee.

20. *The Same, Digest, Book XIX.*

I learned from my father, and Proculus also held the same opinion, that where a legacy is bequeathed to a slave owned in common, and one of his masters refuses it, his share will not accrue to the other, for the bequest was not made conjointly, but a portion was left to each of the parties; and if both should demand it, each of them will be only entitled to a share of the same in proportion to his interest in the slave.

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

Where a certain individual has returned her dowry to his wife, and wished to bequeath to her forty *aurei,* and although he knew that her dowry had been returned, still, he made use of the pretext that he was bequeathing to her the said sum on the ground of returning her the dowry, I think that the forty *aurei* will be due, for the term "return," although it may have the signification to give back, also includes the meaning of the word to present.

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

Lucius Titius bequeathed to Publius Mævius, by his will, an office which he held in the army, or the money which could be derived from the sale of the same, together with all the privileges attaching thereto. Lucius Titius, however, having survived his will, sold the office and collected the price, and gave it to him to whom he had intended to leave by his will the said office, or the price received for the same.

After the death of Lucius Titius, Publius Mævius brought suit against the heirs of Lucius Titius to recover either the office or the money. Celsus: I think that the price received for the office should not be paid unless the legatee can show that the testator, after having paid it once, intended that he should receive it a second time. But if the testator, while living, gave to the legatee, not the entire price of the office but only that of a portion of the same, the remainder can be collected, unless the heir can show that the testator intended, by doing this, to annul the legacy; for the burden of proving that the deceased changed his mind rests upon him who refuses to discharge the trust.

23. *Marcellus, Digest, Book XIII.*

"I bequeath to Lucius Titius the Seian Estate, or the usufruct of the same." The legatee can claim either the land or the usufruct, which he to whom only the land is devised cannot do.

24. *Ulpianus, Trusts, Book II.*

Where a certain man left a trust in the following terms, "I charge you to deliver such-and-such property to those of my freedmen whom you may select," Marcellus thinks that even an heir who is unworthy can be selected.

If, however, he had said, "Those whom you may consider worthy;" he holds such as have not committed any offence will be eligible. He also holds that if the heir does not select anyone, all the freedmen will be permitted to claim the legacy, just as if it had been given upon that very day when it was left "To those whom you may select," and the heir does not tender it to

any of them.

It is clear that if the other freedmen are dead, it must be delivered to the survivor, or to his heir, if he should die before presenting his claim. Scævola, however, says in a note that if all could demand a legacy when it is not tendered to any of them, why will not those who have died transmit their rights to their heirs, especially where there is only one claiming it, and the heir cannot select the one to whom he may give the legacy?

For it appears that Marcellus held that where a trust was bequeathed as follows, "To such of my freedmen as you may select," unless he tenders the legacy to the party whom he wishes to have it, and does so without any delay, all the heirs will be entitled to claim it. Therefore, since all of them can do this, he very properly thinks that it should be given to the survivor alone, unless the other heirs have died before sufficient time had elapsed during which the heir could select one to whom he could give the legacy.

25. *Marcellus, Digest, Book XXV.*

If, however, some of the freedmen should be absent, and those who are present demand the execution of the trust, which was directed by the testator to be carried out immediately, after investigation has been made, it should be determined whether the others also are not entitled to claim the legacy.

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

A certain man in whom the ownership of a slave was vested, having appointed as his heir one who had the usufruct of said slave, bequeathed the slave to a third party. The heir cannot avail himself of an exception on the ground of fraud, if the legatee desires to claim the slave without leaving the usufruct for the benefit of the heir.

27. *Celsus, Digest, Book XXXIV.*

Where such-and-such property, or such-and-such other property is bequeathed, there is only one legacy. If one article is bequeathed under certain conditions, and another under others, we hold that there is but one legacy, nor does it make any difference whether the heirs, and those to whom the legacies were left, are different persons or not; for instance, if the legacy was expressed in the following terms: "If Nerva should be made Consul, let my heir Titius be charged with the delivery of such-and-such a tract of land to Attius; and if Nerva should not be made Consul, let my heir Seius pay a hundred *aurei* to Mævius."

28. *Marcellus, Digest, Book XXIX.*

Where a patron is appointed by his freedman heir to the share to which he is entitled by law, he is not compelled to execute a trust left by him. If the patron should reject the appointment, can those who have a right to claim his share hold it in the same manner, or will they be obliged to discharge the trust? The better opinion is that they will be compelled to discharge it, since the especial privilege enjoyed personally by the patron should, by no means, be enjoyed by another.

29. *Celsus, Digest, Book XXXVI.*

My father stated that when he was in the Council of the Consul, Ducenus Verus, his opinion was taken in the following case. Otacilius Catulus, having appointed his daughter sole heir to his estate, left his freedman the sum of two hundred *aurei,* and charged him to pay it to his concubine. The freedman died during the lifetime of the testator, and what had been left to the freedman remained in the hands of his daughter, and my father decided that the daughter should be compelled to pay to the concubine the sum left to her under the trust.

(1) Where an heir is specifically charged with a trust, it can be held that it was only intended that he should discharge it, if he became the heir.

(2) If the share of a son appointed as heir is increased by the accrual of a sum specially bequeathed to another charged with its payment as a legacy, he will not be compelled to pay the legacy, to which he is entitled by ancient law.

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

A certain person inserted the following provision in a will: "I bequeath to the Republic of the Graviscani, for the purpose of repairing a road which extends from their colony to the Aurelian Way." The question arose whether this legacy was valid. Juventius Celsus answered: "This document is to a certain extent defective, so far as it relates to the maintenance of the Aurelian Way, for the reason that the amount is not stated. Still, it can sometimes be held that a sum sufficient for the purpose was bequeathed, provided that it does not appear that the intention of the deceased was otherwise; either because of the large amount required, or on account of the moderate circumstances of the testatrix. It will, then, be the duty of the judge to fix the amount of the legacy, in accordance with the appraised value of the estate."

31. *Modestinus, Rules, Book I.*

Where anyone makes a bequest for the manumission of slaves, who himself has not the power to manumit them, neither the legacy nor the grant of freedom will be valid.

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

Everything which is left by will without fixing a time or prescribing a condition must be delivered upon the day when the estate is entered upon.

(1) When a legatee obtains possession of land, before the condition under which it was to have been delivered by the heir has taken place, the heir can recover it, together with the crops.

(2) Where a legacy is bequeathed as follows, "I devise to So-and-So such-and-such a tract of land, with everything that is thereon," the slaves found there will also be included.

(3) Where a bequest is made as follows, "I bequeath whatever is in my granary," and the party to whom it is left has placed in the granary certain articles for the purpose of increasing his legacy, without the knowledge of the testator, what he placed there will be held not to have been bequeathed.

(4) Where a legatee has been charged "To deliver his legacy to another," and the legatee should die, the heir will be obliged to deliver the property bequeathed.

(5) Where certain articles which are specifically mentioned are bequeathed, but are not found, and this is not due to the bad faith of the heir, they cannot be claimed under the will.

(6) Where property is left in trust to the family of the testator, those can be admitted to claim it who have been expressly mentioned, or if all of them are dead, those who, at the time of the death of the testator, bore his name, and their descendants in the first degree; unless the deceased especially included others in his will.

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

Legatees have a right to claim their legacies from each one of the heirs in proportion to his share of the estate, but some co-heirs cannot be charged with legacies for others who are insolvent.

(1) A testator appointed several heirs, and charged some of them with legacies, and afterwards he made a codicil including all his heirs. I ask which of the heirs will be charged with the legacies ? Modestinus answered, that as the testator had plainly indicated in his will by which of his heirs he desired the legacies to be paid, and even though he addressed his codicil to all of them, still, it is evident that what he bequeathed by the codicil must be paid by those whom he showed by his will he intended should discharge that duty.

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

Titia, after making a will and appointing her children Mævia and Sempronius heirs to equal shares of her estate, died, and charged Mævia to manumit her slave Stichus, in the following terms: "I ask you, my dear daughter Mævia, to manumit your slave Stichus, since I have bequeathed to you by my codicil so many slaves for your service," but she did not actually make such a bequest. I ask, what seems to have been left by these words? For, as has been above stated the deceased testatrix, having appointed two heirs, the hereditary slaves of the estate belonged to two distinct persons, and since nothing was provided by the codicil with reference to the delivery of the slaves, the trust could not be held to be legal, where it was not really created; as where the testatrix said she made a bequest, but did not add what it consisted of, nor did she charge the heir with the delivery of the slave.

Modestinus answered, as a result of the consultation, that Mævia had no right to claim either the legacy or the trust, and could not be compelled to grant freedom to her slave.

(1) Lucius Titius inserted the following provision into his will: "To Octaviana Stratonice, my dearest daughter, Greeting. I wish her to receive for herself the estate called Gaza, with all its appurtenances. To Octavianus Alexander, my dearest son, Greeting. I wish him to receive from himself all my unproductive lands, with their appurtenances."

I ask whether, by an instrument of this description, the testator should be considered to have given to each of his heirs an entire tract of land, or whether he merely included in the devise the shares of his estate to which they were legally entitled, as he could not properly charge each one of them with a legacy a portion of which he or she already had. Modestinus answered that the document in question should not be interpreted in such a way as to render the trust of no effect.

I also ask, in case it should be decided that the land entirely belonged to one of the heirs, whether the value of the share of the brother and co-heir should be paid, because as the testator wished him to have the entire property in the land, he seemed to have prescribed the condition that the co-heir should be paid the value of his share. He answered that the beneficiary of the trust could, by no means, be compelled to pay the co-heir the value of his or her share.

(2) Lucia Titia, having died intestate, charged her children, by a trust, to deliver a certain house to a slave belonging to another. After her death, her children, who were also her heirs, when dividing their mother's estate, also divided the above-mentioned house, at which division the master of the slave who was the beneficiary of the trust was present as a witness.

I ask, if, for the reason that he was present at the division of the property, he should be considered to have lost the right to demand the execution of the trust, acquired by him through his slave. Modestinus answered that the trust was not annulled by operation of law, and it could not even be repudiated, nor would the master be barred by an exception on the ground of bad faith, unless it was perfectly evident that he had been present at the division of the property for the purpose of renouncing his rights under the trust.

(3) Gaius Seius, who had a house of his own, went to live in a villa belonging to his wife, and removed certain property to it from his own residence, and having died there a long time afterwards, left his wife and several other persons his heirs by his will, into which he inserted the following clause: "In the first place, let my heirs know that I have no money nor any other property in the hands of my wife, and therefore I do not wish her to be annoyed on this account." I ask whether the property which, during the lifetime of the testator, was transferred to the residence of his wife, can be claimed by his estate; or, in accordance with the terms of the will, the co-heir can be prevented from sharing it with the widow of the deceased.

Modestinus answered that if the testator intended the property which he had conveyed into the

house of his wife to go to her, as a preferred legacy, there was nothing in the case stated to prevent his intention from being carried out; therefore, it was necessary for the woman to prove that such was the intention of the testator. If she did not do this, the property must remain a part of the estate of the husband.

(4) Where a trust was left to a freedman under the condition "That he should not desert my children," and he was prevented from complying with the condition by their guardians, it is unjust that he should be deprived of the benefit of the trust since he is free from blame.

(5) Where a man, against the wishes of his daughter, brought suit for the recovery of her dowry, and died, and after disinheriting his daughter, appointed his son his heir, and charged him with *a* trust for the payment to his daughter of a sum of money instead of her dowry, I ask how much the woman is entitled to recover from her brother.

Modestinus answered that, in the first place, the right of action for the recovery of the dowry is not lost by the woman, since she did not consent that her father should claim it, and was aware that he did so. Hence, the matter should be explained as follows. If a larger amount had been included in the former dowry, the woman should be content merely with her right of action; because if the sum bequeathed to her instead of the dowry was larger than the dowry itself, a deduction should be made until the sums were equal, and she could obtain under the will only the excess over and above the legacy. For it is not probable that the father would have intended to charge his son and heir with the payment of a double dowry, especially as he thought that he could properly bring an action against his son-in-law for the recovery of the dowry, even though his daughter did not give her consent.

(6) Lucius Titius, having left two children of different sexes, whom he appointed his heirs, added the following general provision to his will, namely, "That the legacies and grants of freedom which he left should be executed by these his heirs." Nevertheless, in another part of his will he directed his son to sustain the entire burden of the legacies as follows, "I order that whatever I have left in my legacies or directed to be paid shall be given and delivered by Attianus, my son and heir." He then added a preferred legacy to his daughter in the following terms: "I direct that my dear daughter, Paulina, shall have what I gave or purchased for her during my lifetime, and I forbid that any question shall be made with reference to said property; and I request you, my dear daughter, not to be offended because I have left the greater portion of my estate to your brother, as he has six great obligations to meet, and will be compelled to pay the above-mentioned legacies, which I have bequeathed."

I ask whether, by these last words which the father addressed to his daughter in his will, the result would seem to be that he charged his son with actions which could be brought against the estate, that is to say, with all of them; or whether it should be held that he only had reference to suits which could be brought by the legatee, so that actions against the estate might be granted to creditors against both the heirs. Modestinus answered that, in the case stated, it did not appear that the testator had directed that his son alone should be liable for the claims of the creditors.

(7) Titia, at the time that she married Gaius Seius, gave him by way of dowry certain lands and other property, and died after making the following provision by a codicil: "My daughter, I commit you to the care of my husband, Gaius Seius, whom I wish to receive the usufruct of, and a life interest in the Castle of Naclea, which I brought him as dowry, together with other property included in the dowry; and I desire that he should in no way be annoyed with reference to the dowry, for, after his death, all of this property will belong to you and your children." In addition to this, the woman left a great deal of property to her husband to belong to him as long as he lived.

I ask whether, after the death of Gaius Seius, an action based on the trust will lie in favor of the daughter and heir of Titia on account of the property which, in addition to the dowry, was

left by the codicil, as well as on account of what Gaius Seius received by way of dowry. Modestinus answered that, although these words do not show that a trust was not created by which Gaius Seius was charged for the benefit of the daughter of the testatrix, after she had given him what had been bequeathed by the will; still, there is nothing to prevent an action to compel the execution of the trust, in accordance with the will of the testatrix, after the death of Gaius Seius.

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

Where a legacy of property which she was accustomed to use is left by a husband to his wife, the bequest will not include slaves that were not especially devoted to her service, but such as were used by both of them.

36. *The Same, Pandects, Book III.* A legacy is a donation left by a will.

37. *Javolenus, On Cassius, Book I.*

Where a slave has been illegally manumitted by a will, he can be bequeathed by the same will, because freedom only takes precedence over a legacy where it was granted in accordance with law.

38. *The Same, On Cassius, Book II.*

Whatever a slave, who was bequeathed, acquired before the estate was entered upon, he acquires for the estate.

39. *The Same, On Cassius, Book III.*

When land which is not built upon is devised, and, after the will was executed, a building is erected thereon, both the ground and the building must be delivered by the heir.

40. *The Same, Epistles, Book I.*

Where the same property is bequeathed to two of my slaves, and I am unwilling to accept the legacy left to one of them, the whole of it will belong to me, for the reason that I acquire through one of these slaves the share of the other, just as if the legacy had been bequeathed to my slave and one belonging to another person.

41. *The Same, Epistles, Book VII.*

"I devise to Mævius half of such-and-such a tract of land, I devise to Seius the other half, and I devise the same land to Titius." If Seius should die, his share will accrue to the other legatees, because the land, having been left separately and by shares, as well as altogether, it is necessary that the part which is without an owner should accrue proportionally to each of the legatees to whom the bequest was separately made.

(1) An heir having been appointed by me, I charged him with a legacy for the benefit of his wife, as follows, "Let Seius, my heir, pay Titia a sum equal to whatever comes into the hands of Seius, by way of dowry, through Titia."

I ask whether the expenses incurred through legal proceedings instituted with reference to the dowry can be deducted. The answer was there is no doubt, where a bequest was made to a wife as follows: "I charge you, my heir, to give to her an amount equal to what comes into your hands," that the entire dowry will be due to the woman, without any deduction of expenses.

But the same rule that applies to the will of a husband who returns her dowry to his wife should not be observed with reference to the will of a stranger; for the words, "What comes into your hands," are to be interpreted as a limiting clause; but where a man leaves property in this way to his wife, he is considered to bequeath what his wife could recover by an action on dowry.

42. *The Same, Epistles, Book XL*

Where a legacy is bequeathed to a person who can only receive a portion of the same, with the understanding that it is to be delivered to a third party, it has been decided that he can take the whole legacy.

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

Where a legacy was bequeathed as follows, "I wish that as much be given to Tithasus as my heir will have," it is the same as if it had been said: "As much as all my heirs will have."

(1) If, however, the bequest was made in the following terms, "I wish my heirs to give as much to Tithasus as one of them will have," the smallest amount included in the legacy is understood to be intended.

(2) Pegasus was accustomed to make a distinction where a trust was bequeathed for a certain time, for instance, after ten years; and he held that it made a difference for whose benefit this time had been fixed, whether in favor of the heir, in which case he was entitled to retain the profits of the property, or in favor of the legatee, for example, where the trust was left to take effect at the time of puberty, when the beneficiary was under that age; for in this case the profits of the preceding period must be delivered.

These principles are understood to apply where it was specifically added by the testator that the heir must deliver the property subject to the trust, together with all its increase.

(3) Where the following provision was inserted in a will, "Let my heir pay ten or fifteen *aurei,"* it is the same as if only ten *aurei* had been bequeathed. But if he had left the legacy as follows, "Let my heir pay such-and-such a sum of money one year, or two years, after I die," the legacy is considered to be due after the lapse of two years, because it is in the power of the heir to select the time for payment.

44. *The Same, On Quintus Mucius, Book IV.*

Where several heirs were appointed, and the legacy was bequeathed as follows, "Let my heir be charged with the payment of five *aurei,"* not any one heir, but all of them together, are considered to be charged with the payment of five *aurei.*

Where a legacy was bequeathed in the following terms, "Let Lucius Titius, my heir, be charged with the payment of five *aurei* to Tithasus," and then, in another place in the will, it was provided, "Let Publius Mævius, my heir, be charged with the payment of five *aurei* to Tithasus," unless Titius can prove that Publius has been charged with the payment of the legacy for the purpose of releasing him, the legatee will be entitled to receive five *aurei* from each of the heirs.

45. *The Same, On Quintus Mucius, Book VIII.*

Where the following was inserted into a will, "I give a hundred *aurei* to my daughters," will the legacy be considered to have been equally bequeathed to the male and female children ? For if it had been left as follows, "I appoint So-and-So guardians of my sons," it has been held that guardians were also appointed for the daughters.

On the other hand, it should be understood that males are not included under the term "daughters," for it would establish a very bad precedent for males to be included in a word which designates females.

(1) Where a legacy is bequeathed to us under a condition, or at a certain time, we cannot reject it before the condition is fulfilled, or the time arrives; for before this the bequest will not belong to the legatee.

(2) If a father by will directs his heir to pay a certain sum of money to his daughter when she marries, or if she should be already married when the will is made but her father was absent at

the time and not aware of the fact, the legacy, nevertheless, will be due. For if her father was aware of it, he is held to have intended to have left the legacy with a view to some other marriage.

46. *Proculus, Epistles, Book V.*

If the party who bequeaths a legacy does so as follows, "I bequeath to Sempronius whatever Lucius Titius can be made to pay me," and does not add that the sum is payable "at the present time," I have no doubt that, so far as the interpretation and meaning of these words are concerned, that money is not included in the legacy which was not collectible at the time when the party who executed the will died; but, by adding the following words, "At the present time," he would have plainly indicated that he intended also to include money which was not yet due.

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

Sempronius Proculus to his grandson, Greeting. Two wills written at the same time by the same testator, one of which was a copy, as is usually the case, were produced. In one of said wills a hundred, and in the other fifty *aurei* were left to Titius. You ask whether he will be entitled to a hundred *aurei,* or only to fifty. Proculus answered, that in this instance, favor should be extended to the heir, and therefore as both legacies can, under no circumstances, be due, only fifty *aurei* are payable.

48. *The Same, Epistles, Book VIII.*

Licinius Lucusta, to his friend Proculus, Greeting. I ask where a husband bequeaths a dowry to his wife, and gives her the choice of receiving slaves which she had given to him by way of dowry rather than money, if she should prefer to have them, and the wife selects the slaves, can she also claim any offspring of said slaves which may have subsequently been born to them?

Proculus to his friend Locusta, Greeting. If the wife should prefer to receive the slaves rather than the money, the slaves themselves that, after having them appraised, she gave as dowry, and not their offspring, will be due to her.

(1) Where the possession of an estate is granted by the Prætor to the curator of an insane person, an action for the recovery of legacies can be brought against the curator, whose duty it is to defend the said insane person; but those who bring such an action must give security that, "If the estate should be evicted they will return what has been paid to them as legacies."

49. *Paulus, On the Lex Julia et Papia, Book V.* Where an ox which has been bequeathed dies, neither his hide nor his flesh will be due from the heir.

(1) Where a ticket calling for grain is bequeathed to Titius, and he dies, certain authorities hold that the legacy is extinguished. This, however, is not correct, for anyone to whom a ticket of this kind, or an office in the army is bequeathed, is held to be entitled to the appraised value of the same.

(2) Labeo states that it was the opinion of Trebatius that a tract of land which is not in commerce, so far as you are concerned, can be legally bequeathed to you; but this Priscus Fulcinius says is not true.

(3) Proculus, however, says that, if anyone should charge a tract of land belonging to him which is not in commerce, so far as the heir is concerned, to be delivered to someone, he thinks that the heir will be bound to either give him the property itself, if it forms part of the estate of the testator, or if it does not, to pay him the value of the same; which opinion is correct.

(4) Where a testator directs something to be paid, or some work to be done, or some service to be performed, it is held that those to whom a part of the estate has accrued must make

payment, or perform the act, in proportion to their shares, and that they are also equally liable for the payment of other legacies.

50. *Marcellus, Digest, Book XXVIII.*

Substitutions may be made for heirs just as for legatees. Let us see whether the same thing can be done where a donation *mortis causa* is made in such a way that the donor promises property to another if he should not be able to receive it himself. The latter is the better opinion, because in this case the donation is considered to have also been made to the person who was substituted.

(1) If Titius owes me Stichus, or ten *aurei,* and I bequeath to you Stichus, whom he owes me, it is held that the legacy will be extinguished on payment of the ten *aurei.* If, on the other hand, Stichus should be bequeathed to one person, and the ten *aurei* to another, the legacy will be valid, according to the character of the payment.

(2) Where a legacy is bequeathed as follows, "Let my heir pay the same amount to Mævius that he will collect from Titius," if this bequest is considered to be made under a condition, the legatee cannot bring his action before the money has been collected from Titius. If, however, the legacy is considered as payable immediately (as Publicius very properly holds), the legatee can bring suit at once to compel the assignment of the right of action.

51. *Ulpianus, On the Lex Julia et Papia, Book VIII.*

Where a testator made the following provision in his will, "I desire that there be given to So-and-So all that he is permitted to receive by law," then this bequest is considered to refer to the time when the legatee could receive the property under the will. If, however, the testator had said, "Let my heir be charged to give the largest share of my estate that I can dispose of," it must be said that the same rule will apply.

(1) A person to whom the third part of an estate is left to vest at a time when he will have children cannot obtain the third part of said estate by the adoption of children.

52. *Terentius Clemens, On the Lex Julia et Papia, Book III.*

It is not necessary to examine the legal capacity of anyone before an estate or a legacy belongs to him.

53. *The Same, On the Lex Julia et Papia, Book IV.*

Where an heir is charged with a legacy to be paid to the wife of the testator instead of her dowry, with the intention of compensating her therefor, and she prefers to have her dowry rather than the legacy, the question arises whether an action to recover the dowry should be granted her against all the heirs, or only against the one charged with the payment of the legacy.

Julianus thinks that the action should first be granted against the one who was charged with the payment of the legacy; for as she ought either to be content with her rights, or with the bequest of her husband, it is only just that he whom her husband charged with the payment of the legacy, instead of her dowry, should sustain the burden of the debt to the amount of the legacy, and that the remaining part of the dowry should be paid by the heirs.

(1) The same principle will apply if the woman, having been appointed heir in lieu of receiving her dowry, should reject the estate, in order that an action might be granted her against the substitute. This is correct.

(2) It may, however, seriously be doubted, where the legacy and the Falcidian Law are involved, whether he against whom alone an action to recover the dowry is granted will personally be obliged to pay the entire legacy, just as if all the heirs had paid the dowry, or whether the entire dowry should be included in the debts of the estate, because the action for

its recovery is granted against him alone. This, indeed, seems to be the most reasonable conclusion.

54. *The Same, On the Lex Julia et Papia, Book XIII.*

Where a tract of land worth a hundred *aurei* is devised as follows, "If he should pay a hundred *aurei* to my heir or to anyone else," the legacy is held to be very valuable, for it may be more to the benefit of the legatee to have the land than a hundred *aurei,* since it is often to our interest to acquire land adjoining our own, for a sum even above its just appraisement.

55. *Gaius, On the Lex Julia et Papia, Book XII.*

Where the same property was bequeathed to Titius and myself, and the testator died on the very day that the legacy began to vest, and he appointed his heir, and I reject the legacy, either on my own account, or as the heir to the estate, I see that the opinion generally prevails that the legacy is partially extinguished.

(1) Where a person has been appointed heir who cannot receive any of the estate, or only a portion of the same, and he leaves it to a slave belonging to the estate, in the discussion of his capacity to do this it must be determined whether the person of the heir or that of the deceased should be taken into consideration, or whether neither should be. It was settled after many conflicting decisions that, for the reason that there is no master with reference to whose person the question of capacity could arise, the legacy will be acquired by the estate without any impediment whatever; and, on this account, it will certainly belong to him who afterwards becomes the heir, in proportion to the share of the estate which he is entitled to receive, and the remaining portion shall go to those who are called by law to the succession.

56. *The Same, On the Lex Julia et Papia, Book XIV.*

Where a legacy is bequeathed to the Emperor, and he dies before the day when it becomes due, it will belong to his successor, according to a Constitution of the Divine Antoninus.

57. *Junius Mauricianus, On the Lex Julia et Papia, Book II.*

If you should bequeath a legacy to the Empress, and she should die, the legacy will be void, as the Divine Hadrian decided in the case of Plotina, and the Emperor Antoninus recently in the case of the Empress Faustina, as both of them died before the testator.

58. *Gaius, On the Lex Julia et Papia, Book XIV.* When a party to whom a legacy was bequeathed wishes only to obtain a portion of it, he will acquire it all.

59. *Terentius Clemens, On the Lex Julia et Papia, Book V.*

Where property has been bequeathed to me absolutely, and has also been left to my slave either absolutely or conditionally, and I reject the legacy, and then, the condition having been fulfilled, I wish to obtain what was bequeathed to my slave, it has been established that the bequest of half the legacy is void, unless someone should claim that the condition was that the slave should be living, for then the legacy which I once desired to obtain will be entirely mine; which seems to be the more equitable opinion.

This rule also applies where the same property is bequeathed to two of my slaves.

60. *Ulpianus, On the Lex Julia et Papia, Book XVI.*

Julianus says that if a son, who was an heir, should be charged with the payment of a legacy to Seius, and Seius is charged with a trust, under a condition, to pay it to Titius, and Titius dies before the condition has been fulfilled, the trust remains with Seius, and will not belong to the son who is the heir, because the Senate intended that, in the case of a trust, the condition of him who had been selected as trustee should be the better.

61. *Ulpianus, On the Lex Julia et Papia, Book XVIII.*

If Titius and Mævius should be appointed heirs by a testator who left four hundred *aurei,* and he charged Titius with a legacy of two hundred, and whomever might become his heir with a hundred, and Mævius, his heir, should not enter upon the estate; Titius will be responsible for the payment of three hundred *aurei.*

(1) Julianus, indeed, says that if one of two heirs at law who was charged with a trust rejects the estate, his co-heir cannot be compelled to execute the trust, for his share will belong to the co-heir without an obligation of any kind. However, after the Rescript of Severus, by which it is provided that where an appointed heir is charged with a trust, and rejects it, it must be executed by the substitute, in this case the heir at law will obtain the share by accrual, just as the substitute will acquire it with its burden.

62. *Licinius Rufinus, Rules, Book IV.*

Where a slave belonging to another is appointed an heir, his master can be charged with the execution of a trust. The latter, however, will not be obliged to execute it, unless he becomes the heir to the estate through his slave. If, however, the slave should be manumitted before he enters upon the estate by the order of his master, he can accept the estate if he chooses to do so, and the master will not be obliged to execute the trust, because he did not become the heir, and the slave will not be compelled to do so, for the reason that he was not charged with it. Therefore, an equitable action will lie in this case, in order that he who will benefit by the estate may be forced to execute the trust.

63. *Callistratus, On the Monitory Edict, Book IV.*

Where an heir who is not aware that certain property has been bequeathed uses it to pay the funeral expenses, he will not be liable to an action for the production of said property, because he is not in possession of it, and did not act fraudulently to avoid having possession. The legatee, however, will be granted an action *in factum,* in order that he may be indemnified by the heir.

64. *Papinianus, Questions, Book XV.*

Where a case is stated with reference to a trust which was left to several persons conditionally, and the testator, through mistake, omitted to substitute them for one another, but mentioned this reciprocal substitution in a second will, by which he made the substitution, the Divine Emperors Marcus and Commodus stated in a Rescript, that it was evidently the intention of the testator to create a reciprocal substitution of the beneficiaries of the trust; for, in the case of a trust, a mere conjecture can be admitted in order to establish the uncertain intention of the testator.

65. *The Same, Questions, Book XVI.*

Where *peculium* is bequeathed, it can be increased and diminished; if the property composing it is augmented by new acquisitions, or the original amount is decreased.

The same rule will apply to the slaves of a testator, whether he bequeaths the entire body of them, or only a certain portion; for instance, those belonging to his city-house or his country-house, and he should subsequently change the duties or the employments of said slaves.

This rule is also applicable to slaves who are litter-bearers, or footmen.

(1) Certain authorities hold that the bequest of a team of horses will be annulled, if one of the horses that belonged to the team should die, but if, in the meantime, the loss was made up, the team would belong to the legatee.

(2) Stichus was bequeathed to Titius and was to receive his freedom together with a legacy after the death of Titius. As soon as the estate is entered upon after the death of Titius, he will be entitled to his freedom.

The same rule will apply if he was directed to be free at the death of Titius.

(3) If, however, the slave was bequeathed to Titius, who had also been appointed heir to a part of the testator's estate, and the latter ordered the said slave to be free after the death of Titius, the slave will be entitled to his freedom after the death of Titius, whether Titius accepted the estate or not.

66. *The Same, Questions, Book XVII.*

Mævius left a tract of land to Titius and myself under a condition, and his heir left the same land to me under the same condition. Julianus says that it would be held that, when the condition is fulfilled, the same share will belong to me under both wills. The question of intention is, however, involved, for it seems to be incredible that the heir should have intended that the same share of the estate should be twice due to the same person. Still, it is very probable that he had in mind the other half of the estate. For the Constitution of the Emperor, by which it was provided that where the same property is bequeathed several times to the same person, does not impose an additional burden upon the heir, as it applies to only one will. A debtor, however, cannot always legally bequeath what he owes, as, for him to do so, the property contained in the legacy must be of greater value than the debt. For if the same property is left under the same conditions under which it is due, what advantage will attach to a legacy?

(1) Part of a tract of land which belonged to Mævius was left to Titius by the wills of two persons. It was not unreasonably decided, where the share which belonged to Mævius was delivered by one heir, that a release was obtained for the same share under the other will, and that, where the share had been alienated, the heir could not afterwards recover it by a right of action which had once been extinguished.

(2) Where merely the devise of a portion of the land, but not that which belonged to Mævius, was involved, a former payment did not extinguish the second action, and the other heir could deliver the same share of the property in any manner he chose, after it had once become his own; for it is understood that several persons can have a legal right to one tract of land, even where it is not divided up into sections.

(3) The same opinion is not held where a slave is bequeathed in general terms by two wills, for where a slave is delivered under one of them, and once becomes the property of the legatee, even though he may afterwards be alienated, he cannot be delivered by the other heir.

The same rule applies to a stipulation. For where a slave is bequeathed in general terms, a separate slave should be understood, so that, as a legacy is not valid from the beginning if it includes property which belongs to the legatee, so also the delivery of property whose ownership was subsequently acquired by the legatee is without effect, even though he has ceased to be the owner of the same.

(4) Where the heir has buried a dead body in land which was devised, an appraisement must be made of the value of the entire tract, before the burial took place. Therefore, if the land has been transferred, it is but reasonable that the legatee should retain his right of action under the will, to indemnify him for the alienation of the property.

(5) Where a legatee, to whom one of the heirs was charged to transfer certain property, paid the estimated value of what was bequeathed, and afterwards a codicil was produced by which all the heirs were charged to deliver the same property, I held that the ownership of the same could not again be demanded. For indeed where a party makes use of several ways to establish the testamentary disposition of his estate, he is not understood to have left the same property several times to the same person, but merely to have mentioned it several times.

(6) Where a tract of land is devised, and the usufruct belongs to someone else, it can, nevertheless, be demanded from the heir, for the usufruct, although it may not legally be a

part of the land, still includes its profit. And, indeed, where a tract of land is left, an action can be brought to compel the heir to deliver everything which should be transferred, and follow the legacy; for example, where a tract of land is hypothecated, or is in the possession of someone else.

The same rule, however, does not apply to other servitudes. If my own property is bequeathed to me, the legacy will not be valid, for the reasons above stated.

(7) Where a municipality is appointed an heir, with the reservation of the usufruct, the mere ownership can be bequeathed by the municipality, for the reason that it can lose the usufruct by non-user.

67. *The Same, Questions, Book XIX.*

Where an heir is obliged to select one person out of the family of the testator to whom to deliver property under a trust, which was to be executed at the time of his death, he cannot, after he has made his selection, legally bequeath the same property by will to anyone else, because he can claim the property under another will.

Therefore, will it not be the case that the bequest is invalid, as where a legacy is left to a creditor; for so long as he can change his mind should he not properly be compared to a creditor? Still, while his choice stands, he will appear to resemble a creditor, but when he changes his mind, he will have no right to claim the property under either will.

(1) Where the benefit of the Falcidian Law is claimed, everything must be carried out just as if the trust had been expressly left by the first will to him who afterwards was chosen, for the necessity of making a choice does not give rise to an obligation founded on his own liberality. For, can he, who would absolutely be obliged to surrender what he left, be considered to have bequeathed some of his own property?

(2) Hence, where there are three persons in the family, of the same or different degrees, to whom a trust was left, it will be sufficient to leave it to one of them, for after the will of the testator has been complied with, the others will be excluded by the condition.

(3) If, however, one of the family of the testator should be appointed heir, and the tract of land be left by him to a stranger, the execution of the trust can be made the subject of an action at law under the will, if no member of the family was appointed by the heir. However, where a testamentary heir was appointed by him, it is understood that an action based on bad faith can be filed against the others who claim the trust, for the same reason which enables them to benefit by the trust, will also furnish a ground for implied compensation.

(4) If the heir should appoint two members of the testator's family heirs to unequal portions of his estate, and should leave to a stranger a certain share of the land (for instance a fourth), the execution of the trust cannot be demanded, so far as those shares which the heirs retained by right of inheritance are concerned, any more than if the land had been devised to one of them as a preferred legacy; but all the members of the family can claim equal portions of the share which was left to the stranger, and contribution must be made, in order that these heirs may receive equal portions with the others.

(5) If, however, the heir should leave the land to one member of the family and charge him to deliver it to a stranger, the question arises whether the execution of this trust can be demanded. I said that this could only be done where an amount was also left to the heir which was equal to the value of the land. If, however, the first testator had left the trust as follows, "I charge you leave this tract of land to whom you may wish, or to those members of my family to whom you may desire to leave it," the matter will be free from difficulty.

But if the trust was established in the following words, "I do not wish the land to go out of my family," the successors of the heir are understood to be bound on account of the trust, which was created for the benefit of the stranger; and the members of the family of the first testator

will afterwards have a right to demand the execution of the trust, of course after the death of him who was selected in the first place.

(6) Therefore, if, after the selection of one of the relatives of the testator has been made, a trust should not be created in favor of a stranger, the party who was chosen cannot obtain the benefit of the trust, unless he furnishes security for the return of the land at the time of his death, if it should actually not be in the family at that time.

(7) "I ask that when you die you will transfer such-and-such a tract of land to any one of my freedmen whom you may select." These words seem to mean that the choice will belong to the heir himself, and that none of the freedmen can claim the property so long as another can be preferred to him; but if the heir should die before making a selection, all the freedmen can claim the land.

Hence, the result is that where the property is given to one, one of them cannot claim it while several are living, but all can claim it although it is not left to all; and one can only claim it if he should be the sole survivor at the time of the death of the heir.

(8) If, after having appointed you my heir, I bequeath your property, which I suppose to be my own, to Titius, there is no ground in this case for the application of the opinion of Neratius Priscus, by which it is provided that an heir cannot be compelled to pay the legacy, as relief should be granted heirs to prevent them from being compelled to purchase property which the testator bequeathed under the impression that it was his own. For men are much more inclined to bequeath their own property than to purchase that of others, and thereby impose a burden upon their heirs, which, in this instance, does not happen, as the ownership of the property is vested in the heir.

(9) If words creating a trust are omitted by the testator, and other property which is bequeathed seems to agree with what should have been written, the trust will be legally created, and it is presumed that less was written than was intended; just as is understood in the case of the appointment of heirs and legatees.

This opinion was also adopted by our Illustrious Emperor Severus.

(10) Moreover, the Emperor Marcus stated in a Rescript that where a testator provided as follows, "I do not doubt that my wife will return to her children everything that she has received from me," it should be considered to be a trust. This Rescript is of the greatest importance, for it presumes the existence of an honorable and well-conducted matrimonial life, and that the father was not deceived with reference to a trust created for the benefit of the children of both the parties. Therefore, when this most wise Prince, who scrupulously observed the laws, perceived that the ordinary terms employed in creating a trust had been omitted, he decided that the language used should be understood as having established one.

68. *Paulus, Questions, Book XI.*

The question now arises whether property which was given by a husband to his wife during his lifetime should be held to constitute a trust. I answered that what she received should be considered separate and apart from the estate of her husband, and therefore was not included in a trust, because the woman would be entitled to it, even though there should be another heir. It is clear, however, that a husband cannot charge his wife with property of this kind for the purpose of delivering it to someone else.

69. *Papinianus, Questions, Book XIX.*

"I ask Lucius Titius to be content with a hundred *aurei."* It is settled that where a clause of this kind is inserted into a will it creates a valid trust. But what if, after the testator had appointed an heir to a portion of his estate, he should speak as follows: "I ask that Lucius Titius be content with his share of *a* hundred *aurei"?* The co-heirs will have a right to demand his share of the estate, whether he either retains or holds as a preferred legacy, the sum which

the deceased desired he should be content with. It is no doubt better to adopt this opinion than the one that the trust can be claimed to those whom the testator did not mention.

We hold that the same rule will apply where the testator appointed an heir to his entire estate for the purpose of favoring him who would be his heir-at-law, and used the following language: "I ask that you be content with a hundred *aurei* which I have left to you instead of my estate, which will pass to my brother by operation of law."

(1) Where a tract of land is left with the understanding that it will remain in the family, and it is disposed of without the consent of the heir, by means of a forced sale, the purchaser can retain it as long as the debtor could have held it, if his property had not been sold, but he cannot retain it after his death, as the foreign heir will be compelled to surrender it.

(2) A mother having appointed her son, who was under the age of puberty, her heir, also appointed a guardian for him, and charged the latter: "To deliver the estate to Sempronius, if her son should die without reaching the age of fourteen years." Although the mother could not legally appoint a guardian, the trust should still be understood to have been properly created. For if a father should appoint a guardian, and charge him with the trust by a will which was not drawn up in compliance with the legal requirements, the trust must, nevertheless, be executed, just as if the will had been made in accordance with law. In order that a minor under the age of puberty may be charged with a trust it will be sufficient for the testator to charge his guardian, whom he appointed, with it, or one whom he supposed to be his guardian.

The same rule should be adopted in the case of the appointment of a curator for a child under the age of puberty, or a minor. Nor does it make any difference whether a guardian, who was properly appointed, dies during the lifetime of the father, or whether he has been excused from serving on account of some privilege which he enjoyed, or whether he could not act for the ward for whom he was appointed on account of his age; since in these instances it is certain that the trust is not annulled, because it is considered that the ward is charged with its execution. Hence, in accordance with this principle, it was decided that a guardian who did not receive anything under the will can not be charged with a trust for the benefit of his ward, as whenever he is charged with a trust for the benefit of a stranger, it must be executed in the name of his ward, and not in that of himself.

(3) Where a testator appointed his brother his heir and charged him not to sell his house, but to retain it in the family, and the heir did not comply with the request, but sold the house, or died after appointing a stranger his heir; all those who belong to the family can demand the execution of the trust. But what if they were not all of the same degree? This question should be disposed of by considering the party who is next of kin to be first heir called to the succession; still, the rights of the heirs further removed should not be prejudiced on account of those who precede them, and the next of kin should be admitted only where he is ready to give security to restore the house to the family.

If, however, security should not be required of the heir who was first admitted, no right of action for the recovery of the property will arise on this ground; but if the house should ever pass into the hands of a stranger, an action to compel the execution of the trust will lie in favor of the members of the family. I think that security can properly be required of the next of kin, by filing an exception on the ground of bad faith, even though there may be no surviving member of the family in a more distant degree.

(4) Where certain members of the family are subsequently emancipated, the question may arise whether they also can legally demand the execution of the trust. I think that they can do so, according to law, since the persons mentioned by the testator in this way are understood to be included in the term "members of the family."

70. *The Same, Questions, Book XX.*

The Emperor Antoninus stated in a Rescript that where a legatee had received nothing by way of legacy, he could not be compelled to pay the beneficiary of the trust with which he had been charged, but he could assign to him his rights of action against the heir. But what if he was charged to deliver, not the entire amount of the legacy bequeathed, but only a portion of the same, and he should refuse? Would he be compelled to assign all of his rights of action, or only an amount corresponding to what was included in the trust? This last opinion is the more reasonable one, but if he had come into possession of the legacy, he would not be obliged on account of the trust to pay any more than he had received.

(1) If a legatee, to whom a hundred *aurei* had been bequeathed, is asked to pay double the amount, the trust will be reduced to the amount of the legacy; and if the trust is to become operative after a certain time, only the interest on what was bequeathed can be collected.

Nor can this rule be changed for the reason that the legatee, after receiving the bequest, may have profited greatly by some other transaction, or has escaped liability for a penalty growing out of some stipulation with the enforcement of which he was threatened. This principle, however, will only apply where the sum bequeathed is equal to the amount of the trust. For where money has been received, and the party is asked to deliver to another something of his own, although it may be of greater value, the legatee should not be heard, if, having received the legacy, he demands contribution; for equity does not permit a legatee to tender to the beneficiary of the trust what he has received as a bequest.

(2) Where a certain man having appointed his son heir to a portion of his estate appoints his uncle his co-heir, and requests the latter to make his son his co-heir on equal terms with his children, and the amount bequeathed to the son is less than that of the uncle, nothing more can be demanded; because if anything more should be demanded, it has been decided that an account must be taken of the profits which the uncle has collected, or could have collected, but did not take through bad faith; just as should be done when a hundred thousand *aurei* have been left as a legacy, and the legatee is charged to pay a larger sum after a certain time.

(3) Where a trustee is charged to deliver whatever portion of the estate may remain at the time of his death, sells the property, and purchases some other with the proceeds of the same, he is not held to have diminished the estate by disposing of the property in this way.

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

But whatever is purchased under such circumstances must be delivered, just as if there had been an exchange of ownership.

72. *The Same, Questions, Book XX.*

The same rule must be observed where the heir paid his own creditors with the money of the estate, for he is not considered to have squandered what remains as part of the estate.

73. *The Same, Questions, Book XXIII.*

Where a slave to be born of Pamphila is bequeathed to me, and I purchase Pamphila, and she brings forth a child in my house, there is good reason for saying that the said child should not be understood to have been acquired by me for a valuable consideration, and therefore a demand can be made under the will for the child, just as if I had actually purchased it; so that, if a contribution of the price is made, I can obtain as much as the child would have cost me after having deducted the appraised value of the mother, and the judge appointed to hear the case must make an estimate of the amount of the same.

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

"Let my heir pay a hundred *aurei* to Titius without delay." The testator then extended the time for the payment of the legacy. It is not true, as Alfenus says, that a hundred *aurei* should be paid immediately, for the reason that a time has been fixed for payment.

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

A soldier sent a letter to his sister which he directed her to open after his death, and stated therein, "I wish you to know that I give to you eight hundred *aurei,"* it was established that a trust was created in favor of the sister, and that better evidence of his last will could not be left by anyone. For it was held that the trust would stand, just as if the deceased had spoken to the party himself, on whom he conferred the benefit indirectly.

(1) A man who was appointed heir to a portion of an estate, and was also left certain preferred legacies, died before entering upon the estate. It was held that his share belonged to his co-heirs who had been appointed substitutes, but that what was included in the preferred legacies with which his co-heirs had been charged would descend to his own heirs.

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

Where a son brought suit on the ground of an inofficious testament of his mother, before different tribunals, and various decisions of the judges were rendered, the heir who defeated the son will not be entitled to the preferred legacies, at least for the shares which the son would have obtained from the other co-heirs, any more than the other legatees would be entitled to any actions against the son; but it was decided that the grants of freedom conferred by the will should be carried out, since the son had partially broken the will of his mother.

This rule should not be applied to servitudes, which cannot be partially diminished. It is evident that a servitude must be entirely demanded from the party who defeated the son, but only the appraised value of a portion of it need be paid; or, where the son is ready to transfer the servitude, if the price is paid, the legatee will be barred by an exception on the ground of fraud, if he does not tender the appraised value of a portion of the same, just as in the case of the Falcidian Law.

(1) "I bequeath to Lucius Sempronius the entire estate of Publius Mævius." In this instance, Sempronius will only be liable for the burdens imposed upon the estate of Mævius, and which continued to exist until the death of him who became the heir of Mævius; just as rights of action are assigned instead of loans which could be paid.

(2) The owner of land, the usufruct of which had been left to an heir, bequeathed it under a certain condition. The terms of the will did not permit the heir to retain the profits, on account of the usufruct.

A different opinion is held with reference to certain servitudes attaching to land to which servitudes the heir was entitled, since he obtains the profits as a portion of the land.

(3) "Let my heir give to Titius what is due to me under the will of Sempronius." As the legatee, who was also a testator, had previously taken advantage of the law of novation, the legacy was not payable under the will; and it was held that the false representation did not injure the legatee, and that what, in the first place, was true, could not be considered as entirely false.

(4) Where a slave is manumitted unconditionally, but cannot obtain his freedom as soon as the estate is entered upon on account of some legal impediment, and because his condition is not established, or for some additional reason, for example, an accusation of adultery, he cannot expect to receive either legacies or the benefits of a trust absolutely granted by the same will, because the time has passed when he could take advantage of them.

(5) A father, having appointed his daughter heir to half of his estate, made the following provision in his will: "I ask that when you die, even though you should have other children, you will leave a larger share of your estate to Sempronius, my grandson, in honor of my name which he bears." The daughter seems to be necessarily compelled to give, in the first place, equal portions to all the grandchildren, but she has the choice of fixing the larger amount which her father desired to be bestowed upon one of his grandsons.

(6) A mother, without having observed the proper formalities, appointed a guardian for her son, and bequeathed him a legacy, on condition that the guardian should consent to be confirmed by the decree of the Prætor. If the Prætor does not consider him a suitable person, he will, nevertheless, not be denied an action for the recovery of the legacy.

(7) Where anyone has furnished the Mucian bond to provide against his doing anything forbidden by the testator, and afterwards commits such an act, he must also surrender the profits of the legacy which, in the beginning, he promised to return.

(8) A legatee cannot make use of several actions at the same time, because a legacy cannot be divided into several parts. For as a legacy is not bequeathed with the intention that the legatees may avail themselves of several actions, but, in order that it may be easier for them to bring suit, they can do so by selecting whichever action they please.

(9) The power is granted to recover a legacy from the legatee after it has been paid in compliance with the terms of the will, where the latter is decided to be void, when it is known that the memory of the deceased has become infamous; especially if the testator was convicted of treason after the legacy has been paid.

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

Where a father appointed his children and their mother his heirs as follows: "I ask you, my daughter, that, having accepted as your share of my estate a hundred *aurei* together with the Tusculan estate, you transfer to your mother your share of my estate," I held that, when the estate was divided, the daughter would be entitled to the land mentioned as part of it, and that she could retain the money in addition to her share.

(1) Those persons to whom a donation *mortis causa* has been given can be charged with a trust for any length of time; and this trust the heirs must execute after deducting the Falcidian portion which, in donations of this kind, follows the example of legacies. Where only a part of the donation is included in the trust, the latter will also be subject to the privileges of the Falcidian Law.

Where, however, the testator desired support to be furnished, it should be held that, according to his will, the whole burden of the Falcidian Law must be sustained by the remainder of the donation, as there is no doubt that the deceased intended that the entire maintenance should be furnished when his bequest of a larger sum is taken into consideration.

(2) A mother, desiring to make a donation *mortis causa* to her children born out of wedlock, permitted a stipulation to be made for her dowry. Afterwards, having appointed other heirs, she requested her children to return the dowry to her husband. It was held that the entire trust relating to the dowry was due to her husband, in case the Falcidian Law did not interfere; and therefore that her husband was entitled to retain the dowry, even though otherwise an action *in factum* would be granted to the heirs for the recovery of the Falcidian portion out of the dowry, if the children should institute proceedings based on the stipulation entered into with the husband.

(3) Anyone who is deaf and dumb, and receives a legacy, can be legally directed to surrender it at his death; for persons who are not aware of the fact can be charged with a trust, where they obtain some benefit from a will without knowing it.

(4) A son was requested when he died to deliver an estate to his own sons, or to one of them whom he might select. This son, having in the meantime been banished to an island, it was decided that he was not deprived of the power of choosing his heir by the infliction of the penalty, and also that the condition upon which the trust depended was still in existence, until his death, but that the children who were living at the time would be entitled to equal shares under the trust, as the father was not then capable of making a choice.

(5) Where a husband who, in violation of the *Lex Julia,* sold land which formed part of his

wife's dowry, bequeathed a legacy to her, and charged the purchaser of the land to pay her a larger sum than the price received, it was held that the purchaser was not liable under the terms of the trust. If, however, the woman, after having accepted the legacy, should wish to have the sale declared void, she can be barred by an exception on the ground of bad faith, after the price has been tendered her by the purchaser.

(6) A creditor directed his debtor Mævius to pay the amount he owed him to Titius, to whom he intended to make a donation *mortis causa.* If Mævius, knowing that his creditor had died, should pay the money, it is established that his release from liability will not follow; and even if Mævius should not be solvent, an action will not be granted against Titius for the collection of the entire amount, nor will one lie under the Falcidian Law, for the reason that Titius is not held to have received anything *mortis causa.* The case would be different if Mævius, not being aware that his creditor was dead, should pay the money by mistake, for any amount due by the Falcidian Law could be recovered.

(7) A father owed certain lands to his daughter under a trust created by her mother's will, and appointed the said daughter heir to a share of his estate, in order to compensate her for the amount of the estate of her mother to which she would be entitled under the trust, and he afterwards desired that the said lands should be given to his son whom he had disinherited. It was decided that, even if the daughter should be unwilling to accept her father's estate, the property left by the trust must be delivered to the son by the heirs to whom the share of the estate which the daughter had accepted would pass. Even though he had substituted another heir for his daughter, it would be necessary for him to execute the trust in favor of his son.

(8) Where a father, who believed himself to be the owner of certain lands, left them to his son by the terms of a trust, and the said lands were evicted, no action will lie in favor of the son against his brothers and co-heirs. If, however, the testator divided his property among his sons, his intention will not be considered to have been to restore the preferred legacies to the co-heirs, unless they themselves were prepared to see that the will of their father was executed in favor of their brother.

(9) Where a father left a certain sum of money by a trust to his daughter whom he had disinherited, and desired that the said sum should be given to her by way of dowry at the time of her marriage, and that his son should stipulate for said dowry, if the latter should pay a smaller sum than the dowry, it is evident that he must pay the remainder to the daughter. If a divorce should take place, the daughter could legally demand the execution of the trust, so that the right of action under the stipulation would be assigned to her, since it was not probable that the father intended the stipulation to be interposed in order that his daughter should remain without a dowry after the first marriage. If, however, she should marry subsequently, the security furnished by her brother will not extend to the second marriage.

(10) A father requested his daughter to surrender, at the time of her death, certain real property to any one of her children whom she might select, and she, during her lifetime, gave the said land to one of her children. This was not considered a choice, in accordance with the terms of the trust, because while the date of the latter was uncertain, the date of the donation was certain, for the disposal of the property without regard to the choice of the mother could be made in favor of one of the children, who, together with the others, would be entitled to the benefit of the trust.

(11) "I charge my heirs not to alienate the Tusculan Estate, nor permit it to pass out of my family." Those also must be understood to be called to the execution of this trust, under the terms of the will, to whom foreign heirs should have granted freedom under the said trust.

(12) "I charge you, my wife, to give and restore to my daughter at the time of your death, any of my property which may have come into your hands in any way whatsoever." Whatever the testator afterwards gave to his wife by a codicil will be included in the trust, for the order in

which the two instruments were executed -does not interfere with the law, and his intention; but if the wife's dowry had been previously left to her, she will have the right to retain it, since this disposition of the property is understood to be restored rather than donated.

(13) "I desire such-and-such land to be given to my freedmen, and if any of them should die without issue, I desire that their shares shall belong to the survivors." A testator having enfranchised a father and a son, it was held that the substitution was excluded under the will.

(14) Where a curator was charged by a minor to render an account of his administration to his brother, who would be his heir, this was held to be of no effect. Therefore, although it was provided by the will that payment should only be made to the said brother when he became of age, it was, nevertheless, held that the latter could bring an action against his brother with the consent of his curator, as it was presumed that his interest had rather been considered by the testator, than that the payment of the money, which could be legally collected, should be postponed.

(15) Where a testator, having appointed a stranger his heir by the terms of the trust, charged him to transfer certain lands to his freedman when he died, and requested that the said lands should not be disposed of out of the family, I answered that the substitute was required to deliver said lands in compliance with the will of the deceased. Whether, however, the lands should be delivered immediately, or when the condition was fulfilled, is a question which depends upon the intention of the testator; but, so far as this can be ascertained, the trust could not be executed before the death of the appointed heir.

(16) Where the business of a bank has been made the subject of a trust, and the indemnity of the heirs of the estate against the creditors has been secured by a bond, the transaction is similar to a sale, and therefore it will not be necessary to inquire whether the liabilities are greater than the assets.

(17) A father, by the terms of a trust, provided that certain slaves of his daughter, whom he had given to her at the time of her marriage, should belong to her. I gave it as my opinion that the offspring of said slaves, even though their mother had died before the will was executed, should be delivered under the trust, and that the same thing should be done where any donations had previously been made to his daughter after her marriage.

(18) Where heirs are charged to surrender the estate at the time of their death, they are not liable to the risk of loss of any claims which they have obtained by division, and which have been assigned to the different co-heirs, any more than to the diminution in value of lands belonging to the estate, for where a distribution is made, the change of property disturbs the community of interest.

(19) "I desire that my daughter may have for herself, as a preferred legacy, the property of her mother." Any profits which the father may have received, in the meantime, and did not keep separate, but either consumed or made a portion of his own estate, are not held to have been left to the daughter.

(20) "I desire that any property belonging to me and situated in Pamphilia, Lycia, or anywhere else, which belonged to my mother's estate, shall be given to my dear brothers, who are your maternal uncles, in order that you may have no controversy with them." All the property forming part of his mother's estate, which remained in the same condition of ownership, belonged to the trust. Therefore, any money derived from said property, included in the estate of the testator, and made his own property, will also not be due under the terms of the trust; as the testator intended to prevent that disagreement of his relatives which community of property is accustomed to provoke.

(21) A father, having appointed several of his children his heirs at the time of his death, gave to his oldest daughter his keys and ring for safe-keeping, and ordered a freedman who was

present to deliver to his said daughter all the property which was in his charge. It was understood that the "business of the estate was to be transacted by all his children in common, and that his daughter could not, on this account, demand in court any preference in the division of the property.

(22) When a will is found to be imperfect, any words bequeathing a legacy or a trust, and which precede or follow the defect, can only be considered as remedying it, where what is written agrees with the intention of the testator.

(23) A son appointed his mother his heir, and requested her, under the obligation of an oath, to execute certain trusts created by the will. The will having been declared void, I answered that the mother was, nevertheless, compelled to execute the trust, as the lawful heir, for the requests contained in the will are held to extend to every kind of succession.

(24) "Being solicitous for the welfare of my daughter, I direct her not to make a will until she has children, so that she will be able to live without any apprehension." It would appear that the estate was not left in trust for the sister and co-heir of the said daughter, for the reason that the testator did not intend that his daughter should not dispose of her estate by will, but as he had, by thus forbidding her to make a will, merely offered his advice, she should not make use of her legal right.

(25) "I ask you, my daughter, to distribute all your property of every kind among your children, according as each one may be deserving of your bounty." In this case, it seems that a trust has been created for the benefit of all the children, even though they may not have been equally deserving, and if the mother should not make any choice among them, it will be sufficient for the execution of the trust if they have not been guilty of any offense towards her.

I, however, was of the opinion that those should be preferred whom the mother might select, if they were more deserving. But if she should not select any, those alone who have offended her should not be admitted to share in the estate.

(26) A mother made a deposit, in a sacred place, of a letter donating certain lands to her son, he not being aware of the fact. She did not confirm her acts by words creating a trust, but only sent to the guardian of the temple a letter containing the following: "I wish the document containing my will to be delivered to my son, after my death."

The mother died intestate, leaving several heirs, and I gave it as my opinion that she should be understood to have left the trust for the benefit of her son; for it is not necessary to inquire to whom anyone may speak with reference to their last will, but toward whom the intention of the will is directed.

(27) A testator left a tract of land to his freedmen, and requested them not to alienate it, so that it might be retained in the family of the said freedmen. If all of them, with the exception of one, should sell their shares, the one who did not do so can claim the shares of all the others who by the terms of the trust were not granted the power of alienating the same; for the testator will be held to have only invited those who complied with his will to share in the benefits of the trust. Otherwise, it would be the height of absurdity if each could make a claim against the others, in such a way that anyone could demand the share which he alienated from another who, by alienating his own, had lost it.

This proceeding, however, can be instituted if all of them alienated their shares in the same manner. Moreover, it is understood that it is not the act of the first freedman who alienated his share, but that of the one immediately preceding him who did not dispose of his, which causes the accrual of the shares of the others to the advantage of the former.

But if no one should sell his share, and the last one should die without issue, the right to demand the execution of the trust will not survive.

(28) Where land is left to freedmen under such circumstances, and there is a freedwoman

among them, and the patron requests that the property shall not go out of the family, it was held that the heir of the freedwoman is entitled to retain the share of the land which his mother received.

(29) A person who thought that his entire estate would belong to his female cousin made a will by which he charged her with several trusts. The possession of the estate having devolved upon two heirs of the same degree, by the right of succession, in accordance with the principles of equity, and agreeably to the terms of the Perpetual Edict, I gave it as my opinion that the woman should be relieved from the execution of half the trust, but that it would be a hardship that the grants of freedom which she was required to bestow, should not be made on account of the loss she had sustained.

(30) A father who had appointed his son heir to half of his estate, and the sisters of the latter, who had not yet reached the age of puberty, each heir to a quarter of the same, appointed their brother their guardian, and expressed himself as follows: "My son, you must be content with two hundred *aurei,* instead of your share of half of the estate, and you, my daughter, must be content with a hundred *aurei* instead of your shares of a quarter each."

It was not held that the father intended to charge his children with a trust in favor of one another, but that he had merely made an estimate of his estate, as is ordinarily done by prudent parents; and, on that account, the brother could not, in a *bona fide* action on guardianship, avoid giving an account of his administration of the estate, on the ground that the amount which his sisters were to receive had been indicated.

(31) Mævius, having been appointed heir of Seius, and asked by him at his death to transfer the estate to his brother Titius, died, leaving the said Titius his heir, and charged him, at the time of his decease, to leave not only his own estate but that of Seius, also, to Sempronius. Titius having, in the meantime, obtained the profits of the property, I rendered the opinion that it could not be held that a trust had not been created if Titius should claim that he did not hold the estate as a donation but rather in payment of a debt, since by reason of the compensation for the profits which he had received he had done all that was required of him.

It is clear that if Mævius had appointed Titius his heir, under the condition that he would not retain the trust under the will of Seius, the Falcidian portion would be sufficient by way of compensation; but some injustice would be done. He, however, would act more prudently if he rejected the estate left to him by his brother, and then obtained possession of the same on the ground of intestacy, for it would not be held that he had acted in bad faith, as he would thus avoid being defrauded.

(32) "I ask you, my husband, to leave such-and-such land to your children, if you should have any; and if you should not have any, to either your, or my relatives, or even to our freedmen."

In this instance, I gave it as my opinion that no right of choice was granted, but only a certain order was arranged, by the terms of the will, for the substitution of heirs.

(33) It has been established that where certain tracts of land, which have their own boundaries, are left to a city, they will, none the less, be due under the terms of the trust, because the testator, having been prevented by death, did not by means of another instrument, as he promised he would do, establish the boundaries of said property, as well as those of a race-course where he wished races to be held every year.

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

The beneficiary of a trust will in vain demand its entire execution, where the heir opposes it on the ground that the Falcidian Law applies. If the said beneficiary, in the meantime, demands that his share be paid to him, and he does not receive it, the heir is understood to be in default.

(1) Our Illustrious Emperor, Severus Augustus, decreed that the sale of land belonging to the

State should be rescinded after the death of the purchaser, and the price repaid to his heirs out of money belonging to the legatee to whom the purchaser had bequeathed some land which formed part of that above mentioned.

I gave it as my opinion that the presumption was that the intention of the testator required that a part of the purchase-money should be paid to the legatee in proportion to the amount of the appraisement of said land.

(2) Moreover, a state is required to pay interest where it is in default in the execution of a trust, but if any damage has resulted on this account, it must be made good by those officials who have neglected to perform this duty after judgment has been rendered. Nor will anything be allowed for the expenses of litigation, if there was no reason for it, as those who allege ignorance should not be heard.

(3) A father, by the terms of a trust, forbade a certain tract of land to be alienated by his family of children. The last of the said children who could demand the execution of the trust is none the less understood to have left this right of action as a part of his estate, even if, dying without children, he left a stranger his heir.

(4) Where a creditor by the right of pledge sells a house received from his debtor who made a will creating a trust, judgment cannot be rendered against the purchaser on account of the trust, even though he was aware of the intention of the deceased.

79. *The Same, Opinions, Book XI.*

A woman charged with a trust in favor of the freedmen of her husband, at the time of her death left the enjoyment of the said land, not only to the freedmen of her husband, but also to her own. The latter, through ignorance of the law, having failed to claim the land to which they were entitled by the will of the husband, obtained the profits of the same with the others for a long time, in accordance with the terms of the trust. It was established that they should not, on this account, be held to have been deprived of the benefit of the first trust.

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

A legacy transfers the ownership of the property bequeathed, just as inheritance vests in the heir the ownership of each individual article included in it, the result of which is, that if the property is bequeathed absolutely, and the legatee does not reject the will of the deceased, the ownership of the property belonging to the estate passes directly to the legatee, without having become the property of the heir.

81. *Paulus, Questions, Book IX.*

Where anyone, having made a will by which he appointed his children his heirs, charged them with a trust, not as his lawful heirs, but as those whom he had appointed, and the will, for some reason, becomes void, his children cannot be compelled to execute the trusts under the same, if they should obtain the estate as heirs at law.

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

A debtor bequeathed ten *aurei* to his creditor, which he owed him after the expiration of a year, and which were secured by pledge. The amount is not due (as some authorities hold) under the will, when payment is made before maturity merely as a convenience, but suit can be brought for the entire ten *aurei;* nor will the right of action be barred if, in the meantime, the year has elapsed, for it will be sufficient for the day when the legacy is due to arrive.

Where, however, the year has passed during the lifetime of the testator, it must be said that the legacy will become void, although it was valid in the beginning.

Hence, in the case where a dowry is left as a preferred legacy, it was decided that the entire dowry could be recovered under the will; otherwise, in accordance with the above opinion, if

only an intermediate benefit attaches to the bequest, what shall we say where a certain tract of land, due at a certain time, was bequeathed? In this instance the money cannot be claimed, nor can a part of the land be easily found which can be claimed as a benefit.

(1) Where a first, second, and third heir are appointed, and legacies are bequeathed as follows: "If my first heir should not obtain my estate, let my second heir pay ten *aurei* to Titius; if my second heir should not obtain it, let my first heir deliver the Tusculan Estate to Seius," and both the first and second heirs should decline to accept the estate, the question arises to whom the substitutes appointed for them by the testator should be required to pay the legacies. The legacies will be due from both substitutes.

(2) Valens says that the property of a master can be legally bequeathed to a slave of another, just as a debt can be which he owed unconditionally to his master. For when we give anything by will to a slave belonging to another, the person of his master is only considered with reference to his testamentary capacity, but the legacy is valid so far as the person of the slave is concerned. Therefore, Julianus most properly lays down the rule that a legacy can only be bequeathed to the slave of another which he himself could hold if he became free. The observation that a bequest could be left to the slave as long as he remained in servitude would be improperly made, as a legacy of this kind derives its force and effect from the person of the slave; otherwise, we all might remark that there are certain slaves who, although they cannot obtain their freedom, can, nevertheless, acquire legacies and estates from their masters.

In accordance with the principle, which we have mentioned, namely, that in the case of wills the person of the slave must be considered, it has been decided that a legacy can be bequeathed to a slave forming part of the estate. It is not extraordinary that the property of a master, and what is owing to him, can be absolutely bequeathed to a slave, although such property cannot be legally bequeathed to his master.

83. *The Same, Questions, Book XI.*

Latinus Largus: The following case recently occurred. A freedman appointed his patron heir to half of his estate, and his daughter to the other half. He charged his daughter to transfer her share to certain female slaves belonging to his patron, as soon as they should be manumitted; and if the said daughter should not become his heir, he substituted for her the same female slaves. As the daughter declined to become her father's heir, the said female slaves, by order of their master, that is to say of the patron, entered upon the estate of the deceased. The slaves, having been manumitted by their master after a certain time, inquired whether they could demand the execution of the trust by their patron. Hence, I ask you to write to me what your opinion is on this point.

I answered that, in this case, the trust did not seem to be repeated, but that one thing or the other, that is to say, either the trust or the estate itself had been granted by the testator. It is, however, under these circumstances better to hold that, the slaves being substituted, and entitled to the trust, were therefore called to the substitution. For when a trust is created to be executed by one of the heirs of a testator, in favor of the slave of another, subject to the condition of his obtaining his freedom, and the same slave is substituted for the said heir; although the substitution may be absolute, this is still considered to have been done subject to the same condition under which he was entitled to the trust.

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

Where anyone leaves freedom to his slave by the terms of a trust, and bequeaths him something else, as well, certain authorities say that, because it has been decided that the slave should be manumitted by the heir, the result will be that he cannot be permitted to profit by the trust. This, however, is unjust, for, with reference to a person of this kind, the delivery of both the grant of freedom and the money can be demanded at the same time, and therefore, I think that if the heir should be in default in granting freedom to the slave, he should also be

considered in default, so far as the execution of the trust is concerned, and hence he will be subjected to the payment of interest; for it has been most justly held that everything which a slave may have acquired for his master, while the latter was in default in granting him freedom, should be restored to him.

85. *The Same, Opinions, Book IV*.

A creditor, to whom property given in pledge by a debtor is bequeathed, is not prevented from demanding the money loaned, if the intention of the testator is clearly shown not to have been to compensate him for the debt by means of the legacy.

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

"Let my great-grandson, Gaius Seius, be heir to half of my property, with the exception of my house, and that of my father, in which I live, with everything contained therein. Let it be known that all these things do not constitute part of the estate which I give to him." I ask, if there should be in said houses any silver plate, notes of debtors, furniture, or slaves, whether all this property found there shall belong to the other heirs who have been appointed. Paulus answered that the notes of debtors are not included, and that they will belong to all the heirs in common; but, so far as the other property is concerned, the grandson will have no claim to the same.

(1) Titius, at the time that he left certain lands and other property in a city to his nephew, devised among others the Seian Estate, which he, as head of the household, reserved entirely for himself, as long as he might live; but, in order the more easily to find a tenant, he divided said Estate into two parts, and designated one the Upper Seian Estate, and the other the Lower Seian Estate, which names were derived from the respective situations of the same.

I ask whether this entire Estate will belong to his nephew. Paulus answered that if the testator possessed the whole Estate under one name, then, even though he rented it after having divided it, all must be delivered under the terms of the trust; unless the heir can clearly prove that the testator had in mind only a portion of said Estate.

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

Titia desired that a ticket calling for grain should be bought of Seius within thirty days after her death. I ask if Seius should obtain possession of the said ticket for a valuable consideration, during the lifetime of the testatrix, as he could not demand what he already had, whether he would still retain his right of action. Paulus answered that the price of the ticket should be paid to the party concerning whom the inquiry is made, since a trust of this kind has reference to a certain quantity, rather than to the article itself.

(1) I gave it as my opinion that the interest due under a trust should be paid to the girl who was the beneficiary of the same, after she has attained her twenty-fifth year, where the heir is in default in executing said trust. For, although it has been decided that interest in every instance must be paid to minors under the age of twenty-five years, still, this does not apply to cases where the debtor is in default, for it is sufficient for him to have been in default only once, in order to render the interest payable for the entire time.

(2) Seia devised a tract of land to her freedmen, and charged them as follows: "I direct Verus and Sapidus not to sell this land, and whichever of them may die last, at the time of his death, to deliver it to Symphorus, my freedman, and successor, and to Beryllus and Sapidus, whom I have manumitted by this my will, or to whichever of them may be living at the time."

I ask, as she did not substitute the two freedmen in the first part of the will by which she left the property, and as, in the second part of the will she added the clause, "Whichever of them may die last," whether the share of one of the parties who may die will belong to the other. Paulus answered that the testatrix seems to have created two degrees of substitution under the trust in question; first where the party who dies first must deliver his share to the other; and

second, where the survivor must deliver it to those whom the testatrix expressly mentioned afterwards.

(3) The Emperor Alexander Augustus to Claudius Julianus, Prefect of the City. "If it should be evident to you, my dear friend Julianus, that the grandmother referred to intended, by making donations to her grandson out of her estate, to prevent her will from being broken on the ground of inofficiousness, reason demands that half of said donations should be annulled."

(4) Lucius Titius, who had five children, emancipated all of them, and gave his only son Gaius Seius a large amount of property in donations, reserving very little for himself, and appointed all his children, together with his wife, his heirs. By the same will he left to the said Gaius Seius, as a preferred legacy, two pieces of property which he had reserved, and charged him to give to his daughter Maevia a certain number of *aurei,* and also a certain amount to a brother of hers, to be taken out of the income of the land which he had transferred to her during his lifetime. Gaius Seius, having been sued by his sister Mævia, invoked the aid of the Falcidian Law.

I ask, since the Most Holy Emperor (as above stated) decided that where property had been donated against the will of the donor the gift should be annulled, whether Gaius Seius can, in compliance with the will of his father, be compelled to pay to his sister, his heir, the amount of the trust out of the donations which had been made to him? Paulus answered that, according to the Rescript of the Emperor, there can be no doubt that, in a case of the kind concerning which inquiry is made, relief should be granted to the children whose shares have been diminished on account of the donations made to the son; especially since the Emperor came to their assistance against the will of their father.

In the case stated, however, the will of the father intervenes in favor of those who claim the benefit of the trust. But where the Falcidian Law applies, the trust must be executed to its full extent, on account of the excessive amount of the donation.

88. *Scævola, Opinions, Book III.*

Lucius Titius provided by his will as follows: "Where I have given anything to any one of my children, whether I made him a present of it, or merely permitted him to use it, or where he has acquired any property for himself, whether it has been given to him or bequeathed to him, I desire that he may take and hold the same as a preferred legacy." The father had kept, in the name of one of his sons, an account book of debts, and it was afterwards decided and held that what remained in said book in the name of his son was due to the latter; but not what had been already collected and placed by his father among the assets of his estate. I ask whether the claims of the son which his father had collected before his will was made, and which, after it had been made, he still loaned in the name of his son, would belong to the latter, according to this decision. I answered that any sum which the father had collected in the name of his son, and had afterwards invested in the same way, would belong to him.

(1) "I request you, Titius, and I charge you to attend to my funeral, and to this end I take so many *aurei* from the funds of my estate." I ask, if Lucius Titius should use less than ten *aurei* for the purpose aforesaid, whether the balance of the sum will belong to the heirs. I answered that, according to the case stated, the heirs would profit by the remainder.

(2) Where a woman became the heir of her husband, and made the following provision in her will: "My dearest children, Mævius and Sempronius, take as a preferred legacy everything which came into my hands from the estate and property of my lord, your father, Titius, at the time of his death; provided, however, that you assume all the burdens of said estate, for the past as for the future, as well as those for which it may have become liable after the death of my lord, Titius." I ask if she paid anything after the death of her husband, and made a donation to anyone while she was enjoying the profits of the estate, whether the children will be liable for such obligations. I answered that, in accordance with the case stated, only those

obligations which remained unsatisfied could be imposed upon the legatees.

(3) "I direct whomever shall be my heir, or heirs, to see that Lucius Eutycus receives, in addition to the share which I have given him as heir out of the assets of my estate, in common with Pamphilus, whom I order to be free, all the implements for the manufacture of iron, in order that they may carry on the business."

Lucius Eutycus died during the lifetime of the testatrix, and his share of the estate passed to his co-heir. I ask whether Pamphilus, who was manumitted by the same will, can be permitted to demand half of the said implements for the manufacture of iron, although it cannot be carried on according to the will of the testatrix. I answered that he should be allowed to do so.

(4) Sempronia was substituted for an appointed heir, and, in case she should not be the heir, was to receive a legacy. She instituted proceedings against the heir, alleging that through his fraudulent conduct, the testatrix who, in the first place, had intended to make her her heir, had been prevented from changing her will, and lost her case. I ask whether she could still bring an action to recover her legacy. The answer was that, in accordance with the facts stated, she had a right to do so.

(5) A testator forbade the legacies which he bequeathed to be either claimed or paid before the expiration of five years; the heir, however, voluntarily paid a certain part of a legacy before the five years had elapsed. The question arose whether the heir, having paid the remainder of the legacy, could claim the benefit resulting from the payment of a portion of said legacy before the time prescribed. I answered that, because a portion of the legacy was paid before the designated time, a smaller sum could not be held to have been bequeathed.

(6) Lucius Titius made the following provision in his will: "I desire my small tract of land to be given to my male and female enfranchised slaves, both to those whom I have manumitted by this will, and to Seia, my foster-daughter, in order that it may not pass out of the hands of my family, until the ownership of the same shall vest in one person." I ask whether Seia will be entitled to a share in common with the freedmen, or whether she will have a right to claim for herself alone half of said tract of land. I answered that it was evidently the intention of the testator that all the persons mentioned should be entitled to equal shares of the estate.

(7) A testator appointed as his heir his son, who had not yet attained the age of puberty, and he bequeathed his wife her dowry as a privileged legacy, together with a number of jewels and slaves, and ten *aurei;* and, in case the minor child should die without reaching the age of puberty, he appointed certain substitutes for him, to whom he made the following bequest: "I desire that all of what I have disposed of by my first will, and as much more, shall be given to the heirs of my heir." The question arose whether the amount of the dowry would be payable a second time, under such a substitution, if the child should die before attaining puberty. I answered that it does not appear that the testator intended to double the legacy of the dowry. I also ask, in case the property composing the legacy should already have come into the hands of the woman for a valuable consideration, whether she could demand it from the substitutes. I answered that she could not do so.

(8) "I do give and bequeath to my fellow-citizens the note executed in my favor by Gaius Seius." The testator subsequently made a codicil in which he forbade the note to be collected from Seius, and charged his heir to pay the same sum to the City out of the debt due from another party, whom he mentioned in the codicil. The question arose, if the latter should not prove to be solvent, whether the heirs would be required to pay the entire amount themselves. I answered that the heirs would only be compelled to transfer to the City their rights of action against the debtor who, in accordance with the facts stated, had been mentioned in the codicil.

(9) A testator appointed an heir to his entire estate, substituted his grandson for him, and then provided as follows: "If, as I hope may not happen, neither my daughter, nor my grandson should become my heirs, I then desire that my share, that is half of such-and-such a tract of

land, shall belong to my freedmen." The question arises, if the daughter and the grandson should die before the testator, and his estate should pass to his great grandson on the ground of intestacy, whether the freedmen would be entitled to the benefit of the trust. I answered that, in accordance with the facts stated, if no other heir than the daughter and grandson should be appointed, or substituted, it appeared that the heirs-at-law would be required to execute the trust.

(10) "Let my heir, whoever he may be, know that three *denarii* are due from me to my paternal uncle Denetrius, and that three *denarii* have been deposited with me by Seleucus, another uncle, which I direct shall be immediately delivered and paid to them." The question arose whether the uncles would be entitled to an action, if the money should not be due. I answered that it should not be due, that no action would lie on account of the debt, but that one could be brought on account of the trust.

(11) Lucius Titius, two years before his death, sent away from his house his freedmen, Damas and Pamphilus, and ceased to furnish them with food as he had formerly done, and, afterwards, having made his will, he inserted into it the following legacy: "Let my heir, whoever he may be, give to my freedman whom I have manumitted by this will, as well as to those whom I formerly had, and to such as I have bestowed freedom upon under a trust, a certain sum of money for their support every month." The question arose whether Damas and Pamphilus were entitled to the benefit of the trust. I answered that, in accordance with the facts stated, they were entitled to it, if those who made the claim should clearly prove that it was the intention of the patron, at the time when he made his will, that the legacy should also be given to them; otherwise, nothing would be due to them.

(12) A testatrix gave to Damas and Pamphilus, whom she manumitted by her will, a certain tract of land, and charged them to transfer the same to their children, when they died. She charged her heirs by the same will to manumit Pamphila who was the natural daughter of Pamphilus. This same Pamphilus, after the time that the legacy vested in him, appointed Mævius his heir by will, and charged him to give his property to Pamphila, his daughter, as soon as she became free, that is to say, half of the land above mentioned, acquired by the will of her patroness, and which constituted his entire estate. I ask whether Pamphila, having been manumitted, could claim this share of the estate by virtue of the will of the patroness of her father, or, indeed, by that of her natural father, and whether on account of the trust, the provision of the Falcidian Law will apply. I answered that, in accordance with the facts stated, it should be held that Pamphila could only claim the execution of the trust by virtue of the first will.

Claudius: For the reason that it is believed that under the appellation of "children," natural children are also included, that is to say, such as are born in slavery.

(13) Scævola: A certain person bequeathed a hundred *aurei* to Gaius Seius by a codicil, and charged him to give that sum to a certain female slave belonging to him, the testator. I ask whether the trust, by which the legatee is ordered to make payment to a female slave of the testator, is valid. I answered that it was not. Again, if it is not valid, will the legatee be obliged to pay the heir to whom the said female slave belongs? I answered that he would not be obliged to do so, as he himself would have no right to bring suit to collect the legacy bequeathed to him.

(14) A certain man left a house to his freedmen of both sexes, in such a way that the males receive two-thirds and the females one-third of the rent of the same; and he forbade them to alienate the property. The house, however, was sold by the heir with the consent of all the parties interested. I ask whether the males will be entitled to two-thirds of the purchase-money of the said house, and the females to one-third, or not. I answered that no demand, under the trust, could be made for any part of the price of the house, unless the parties had consented at the time of the sale that the male freedmen should have two-thirds of the purchase-money,

and the females one-third of the same.

(15) Having appointed his son his heir, along with his grandson, who had been born to said son, a testator made the following provisions in his will: "I do not wish my house to be sold by my heirs, nor any money to be borrowed on it, but that it shall remain permanently and absolutely, for all time, in the possession of my sons and grandsons. If, however, any one of them should desire to alienate his share, or to borrow money on it, he shall have the power to sell to his co-heir, and to borrow the money from him. But if any one of them should do otherwise, any obligation which he may incur shall be null and void."

A son of the deceased afterwards borrowed money from Flavia Dionysia, and having rented the house to her, assigned to his creditor the rent due to him; and the question arose whether the condition of the will was held to have been fulfilled, so that the son would be liable to his brothers under the terms of the trust. I answered that, in accordance with the facts stated, the condition was not fulfilled.

(16) A testator, having appointed his mother and his wife his heirs, inserted the following provision into his will: "I request you, my dear wife, not to bequeath anything at your death to your brothers; you have your sister's children to whom you can leave your property, for you know that one of your brothers killed our son, while he was robbing him, and your other brother caused me great injury."

I ask, as the wife died intestate, and her estate passed to her brother as her heir-at-law, whether the sister's sons could demand the execution of the trust. I answered that they could do so, and that the trust was due.

(17) "I, Lucius Titius, have drawn up this, my last will and testament, without the aid of anyone learned in the law, rather having chosen to follow the inclinations of my mind, than to conform to an over-particular and excessive exactitude. Therefore, if I have included herein anything which does not conform to the prescribed legal requirements, or is indicative of a want of knowledge, the will of a man of sound mind should still be considered valid in law." He then appointed his heirs. The question arose when possession of his estate was claimed on the ground of intestacy, whether the dispositions made under the trust could be enforced. I answered that, in accordance with the facts stated, they could be.

89. *The Same, Opinions, Book IV.*

A certain man appointed his son and his wife his heirs by his will, and afterwards is said to have written a letter, by which he gave to his son all the property the latter had in his *peculium;* and added that he desired that the latter should have this property as a preferred legacy, to be disposed of at his pleasure, at his death.

The testator set forth in his will that any paper found sealed after his death would be valid as a codicil; the above-mentioned letter, however, was not sealed, and I ask whether its contents would benefit the son. I answered that if the genuineness of the letter was clearly established, any property which the testator stated therein he intended should be given to his son, the latter would be entitled to.

(1) A testator who owned property jointly with his brother appointed his daughters his heirs, and made the following provision in his will: "With reference to all my property which is owned in common with you, my brother, and your uncle, and of which the value may altogether amount to two thousand *aurei,* I ask that you receive therefrom the sum of a thousand *aurei* from your uncle Lucretius Pacatus, in lieu of your share." The testator survived this will five years, and left a greatly increased estate. The question arose whether the heirs of Lucretius Pacatus could, in compliance with the terms above quoted, by tendering the sum of a thousand *aurei,* obtain the execution of the trust. I answered that, according to the facts stated, it was not the intention of the testator that his entire estate should be given up

on the payment of a thousand *aurei,* but that the tender should be made in accordance with its appraised value at the time of the testator's death.

(2) A testator made a bequest to Seius, whom he had substituted for his heir, as follows: "I wish fifteen pounds of silver to be given to Seius, and his wife Marcella, if he should not be my heir." I ask whether if Seius should be his heir, Marcella would be entitled to half of this bequest. I answered that, according to the facts stated, she would be entitled to it.

(3) Lucius Titius, having died intestate, left a wife and a daughter by her, who had been emancipated, and inserted the following provision into his codicil: "This codicil had reference to my wife and daughter. In the first place, I request them to live together, as they did during my lifetime. I also request them to hold in common any property which I may leave to them, or whatever they may have otherwise obtained."

The daughter acquired possession of the estate of her father, on the ground of intestacy; and the question arises whether any portion of the estate of Lucius Titius is due to her mother from the daughter by the terms of the trust, and if so, how much. I answered that, in accordance with the facts stated, half of the estate is due to her, provided the mother was ready to place all her own property in the common fund.

(4) A testator appointed his four children his heirs to equal shares of his estate, and left a tract of land to each of them as a preferred legacy. The entire estate of the father being encumbered, the children borrowed money with which to pay the first creditor, and encumbered the same property to the second one; then the latter, as the debt was not paid, sold all the land to one of the heirs under his right of hypothecation. The question arises, as the son had possession of this property by the title of purchase, whether his brothers and co-heirs were entitled to demand the execution of the trust; or whether the trust was annulled, as the entire property held in common had been hypothecated by them to the second creditor. I answered that the personal action to which the heirs were entitled could still be brought by all of them, but that the trust could not be restored unless the heir who purchased the property should first be paid the debt by his co-heirs.

(5) A father charged his daughter with a trust as follows: "I ask you, my daughter, after my death to change the dotal security, and renew it in such a way that your brothers may agree that your dowry may be returned to you on condition that, if you should die without having one or more children during your marriage, your dowry shall go to them." The husband died after the death of the father, and before the dotal bond had been renewed, and the girl, having married a second time, died, leaving no children, and was survived by Titius, one of her brothers. The question arose whether Titius had a right to claim the property which was included in the dowry. I answered that the execution of the trust could be demanded by the heirs of the sister, if it was her fault that her brother did not make the agreement with reference to the dowry.

(6) A testatrix who had appointed her son and daughter her heirs, bequeathed legacies to her freedmen, and charged them with a trust as follows: "As I have bequeathed you certain property I ask you to be content with it, during your lives, and when you die, to deliver it to my children." Mævia, the daughter of the testatrix, having died, a freedman also died, after having appointed a son of his patroness his heir to that portion of his estate to which he was entitled by law, and the remaining portion he left to a stranger. The question arose whether, after the estate had been entered upon, the son of the patroness could demand from his co-heir the share of the property which, according to the will of the mother, had come into the hands of the said freedman. I answered that he could demand from his co-heir the same share to which he would have been entitled if the estate had not been entered upon.

(7) A husband appointed his wife heir to his entire estate, and directed that a codicil, which he had executed, should not be opened until after her death. She, considering a certain tract of

land which formed part of the estate unproductive, sold it. The purchaser asks whether, after the death of the woman, the legality of the sale can be called in question by parties to whom it was ascertained that the estate of the testator had been left in trust by the terms of the codicil; or whether the beneficiaries of the trust would only be entitled to the amount of the price received for the land. I answered that on account of the justifiable ignorance of the woman, as well as of that displayed by the purchaser, the land should remain in possession of the latter, and the heir of the woman should be required to pay the price obtained for it to the beneficiary of the trust.

THE DIGEST OR PANDECTS.

BOOK XXXII.

TITLE I.

CONCERNING LEGACIES AND TRUSTS.

1. *Ulpianus, Trusts, Book I.*

Where anyone is not certain of his condition, for instance, whether he is a captive in the hands of the enemy, or merely detained by robbers, he cannot execute a will. If, however, he should be ignorant of his legal rights, and thinks, through mistake, that because he has been captured by robbers, he is a slave of the enemy; or if, having been sent on an embassy, he believes that he does not differ from a captive, it is certain that he cannot create a trust, for the reason that he is unable to make a will who is in doubt as to whether he can do so or not.

(1) Where a son under paternal control, or a slave creates a trust by will, it will not be valid. If, however, the case is proposed that either of them should die after being manumitted, we constantly decide that the trust should be held to have been left, just as if it had been created at the time of the party's death; that is if his intention had continued to exist after the manumission.

Let no one suppose that we adopt this same rule with reference to wills, because whenever a will is not valid, none of its contents are valid either, but it is otherwise where anyone leaves a trust.

(2) Those who have been interdicted from the use of water and fire, as well as persons who have been deported, cannot create a trust by will, because they have not testamentary capacity when they are exiled.

(3) We must understand those to be deported to whom the Emperor has assigned some island as a residence; or such as he has banished by a written order. But before the Emperor has confirmed the sentence of the Governor, no one is considered to have lost his civil rights. Hence, if he should die before this is done, he is held to have died a citizen, and any trust which he left before he was sentenced will be valid, or one which he created after sentence was imposed upon him, and before the Emperor confirmed it, will also be valid; because up to this time he was still in the possession of his privileges as a citizen.

(4) So far as those are concerned who have been deported by the Prætorian Prefect, or his deputy who has cognizance of cases under the direction of the Emperor, or also the Urban Prefect (because the right of deportation was likewise granted to him by a Rescript of the Divine Severus and our Sovereign) they immediately forfeit their civil rights, and therefore it is evident that they have neither testamentary capacity nor legal power to create a trust.

(5) Where anyone who has been deported to an island makes a codicil while there, and having been restored to the enjoyment of his civil rights by the favor of the Emperor, dies, leaving the same codicil unchanged, it can be maintained that the trust will be valid, provided the party always had the same intention.

(6) Moreover, it should be noted that those can be charged with a trust into whose hands any of a person's estate is to pass when he dies, whether it is given to them, or whether they are not deprived of it.

(7) Not only the next of kin who have obtained possession of an estate by the judgment of the Prætor, but also those entitled to it on the ground of intestacy, can be charged with a trust.

(8) A child who is not yet born can be charged with a trust, if, after it is born, it will become our successor.

(9) It may undoubtedly be said that if anyone should die intestate, and leave a trust to be

executed by the heir entitled to succeed him in the first degree, and the latter should reject the estate, and the succession pass to the next degree, the heir will not be required to execute the trust. This rule Our Emperor stated in a Rescript.

(10) If a trust should be left by a freedman to be executed by his patron, and he should die, and one of his children should be permitted to take possession of his property, the same rule will apply.

2. *Gaius, Trusts, Book I.*

A trust cannot be left to be executed by a son who has been passed over in a will, even though he should be the heir-at-law.

3. *Ulpianus, Trusts, Book I.*

Where a woman made a stipulation with reference to her dowry, and her husband, having taken a receipt from her therefor in order that she might charge him with a trust, it must be said that the trust should be executed, for he is considered to have received something from his wife. This is the case where the woman gives a receipt to her husband, being about to make him a donation *mortis causa.* But where she increases her dowry in favor of her husband, *mortis causa,* or marries him again after separation, it may be held that the trust can be executed by him.

(1) Julianus said that if a slave should be bequeathed to me, and I am asked to manumit him, I cannot be charged with a trust, that is to say, if I am requested to do so absolutely; for if I am asked under a condition, or within a certain period, 1 will be liable on account of the profit which I will derive from the labors of the slave in the meantime, and upon this point Julianus entertained no doubt.

(2) Where anyone owes some property to a certain person, as the result of a stipulation, and bequeaths him the property, he cannot charge him with a trust, although the creditor may be held to have benefited by the legacy, because ownership vests at once, and does not wait for an action based on the stipulation.

Perhaps someone might say that he would profit by the expenses of the stipulation, which he would have to pay if the matter should come into court; but it can, by no means, be held that he can be charged with a trust.

(3) If I should transfer to you, *mortis causa,* the usufruct of certain property of which you have the ownership, it may be held that I can charge you with a trust, nor will the point that the usufruct is ordinarily extinguished by death have any weight, since we must consider the benefits which the owner will obtain during the intermediate time that the party who made the donation survives.

(4) If, however, I should release the pledge of my debtor, *mortis causa,* and charge him with a trust, the trust will not be valid.

4. *Paulus, Sentences, Book IV.*

Where a trust is left to be executed by a father or a master, and the estate is not obtained by him who has emancipated his son, or manumitted his slave, the beneficiary of the trust can bring a prætorian action against the said son or slave, because the profits of the estate which he has acquired remain in his hands.

5. *Ulpianus, Trusts, Book I.*

Where a legacy is left to a municipality, those who are transacting its business can be charged with a trust.

(1) Where anyone leaves a trust to be executed, not by the heir or legatee himself, but by the heir of said heir or legatee, it is but proper that this should be valid.

6. *Paulus, Trusts, Book I.*

Even if I should charge my heir with a trust as follows, "I ask you, Lucius Titius, to charge your heir to pay ten *aurei* to Mævius," the trust will be valid; provided that, after the death of Titius, its execution can be demanded from his heir. This opinion was also held by Julianus.

(1) A trust cannot, however, be created as follows, "If Stichus should become the property of Seius, and should enter upon my estate by his order, I ask Seius to pay such-and-such a sum," since anyone who obtains an estate through chance, and not by the will of the testator, or acquires a legacy under such circumstances, ought not to be burdened with the obligation of a trust; and the principle should not be adopted that you can bind anyone by a request of this kind when you give him nothing.

7. *Ulpianus, Trusts, Book I.*

Where the slave of a man who has been deported is charged with a trust, it will belong to the Treasury, unless the party who was deported disposed of the slave, or was restored to the enjoyment of his civil rights during the lifetime of the testator, for then it will belong to him.

(1) Where a soldier charges a man who has been deported with a trust, the better opinion is (and this is also approved by Marcellus), that he cannot receive the trust.

(2) If anyone should bequeath to his creditor what he owes him, he cannot charge him with a trust, unless the creditor obtains some benefit from the legacy; for example, where he is apprehensive of the filing of an exception, or where the debt was to be paid within a certain time, or under some condition.

8. *Paulus, Trusts, Book I.*

If a legatee, who has been charged with a trust, claims the legacy, he can only be compelled to pay to the beneficiary of the trust as much as will be required by the judge; or, if the judge does not compel him to

pay anything, he must assign him his right of action; for it is unjust that he should sustain the risk attending a lawsuit, if the case should be lost through no fault of the legatee.

(1) A slave of the heir cannot be charged with a trust, unless the latter is requested to manumit the slave.

(2) Where a testator provided that any of his estate which might come into his father's hands should be given to his daughter, so that, in this way, she would have more than she would otherwise obtain from her father's estate, the Divine Pius stated in a Rescript that it was evident that the testator intended that the delivery of the property should be made after the death of the father.

9. *Marcianus, Trusts, Book I.*

Where a trust was left as follows, "To anyone who may obtain my estate under the terms of my will, or through intestacy," or, "To anyone in whom my estate may vest by any title whatsoever," by these terms a child who may subsequently be born or come into the family, or anyone who may afterwards become a near relative of the testator, is held to be charged with the trust, as well as any woman who is not yet married, and afterwards is ascertained to be in the position in which, according to the Edict, the property of an intestate husband usually passes to his wife.

10. *Valens, Trusts, Book II.*

If I bequeath a hundred *aurei* to you, and to the one of my three children who may come to my funeral, the legacy will not be diminished, so far as you are concerned, if none of the children should come.

11. *Ulpianus, Trusts, Book II.*

Trusts can also be left in any language, not only in Latin or Greek, but also in Carthaginian, Gallic, or the idiom of any nation whatsoever.

(1) Whenever anyone makes a rough draft of his will, and dies before he completes it, what is contained in the draft is not valid as a codicil, although the document may contain words creating a trust. Mæcianus states that this was decreed by the Divine Pius.

(2) Where anyone writes, "I recommend So-and-So to you," the Divine Pius stated in a Rescript that a trust was not created; for it is one thing to recommend a person to his heirs, and another to intimate that it is his intention that they should be charged with a trust for his benefit.

(3) Where a man was asked to relinquish his share of an estate upon receiving a certain sum of money, it was held that he himself could demand the execution of the trust by the heir. If, however, he desires to do so, can he retain in his hands the sum bequeathed to him, and relinquish his share of the estate; or, indeed, can he, having been tendered the sum bequeathed, be compelled against his will to relinquish his share? He has a right to decide this matter himself.

And, indeed, where anyone is asked to relinquish his share of an estate upon receiving a certain sum of money, a double trust is created; first, where the party is ready to give up his share, he can demand a sum of money; and second, even though he does not demand it, still, he can be forced to surrender his share if the trustee is ready to pay him the said sum.

(4) Where anyone inserts the following in his will, "Such-and-such vineyards, or lands are sufficient for you," a trust is created, since we consider as a trust the clause, "Let him be content with such-and-such property."

(5) Where a trust is left as follows, "I wish my heir to pay ten *aurei* to So-and-So, unless my heir should be unwilling to do so," the trust is, to some extent, conditional, and first requires the consent of the heir; hence, after he has consented, he cannot change his mind and allege that he is unwilling to pay.

(6) When a bequest is made as follows, "If he should be willing," it involves the question as to how long the party who is charged with the trust may live. If, however, the beneficiary should die before the trustee pays the legacy, the heir of the latter must pay it. But if the trustee should die before he is appointed heir, the trust will not be transmitted to his heir, for no one can doubt that the legacy is conditional, and the trustee is held to have died before the condition was fulfilled.

(7) Although a trust which is left in the following manner is not valid, namely, "If he should be willing," it is, nevertheless, valid if expressed as follows: "If you should judge it advisable; if you think it ought to be done, if you should deem it expedient; if it seems, or should seem to you to be advantageous;" for the will does not confer full discretion upon the heir, but the trust is left, as it were, to the judgment of a good citizen.

(8) Hence, where a trust is left as follows, "If he should render some service to him," it will undoubtedly be valid, if the beneficiary has been able to render the heir any service of which a good citizen would approve. It will likewise be valid if left as follows, "Provided that he does not offend you," and the heir cannot allege that the beneficiary does not deserve it, if some other good citizen who is not prejudiced, will admit that the party is deserving of the benefit.

(9) These words, "I ask you, my son, to take the greatest care of the real property which is to come into your hands, in order that it may pass to your children," although they do not exactly express the creation of a trust, as they rather imply advice than the obligation of leaving the property to the children; still, the devise of said land is considered to have the effect of a trust for the benefit of the grandchildren, after the death of their father.

(10) Where a trust is left to a son who has been appointed the heir of his father, while it was not expressly stated that it would take effect at the death of the latter, this may be inferred; for instance, because the following words are used, "In order that he may leave the property to his son," or, "I wish him to have the property," or, "I wish it to belong to him," it can be maintained that the execution of the trust is to be postponed until the son becomes his own master.

(11) Where a trust has been left to anyone in the following terms: "If he should become his own master at the death of his father," and he becomes independent by emancipation, the condition will not be held to have failed, but he will obtain the benefit of the trust at the time of his father's death, just as if the condition had been fulfilled.

(12) Where a testator bequeathed certain property belonging to him, and afterwards alienated it through urgent necessity, the execution of the trust can be demanded, unless it can be proved that the testator intended to deprive him of the benefit of it, the fact, of his having changed his mind must, however, be proved by the heirs.

(13) Therefore, if anyone should collect the note of a debtor which he had in trust but did not, by enforcing payment, intend to annul the trust, it can be said that it must be executed. There is, however, a certain difference between these two cases; for, in one, the substance of the debt itself is extinguished, but in the other, the property still remains, although it may have been alienated. But I held that the claim for the execution of the trust still existed, even though a certain party had exacted the payment of a note of the debtor and retained possession of the money as a deposit, especially because the creditor did not himself demand the money, but the debtor tendered it of his own accord, and he, having done so, the former could not refuse to accept it.

Therefore, by degrees we admit that, even if the testator had purchased property with this money which he did not collect with the intention of depriving the beneficiary of the bequest to which he was entitled, the demand for the execution of the trust can still be made.

(14) Where anyone builds a house in an unlawful manner (that is to say one which the Imperial Constitutions say should be demolished), let us see whether a person can leave anything of which it is composed, by way of trust. I think that he can do so; for although it is necessary for the house to be torn down, still, there is no doubt that the terms of the Decree of the Senate offer no obstacle to such a disposition of the property.

(15) Where an heir is requested to lend a sum of money at a specified rate of interest, the trust is valid. Mæcianus, however, thinks that he cannot be compelled to lend it, unless he is furnished with proper security. I am more inclined to the opinion that security should not be required.

(16) Where a commission in the army is left in trust to the slave of another, the question arises whether the legacy is acquired by his master. I hold that the estimated value of the legacy must be paid if the testator knew that the party was a slave; but if he was ignorant of the fact, the master should not be permitted to demand the execution of the trust, because if the testator had known that the legatee was a slave, he would not have left him the bequest.

(17) It is evident from these cases, that when anything is left by way of trust, the article itself must be delivered, and when this cannot be done, the appraised value of the same must be paid.

(18) If anyone should leave ten *aurei* to someone by a trust, and agree to leave the same amount to him a second time, if he should lose what was left to him by the will, the question arose whether the second trust would be valid, or whether the heir should require security to protect himself, lest he might be compelled to pay the ten *aurei* again; and also if the sum should be lost several times, whether the trustee ought to be called upon to make it good.

The Divine Pius stated in a Rescript that no security should be required, and that where the property had been lost, it should not be replaced more than once by the trustee, for the heir ought not to be indefinitely burdened, and compelled to repay the said sum of money every time it was lost, but, as the legacy seems to be doubled by the second trust, no further liability attaches to the heir, if the beneficiary should afterwards waste what he has received under it.

(19) Likewise, if anyone should bequeath a certain sum of money to anyone, and add that the said sum can easily be set off, as the beneficiary is himself a debtor to the estate of the testator, Gaius Seius, and he refuses to accept the estate of the said Gaius Seius, but demands the execution of the trust, Our Emperor stated in a Rescript that such a demand was contrary to the intention of the testator, as with reference to trusts the intention of the testator must by all means be considered and observed.

(20) It frequently happens that what was left is intended for the benefit of several persons; but the testator desired to honor only one of them by mentioning him. This opinion of Marcellus is perfectly correct.

(21) Hence, it happens that, sometimes, where a testator wished to do honor to several persons, and had them all in his mind, although there was but one legacy, still, several are permitted to claim it, as for instance, where ten persons stipulated for the same property, and the heir or trustee was requested to pay them, for in this case, if it was to the interest of all of them, and the testator had them in his mind, they all could demand the execution of the trust.

But let us see whether each can bring an action for his share, or for the entire amount. I think that they can bring suit according to the interest of each one, and therefore the one who first proceeds will obtain the entire amount, provided he gives security that he will defend the party who paid him against all the other beneficiaries of the trust, whether they are partners or not.

(22) Sometimes, however, the right to make a demand for the execution of a trust, or for a legacy, will belong to another party than the one whose name is mentioned in the will; as, for example, where the heir is charged to pay a public tax for Titius, the farmer of the revenue must make the demand for the execution of the trust, or for the payment of the legacy; although he may be the person mentioned, and Titius himself can demand the legacy which was left to him.

I think that it makes a great deal of difference whom the testator had in his mind, and whom he intended to benefit. Generally, however, it should be understood that he acted for the advantage of a private individual, although the profit may have actually enured to the farmer of the revenue.

(23) Where something is left for the erection of a public work in a city, the Divine Marcus and Lucius Verus stated in a Rescript directed to Procula that each heir was liable for the entire amount. They, however, in this instance, granted time to a co-heir during which he might send persons to do the work, and after this time they decided that Procula alone would be liable, and that she could collect from her co-heir his share of the expense which she had incurred.

(24) The Divine Marcus also stated in a Rescript that the same rule was applicable to a statue, a servitude, and other things which are incapable of division.

(25) Where anyone is ordered to construct a public work, and offers to furnish the money to the city in order that it may construct it, when the testator intended that the trustee himself should do so, he shall not be heard; and this the Divine Marcus stated in a Rescript.

12. *Valens, Trusts, Book I.*

"Let Stichus be free, and I request my heir to teach him a trade, in order that he may be able to support himself." Pegasus says that the trust is void, because the kind of trade was not stated. But the Prætor or the Judge must determine, in accordance with the intention of the deceased,

and the age, position, character, and talents of the slave to whom the bequest was made, what trade it would be best for the heir to teach him at his own expense.

13. *Mæcianus, Trusts, Book II.*

Where a testator expressed himself as follows, "Let my heir give So-and-So such-and-such a tract of land, and pay ten *aurei* to Seius in addition," there is no doubt that Seius can claim half of the land and ten *aurei* under the provision of the will.

14. *Gaius, Trusts, Book I.*

There is no question, where a legacy is bequeathed to a wife under the condition that she will not marry again, and she is requested to return the legacy if she does; that she can be compelled to do so, if she should marry a second time.

(1) An heir who has been released from the requirement of taking an oath, will still be obliged to pay legacies and execute trusts under a will.

(2) Where, however, a legacy has been left to someone for the purpose of purchasing property belonging to another, in order to deliver the same to a third party; and he is unable to purchase said property for the reason that the owner will not sell it, or wishes to sell it at an exorbitant price, he must pay the just value of the same to the beneficiary of the trust.

15. *Mæcianus, Trusts, Book II.*

Where the property of a testator, which is said to be in the sea is bequeathed, it must be delivered after it has been recovered.

16. *Pomponius, Trusts, Book I.*

The property left under a trust is very frequently delivered to the beneficiary in a better condition than it was when bequeathed; as for instance, where a field has been increased by alluvial deposit, or where an island has arisen.

17. *Mæcianus, Trusts, Book II.*

Property which will be in existence at some future time, as an island which may be formed in the sea or in a river, can also be bequeathed.

(1) A servitude can also legally be bequeathed to a slave who owns an adjoining tract of land.

18. *Pomponius, Trusts, Book I.*

If, having executed a will according to law, I leave you a trust, and then afterwards I make another will without observing the required formalities, by which I do not leave you a trust, or if I do, I leave you one entirely different from that included in the first will; it must be considered whether it was my intention, when I made my second will, to deprive you of what was bequeathed by the first, because trusts are annulled by the mere intention. This, however, is difficult to establish as perhaps I may not have intended to revoke the first will, unless the second should be valid, and now the trust in the second will will not be valid, even though the same heirs were appointed by both wills, and entered upon the estate under the first one.

19. *Valens, Trusts, Book V.*

Nerva and Atilicinus very properly held that where a legacy was bequeathed to you, or a trust was left requiring you to perform some act, even if it was not to the interest of the heir for this to be done, the right to bring an action should be denied to you, if you did not furnish security to the heir to comply with the will of the deceased.

20. *Ulpianus, Trusts, Book VI.*

If property should be left to me in trust, and the same property should be bequeathed to you either as a legacy, or in trust, not with the intention of dividing it, but entirely to each one of

us, there is no doubt that if it should be given to one alone, the other will have no right whatever in the property, but he will be entitled to an action to recover the entire price of the same.

21. *Paulus, Sentences, Book IV.*

A trust can also be left by a mere motion of the head, provided he who does so is also able to speak, unless some disease with which he is suddenly attacked prevents him from using his voice.

(1) It has been established that where a trust is left, and the property to which it relates is ascertained to belong to the party to whom it was left by reason of a valuable consideration, the trust will be extinguished, unless the deceased intended that the appraised value of the property should also be paid to the owner of the same.

(2) Where the columns or timbers of a house are left under a trust, the highest authority has decided that only such parts of the building can be delivered which may be removed without injuring it, and that no statement of the appraised value of the same shall be made.

22. *Hermogenianus, Epitomes of Law, Book IV.*

Where anyone in the beginning of his will expresses himself as follows, "I wish he to whom I have twice made the same bequest shall only be paid once," and afterwards, by the same will or by a codicil, he knowingly bequeaths the same property several times to the same person, his last will should be held to prevail, for no one can say that a man is not permitted to revoke his first will.

This, however, will only apply where he expressly states that he had changed his original intention, and desired that the legatee should receive several bequests.

(1) Where a soldier who has been sentenced to death for a capital crime is, by the terms of the sentence which condemned him, permitted to make a will, he is also authorized to leave property in trust.

(2) The beneficiary of a trust must alone sustain the loss caused by the death of a slave left to him under the same, before the heir is in default, even though a slave belonging to another is the subject of the legacy.

23. *Paulus, Sentences, Book V.*

It is dishonorable for the Emperor to claim a legacy, or the benefit of a trust under an imperfect will; for it is becoming to the majesty of so great a ruler to show obedience to the laws from whose operation he himself seems to be exempt.

24. *Neratius, Opinions, Book II.*

A bequest can be made to a creditor in order to prevent his heir from recovering money which is not due.

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

"Let So-and-So, my heirs, pay a hundred *aurei* to Seius." Seius can demand payment from whichever of said heirs he wishes.

(1) Where there is no ambiguity in the words made use of, no question as to the intention of the testator should be raised.

26. *The Same, On Neratius, Book II.*

He who owes a trust is compelled not only to deliver the property from the day when he is in default, but also to make good any loss Which the beneficiary of the trust may suffer on this account.

27. *The Same, Decrees, Book II.*

Paula, having appointed Callinicus heir to a part of her estate, bequeathed by her will ten *aurei* to her daughter Jubentiana, and then, after some time, having executed a codicil, she left the hundred *aurei* to the same Callinicus, but did not add: "In addition to his share." It was decided that both sums should be paid to him, especially as nothing had been left to the daughter of Callinicus by the codicil.

(1) Pompeius Hermippus appointed his son Hermippus heir to three-fourths of his estate, and his daughter Titiana heir to the remaining fourth, and left to each of them certain lands as preferred legacies; and he also directed that if Hermippus should die without issue, another tract of land should be given to his daughter. After having made his will, he made a codicil by which he left his daughter certain lands, and desired her to be content with them, together with what he had left her by his will. The property of Hermippus was forfeited to the Treasury, and his sister Titiana demanded the execution of the trust. The question arose, as her brother was requested to pay her so much instead of her share of the estate, whether her father intended that she should only receive what he had left her by the codicil. It seems to me that he had absolutely revoked his first will. The more equitable interpretation seemed to be that her father did not intend to deprive her of her share of the estate to which she would have been entitled during the lifetime of her brother, nor of that which the latter was to leave her at his death, if he should die without issue; and it was so decided.

(2) Julianus Severus, having appointed several heirs at the time of his death, left to his foster brother fifty *aurei* which he desired to be paid to him by Julius Maurus, his tenant, out of the rent of land that he owed him; and he also bequeathed certain property to the said Maurus. The Treasury raised a question as to the disposal of the estate, and Maurus paid the money to the Treasury, by order of the Imperial Steward, and the appointed heir afterwards gained the case against the Treasury. The foster-brother having died, his heir demanded the execution of the trust by the heir of Maurus; but the Emperor decided that he was not charged with the trust, but that he had only been mentioned to point out the source from which the trust could be obtained, and therefore that the heir of Severus should execute it.

28. *The Same, On the Tertullian Decree of the Senate.*

If I should be charged with a trust to deliver to another person all over and above the share that I can legally take, it is established that I can also receive the said amount.

29. *Labeo, On the Last Epitomes of Javolenus.*

Where a man had a concubine, and gave her the privilege of using the clothes of a former concubine, and then made a bequest as follows, "I leave her such-and-such clothing which I have purchased, and intended for her," Cascellius and Trebatius deny that she is entitled to the clothing which was obtained for the first concubine, because a different rule prevails in the case of a wife.

Labeo does not adopt this opinion, because, while it is true that in the case of a legacy of this kind the law governing a wife does not apply, the interpretation of the words used by the testator must be considered.

The same rule applies to the case of a daughter, or to any other person whatsoever. The opinion of Labeo is correct.

(1) Where a legacy was bequeathed as follows, "I desire my wife, Titia, to have a share of my estate equal to the smallest one which any one of my heirs may have," and the shares of the heirs were unequal, Quintus Mucius and Gallus held that the largest share was bequeathed, for the reason that the smaller share is included in the larger. Servius and Ofilius contended that the smallest share was meant, because when the heir was charged with the payment of the legacy, he had the power to give whatever share he chose. Labeo approves this opinion, and it

is correct.

(2) Where a legacy was bequeathed as follows, "Let my heir pay to Seia a sum of money equal to that which I obtained from the estate of Titius," Labeo thinks that the legacy includes what the testator had entered in his accounts as having been derived from the said estate; but he denies that security should be furnished to the heir by the legatee to protect him, in case the heir should afterwards be required to pay anything on account of the said estate.

I, however, hold the contrary opinion, because it cannot be maintained that what the heir will have to pay on account of said estate has actually come into his hands. Alfenus Varus states that this was the opinion of Servius, and it is correct.

(3) Where a slave has been left to you in general terms, and the heir delivers Stichus to you, and he is evicted, Labeo says that you can proceed against him under the will, because the heir is not considered to have given you any slave, since you were unable to retain the one he gave you. I think that this is correct. But he also says that you should notify the heir of the eviction before instituting proceedings, for, if you did otherwise, an exception on the ground of bad faith could be filed against you in case you brought an action under the will.

(4) "If my slaves Stichus and Damus are in my possession at the time of my death, let them be free, and let them have for themselves such-and-such a tract of land." Labeo thinks that if either of said slaves should be alienated or manumitted by their owner, after the will was executed, neither of them would become free. Tubero, however, thinks that the one who remained in the hands of the testator would be free, and be entitled to the legacy. I think that the opinion of Tubero is the one more in conformity with the intention of the deceased.

30. *The Same, On the Last Epitomes of Javolenus, Book II.*

A testator who had four oil jars made the following bequest: "I bequeath two oil jars which are similar." I gave it as my opinion that only a pair of jars was bequeathed, as the expression, "Two pairs of jars," is not the same as "Two similar jars." Trebatius is of the same opinion.

(1) Where a testator rented certain public gardens from the State, and bequeathed to Aufidius the produce of said gardens until the expiration of the lease under which they were rented, and charged his heir to pay the rent of said gardens and permit him to enjoy the same, I held that the heir was obliged to permit him to enjoy them, and moreover, that he would also be obliged to pay the rent of said gardens to the State.

(2) Where it was inserted into a will, "Let my heir pay five *aurei* to Stichus, my slave, and if Stichus should serve my heir as a slave for the term of two years, let him be free," I think that the legacy will be due after the lapse of two years, for both it and the grant of freedom should be referred to that time. This was also the opinion of Trebatius.

(3) If you are charged to sell me a tract of land for a specified price, you will not be at liberty under the terms of said sale to reserve any of the crops of said land, because the price refers to the entire premises.

(4) Where I directed a party to purchase a tract of land for himself and me, to be held in partnership, and he then divided said land into two portions by boundaries, and, before delivering it to me, he devised it as follows, "I give to So-and-So my tract of land," I denied that more than half the land was due, because it would not be probable that the testator, when he made the devise, intended that his heir should be charged with the mandate.

(5) "Let my heir pay two hundred *aurei* to my wife, while she remains with my son at Capua." The son left his mother. I was of the opinion that as long as both parties resided at Capua, the legacy would be due to the mother, even though they did not live together. If, however, they should move to some other town, Trebatius says that the legacy would only be due for one year according to the time during which they lived together. Let us see whether a condition was not implied by the words, "While she remains with my son at Capua," but that they shall

be considered as superfluous. I do not adopt this opinion. Still, the legacy should be paid to her, provided it is not her fault if she did not reside with her son.

(6) If you are charged to deliver a house belonging to another, and you cannot purchase said house on any terms whatsoever, Attius says that the court must make an appraisement of its value, so that the heir may be discharged after the amount has been paid.

The same rule applies if you could have bought the house and did not do so.

31. *The Same, Epitomes of Probabilities, by Paulus, Book I.*

Where a house is bequeathed to anyone, he will be entitled to all the buildings situated on the land belonging to said house. Paulus: This rule, however, does not apply where the owner possessed two adjoining houses, and a room of one of them was destined for the use of the other, and employed for this purpose; for, under these circumstances, the said room will cease to be accessory to the building to which it is attached, and will become accessory to the other.

32. *Scævola, Digest, Book XIV.*

A testator appointed Sextia heir to a fourth of his estate, and Seius and Marcius, his sister's sons, heirs to the remaining three-fourths. He then substituted Sextia for Marcius, and Marcius for Sextia, and left Marcius certain property as a preferred legacy. Marcius rejected the share of the estate to which he was appointed heir, and, having died intestate, his property passed to his legitimate brother Seius. The question arose whether Sextia could, under the substitution, also claim for herself from the heir-at-law what had been left to Marcius as a preferred legacy, on the ground of the substitution. The answer was that, according to the facts stated, Sextia was not substituted, so far as the legacies which had been bequeathed to Marcius were concerned.

33. *The Same, Digest, Book XV.*

A certain man bequeathed to his wife, with other property, that portion of his house in which they had been accustomed to live. The question arose, since, at the time that the will was made as well as when the testator died, he made use of the entire house, and did not rent any portion of it, whether he only intended to bequeath the bedroom in which he was accustomed to sleep.

The answer was that all that part of the house in which he habitually resided with his family was included.

(1) A testator, among other bequests, left the following legacy to his wife: "I desire that whatever I have presented to my wife, or have purchased for her use during my lifetime shall be given to her." I ask whether it should be held that she was also entitled to what he had given to her after the will was made. The answer was that the words mentioned had no reference to future time.

(2) Where Seius paid a hundred *aurei* to a creditor of his wife, and redeemed a piece of jewelry which had been deposited by way of pledge, and, having afterwards executed a will, made the following bequest, "I give to my wife whatever I have paid on account of a stipulation into which she entered, and, in addition to this, two hundred *aurei* every year;" the question arose whether the said two hundred *aurei* could be recovered by the husband's heirs from his wife or from her heirs. The answer was if he had paid the creditor as a donation, his heirs would be liable under the trust if they tried to collect the debt, and that they could even be barred by an exception. The presumption would be that a donation was intended, unless the contrary could be proved by the heir.

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

A certain woman bequeathed a claim of her debtor as follows: "I wish the ten *aurei,* which the heirs of Gaius Seius owe me, to be paid to Titius, in addition; and I desire my heir to assign to

him his right of action against them, and to deliver to the said Titius the pledges which they have given." I ask whether the heirs should only pay the ten *aurei,* or whether the right of action should be assigned for the entire debt; that is to say, for the interest as well as the principal. The answer was that it appears that the entire obligation of the debt was bequeathed. I also ask, if a testatrix should not be aware that her agents in the province entered into a stipulation for the ten *aurei,* and the interest should be added to the principal on account of the above-mentioned trust, whether the increase of this debt would belong to Titius. I answered that it would.

(1) A testator, having appointed his son his heir to a portion of his estate, with other things left him a preferred legacy in these words:

"I request that twenty claims, taken from my account-book, shall be given without fraudulent intent to my son Titius, after he has selected the same." The said testator, during his lifetime, entrusted his son with the transaction of all his business, and the son, after the will was made, and for ten years before his father's death, during which time he acted as his agent, contrary to the usual practice of his father as shown by his account-book, lent new debtors large sums of money, and permitted the old debtors who owed his father small amounts to increase their obligations, in order that the aforesaid twenty claims might almost fill the entire account-book of his father. The question arose whether the son was entitled, as a preferred legacy, to the loans which he himself had made. The answer was that he could only make a choice of those which were in the account-book of the testator at the time he executed his will.

(2) A woman left, as a preferred legacy, to one of her heirs all that remained of the estate of her husband Areto, and charged him to deliver said property to her great-grandson when he reached the age of sixteen years; and she then added the following: "I also ask that you pay, satisfy, and discharge any remaining debt due from the estate of Areto, out of the income of the same to the creditors of said estate." The question arose, if the heir should prove that there was not sufficient income from the estate to pay all the claims, whether he himself would be required to assume the burden of the indebtedness. The answer was that it was evidently the intention of the testatrix that the debts should be paid out of the income of the property, and not out of the private estate of the heir.

(3) A father, having appointed his son and his daughter his heirs, and left to each one of them certain lands and book-accounts by way of preferred legacies, inserted the following provision into his will: "I charge you, my dear son, and I wish you to pay all the legacies which I have bequeathed, and if I should contract any indebtedness by a temporary loan, and owe this when I die, I desire that you pay it, so that what I have left to your sister may remain intact." The question arose whether the son was required to pay all the debts of his father, no matter how they were contracted. The answer was that the daughter could, under the terms of the trust, demand to be released from liability, in order that what the testator had left her might come into her hands unencumbered.

35. *The Same, Digest, Book XVII.*

A patron asked his heir to immediately purchase a place in a tribe for his freedman. The latter suffered from the default of the heir of the patron for a long time, and, at his death, appointed a man of the most illustrious rank his heir. The question arose whether the appraised value of the place in the tribe was due to the heir of the freedman ? The reply was that it was due.

It was also asked whether, in this instance, the ordinary benefits and advantages to which the freedman would have been entitled by his membership in the said tribe until the day of his death could be recovered, if the place in the tribe had been purchased in the beginning, in accordance with the will of the patron; or whether his heir would only be entitled to the interest on the appraised value of the place. I answered that whatever the freedman could himself have recovered was transmitted to his heir.

(1) A testator made a devise to Sempronius as follows: "Let Sempronius take all the lands which I have within the boundaries of Galatia, as far as the tract which is called Gaas, and which are in charge of Primus, the steward, together with all the appurtenances of the same." The question arose, as there was but one tract of land in charge of the said steward, and it was not within the boundaries of Galatia, but within those of Cappadocia, whether this tract would belong to Sempronius, along with the others. The answer was that it would belong to him.

(2) A testator made the following devise to his freedman, whom he mentioned by name, "I desire the Trebatian Estate, which is in the Atellatan district, and also the Satrian Estate, which is in the district of Niphana, together with a shop, to be given." The question arose, as among the lands above devised there was a tract designated as Satrian, but which was not in the district of Niphana, whether it should be delivered to the freedman under the terms of the trust? The answer was if there was no estate called Satrian in the district of Niphana, but if it was certain that the testator had in his mind the one which was situated elsewhere, it would, none the less, be due, because he had made a mistake in indicating the district in which it was situated.

(3) A person made the following provision in a codicil, which he confirmed: "Let the Julian bath, which is joined to my house, be granted for the gratuitous use of the citizens of Tibur and Scitis, to whom I am much attached, in such a way that they can bathe there publicly, at the expense, and under the supervision of my heirs, for six months of every year." The question arose whether the heirs would be required to pay the expense of necessary repairs. The answer was that, in accordance with the facts stated, the testator, in addition to the obligation to heat the bath, and provide for service, also included whatever was connected to its daily maintenance, so that the bath might be provided with everything necessary; and that, during the ordinary periods of intermission, it should be prepared and cleaned, so that it might be proper for occupancy, as is usual under some circumstances.

36. *Notes of Claudius on Scævola, Digest, Book XVIII.*

Where a will has been decided to be inofficious, the trusts therein contained are not due *ab intestato* because, as an insane person cannot make a will, it is held that nothing included in his last will is valid.

37. *Scævola, Digest, Book XVIII.*

A certain person, at the time of his death, devised to his mother, Seia, a certain tract of land which already belonged to her, and requested her when she died to transfer the same to his wife Flavia Albina. After the death of the testator, the mother stated in the presence of a magistrate that she did not wish to do anything against the wish of her son, and that she was willing to transfer the land to Flavia Albina, if she would pay her two *aurei* a year, as income. She, however, neither delivered possession of the property, nor received the sum of two *aurei* a year. The question arose whether she could legally sell the land to a third party. The answer was that, if the inquiry was made with reference to the legacy and the trust, in accordance with the facts stated, what the testator left to his mother was not valid, and there was no obligation to comply with the trust, provided the mother had not received anything else by the will.

(1) A certain person appointed an heir, and left two hundred *aurei* to Mævius, charging him to pay a hundred to Glaucetyches and fifty to Elpidus. Afterwards Mævius, with the consent of the testator, sent letters to the two legatees, and paid them their legacies in accordance with the will of the testator. The testator afterwards made a codicil, and provided that if any instrument was produced which was contrary to the said codicil, it should not be valid. The question arose whether Mævius, who had received two hundred *aurei,* could be sued by the legatees under the trust, because the testator had changed his mind with reference to the letters above mentioned. The answer was that, according to the facts stated, an action could not be

brought against Mævius, whether he had received the two hundred *aurei,* or the land instead of them.

(2) A testator appointed Seia and Mævius, his freedmen, heirs to equal portions of his estate, and substituted his ward Sempronius for Mævius. He then confirmed a codicil by which he provided as follows: "Lucius Titius to Seia, his heir, whom he appointed to inherit half of his estate, Greeting. I forbid Mævius, my freedman, whom I have appointed by my will heir to half of my estate, to receive the same; and, in his place, I desire Publius Sempronius, my ward, to be my heir to his share of my estate." He also left to Mævius, whom he did not wish to obtain a share of his estate, a trust with the following censure: "I wish a hundred and fifty bottles of old wine to be given to Mævius, my freedman, who deserves nothing from me."

As it was the intention of the testator, in the first place, that half of his estate should, under all circumstances, belong to Sempronius, the question arose whether the trust expressed in the above-mentioned words should be considered valid, and of whom Sempronius could make the demand, as the codicil was addressed to a certain person. The answer was that the execution of the trust could be demanded of Mævius.

(3) A father gave to his emancipated son all his property with the exception of two slaves, but did not make a donation *mortis causa,* and stipulated with his son as follows: "Do you promise that the slaves which I have given you and the lands which I have transferred to you as a gift, together with such offspring as may be born to said slaves, and also the implements used for cultivating the soil, or whatever of said property may remain or be under your control, and which has not been fraudulently disposed of by you, shall at your death be returned to me, if I should be living, or delivered to anyone whom I may designate? I, Lucius Titius, the father, have stipulated this and, I, Lucius

Titius, the son, have promised it." The father, when dying, wrote to his son creating a trust as follows: "Lucius Titius, to his son Lucius Titius, Greeting. Confident of your filial affection, I charge you to pay to So-and-So and So-and-So, a certain sum of money, and I desire my slave Lucrio to be free." The question arose whether the son, who could neither obtain prætorian possession of his father's estate nor was appointed his heir, was bound to execute the trust, and grant freedom to the slave by the terms of the letter. The answer was that while the son could not enter upon the estate of his father, nor demand prætorian possession of the same, and although he did not hold anything belonging to his estate, an action could, nevertheless, be brought against him as a debtor by the heirs of his father, on the ground of the stipulation; and also one on account of the trust by those who were interested in its execution; especially after the Constitution of the Divine Pius, which provided for a case of this kind.

(4) A widow, about to be married, directed her two children, whom she had by her first husband, to stipulate for twenty *aurei,* the value of the dowry which he was about to give, if for any reason her marriage could be dissolved, so that her entire dowry could be paid to one or the other of them. One of the children having died during the marriage, the wife, by a letter, directed the survivor to be content with half of the dowry, without demanding any more of it, and to let the remaining half remain in possession of her husband.

The woman having afterwards died, the question arose whether her husband could be sued for the entire dowry by her son, and whether the former could be protected by an exception on the ground of bad faith; and moreover whether an action would lie in his favor, under the terms of the trust, in order that the son might be compelled to release him from his share of the obligation. The answer was that the exception could legally be interposed, and that he could also bring suit under the terms of the trust.

It was also asked whether a prætorian action, having reference to the remaining half of the property, would lie in favor of the heirs of the woman against her son. The answer was that, according to the facts stated, and especially after the letter written to the son, the action could

not be brought. Claudius: Since she stated in her letter that her son should be content with half the dowry, it was held that by these words a trust for the benefit of the son was created.

(5) A testator made the following provision in a codicil: "I wish everything included herein to be carried out. I give to my lord, Maximus, five thousand *denarii* which I received by way of deposit from his uncle Julius Maximus, to be paid to him with interest when he becomes a man, which will amount to thirty thousand *denarii,* for I have promised his uncle under oath to do this." The question arose whether the terms of the codicil were sufficient to authorize a suit to recover the money deposited, as their truth could not be established by any other evidence. I answered that, in accordance with the facts stated, what the testator wrote should be believed, as he alleged that he had bound himself by an oath to do this.

(6) Titia, a woman of high rank, who had always employed Callimacus to transact her business (the latter being incapable of taking under a will), having drawn up a will in her own hand, provided as follows: "I, Titia, have made this my will, and I desire that the sum of ten thousand *denarii* be given to Callimacus, by way of reward." I ask whether this money can be claimed by the heirs of Titia, on the ground of its being a recompense. I answered that what is bequeathed in violation of law can not be collected.

(7) With reference to the following words of a will: "I wish payment to be made to all male and female slaves whom I have manumitted, or may manumit, either by this will, or by any other, together with their sons and daughters," the question arose whether the heir was liable to those whom the testator had manumitted during his lifetime. The answer was that the provisions of the trust must also be executed so far that those who had been manumitted before the will was made, and their children of both sexes, were concerned.

38. *The Same, Digest, Book XIX.*

A father forbade his son, who was also his heir, to alienate the lands belonging to the estate, or to subject them to pledge; but charged him to hold them for the benefit of such children as he might have by legal marriage, and of his other relatives. The son, having paid one creditor of the estate, released certain tracts of land which his father had encumbered, and, in order to obtain the money to pay him, transferred the said lands to a second creditor, by way of pledge or hypothecation. The question arose whether the pledge was legally contracted. The answer was that, according to the facts stated, it was legally contracted. The question was also raised, if the son should sell land forming part of the estate in order to satisfy its creditors, whether the purchasers, who were ignorant of the existence of a trust, could legally buy the land. I answered that, according to the facts stated, the sale would be valid if there was no other property belonging to the estate out of which the debt could be paid.

(1) A certain man having appointed his two freedmen, Stichus and Eros, his heirs, provided as follows in his will, "I do not consent that the Cornelian Estate shall leave the hands of freedmen." Stichus directed his female slave Arescusa to be free by his will, and bequeathed to her his share of said estate. I ask whether Eros, and the other fellow-freedmen of Stichus, can demand from the heir of the latter his share of the said estate, under the terms of the trust. The answer was that Arescusa was not included in the trust.

(2) A man appointed his daughter his heir, and inserted into his will, "I do not desire my house to pass out of the hands of my freedmen, but I wish it to belong to the slaves born in my family, whom I have mentioned in this will." The question arose, after the death of the heir and the slaves born in the household of the testator, whether a single freedman who remained was entitled to the entire benefit of the trust. The answer was that, in accordance with the facts stated, only the proportionate share of the surviving freedman would belong to him.

(3) A testator, having left a tract of land to his son, forbade him to sell, give, or pledge the same, as long as he lived, and added the following clause: "If he should do this contrary to my will, I desire that the Titian Estate shall belong to the Treasury, and this is provided in order

that the said Titian Estate may always be held in his name." As the son retained the property in compliance with the will of his father during his entire lifetime, the question arose whether, after his death, the land would belong to the members of the family, and not to the heirs appointed by the son. The answer was that it may be inferred from the will of the deceased that the son, as long as he lived, could neither alienate nor pledge the land, but that he would have a right to make a will, and leave it even to foreign heirs.

(4) Julianus Agrippa, a member of the First Company of the Triarii, inserted the following into his will: "I do not wish my heir to pledge or alienate, in any way whatsoever, the remainder of such-and-such lands, or my suburban estate, or my house in the city." His daughter, whom he had appointed his heir, left a daughter the grandchild of the testator, who, having held the property for a long time, died after appointing foreign heirs. The question arose whether the foreign heirs would be entitled to the said land, or whether it would belong to Julia, who was a grand-niece of Julius Agrippa. I answered that, as the above provision was only a mere precept, nothing had been done against the will of the deceased, which would prevent the title to the land from vesting in the heirs.

(5) A certain testatrix left a small tract of land, together with a shop, to fifteen of her freedmen, whom she mentioned by name, and added the following: "I wish my freedmen to hold this land under the condition that none of them will sell or give away his share, or do anything else which will cause it to become the property of a stranger. If anything is done, contrary to this provision, I desire their shares, together with the land with the shop, to belong to the people of Tusculum." Some of her freedmen sold their shares to two of their fellow-freedmen, who were included in their number, and the purchasers having died, appointed as their heir Gaius Seius, a stranger. The question arose whether the shares which were sold would belong to Gaius Seius, or to their surviving fellow-freedmen who had not disposed of theirs. The answer was that, according to the facts stated, they belonged to Gaius Seius.

It was also asked whether the shares which were sold would belong to the people of Tusculum. I answered that they would not. Claudius: Because the person of the actual possessor, who is a stranger, is not to be considered but those of the purchasers, who, in accordance with the will of the deceased, were of the number of those to whom she had permitted the property to be sold, the condition under which the land was granted to the people of Tusculum by the terms of the trust has not been fulfilled.

(6) A testator charged a legatee to whom he had bequeathed two thousand *solidi* under a trust, as follows: "I ask you, Petronius, to pay the said sum of two thousand *solidi* to the society of a certain temple."

The society having been subsequently dissolved, the question arose whether the legacy should belong to Petronius, or should remain in possession of the heir. The answer was that Petronius could legally demand it, especially if it did not devolve upon him to execute the will of the deceased.

(7) A mother appointed her sons her heirs, and added: "They must, under no circumstances whatever, dispose of the lands which will come into their possession as part of my estate, but they must reserve them for their successors, and furnish security to one another with reference to this." The question arose whether the lands should be considered to have been left in trust by these words. The answer was that, in accordance with what was stated, they did not create a trust.

(8) A man having appointed an heir to half his estate, left him a certain tract of land as a preferred legacy, and added the following: "I ask you to consent to receive Clodius Verus, my grandson, and your relative as your co-heir to the Julian Estate which I have ordered to be given to you as a preferred legacy." The question arose whether the grandson was entitled to half of the land under the terms of the trust. I answered that he was.

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

"I wish a hundred *aurei* to be given to my freedman, Pamphilus, in addition to what I have left him by my codicil. Pamphilus, I know that all that I leave you will eventually come into the hands of my children, for I bear in mind the affection which you entertain towards them." I ask whether the testator, by the use of the above-mentioned words, charged Pamphilus with the trust to pay to the children of the deceased a hundred *aurei* after his death? The answer was that, according to the facts stated, it could not be held, so far as the language of the testator was concerned, that Pamphilus was charged with a trust to pay the hundred *aurei;* but as it would be extremely dishonorable for the good opinion of the deceased to be contradicted by his freedman, the hundred *aurei* which had been bequeathed to him must be paid to the children of the testator.

The Divine Marcus, Our Emperor, rendered the same decision in a similar case.

(1) The following question was proposed for determination. A certain individual who had no children or relatives, and was reduced to extremity by disease, having called his friends together, told them in the presence of Gaius Seius, who occupied the same house with him, that he desired to leave him certain lands which he mentioned; and Gaius Seius drew up this statement, which was witnessed, and the testator himself, having been interrogated, as to whether he had made it, answered "most assuredly," which was inserted into the instrument. The question arose whether the lands which were designated would belong to Gaius Seius under the terms of the trust. The answer was that there could be no doubt whatever on this point, as the trust was valid.

(2) A father appointed his two daughters heirs to equal shares of his estate, and left a tract of land to one of them as a preferred legacy,

and requested the other to pay her sister twenty *aurei,* and he also requested this same daughter to transfer to her said sister her half of the land. The question arose whether she was obliged to pay the twenty *aurei,* or not. I answered that she was not obliged to do so.

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

A daughter, born after the emancipation of her father, requested her paternal uncle, as her heir-at-law, to give her share of the estate, and two tracts of land, in addition, to her maternal uncle. The succession of the said daughter passed equally to both of her uncles, as next of kin, through prætorian possession.

As the trust was not valid with reference to that part of the estate to which her maternal uncle would be entitled as heir-at-law through prætorian possession, the question arose, whether it, nevertheless, would not be valid, as far as half of the said tract was concerned; so that the said Titius, her uncle, might have two shares of said tracts, that is to say, one of them through his right under Prætorian Law, and the other which he could claim by virtue of the trust. The answer was that he was entitled to make the claim.

The question was also asked, if the deceased daughter had also charged her paternal uncle with trusts for the benefit of others, whether he would be obliged to execute them altogether, or only in proportion to his share of the estate. The answer was that he would be obliged to execute them in their entirety.

(1) A testator appointed Seia his heir to three-fourths of his estate, and Mævius his heir to one-fourth, and he charged Seia with a trust as follows: "I ask, and I charge you to deliver to your son everything that you obtained from my estate after reserving my gardens for yourself." Since he had charged her with a trust in general terms, the question arose whether anyone who would become his heir would be compelled to pay whatever legacies he had bequeathed, and execute whatever trusts he had created; or whether, if Seia should surrender three-fourths of the estate, she could claim all the gardens. The answer was that it appeared

that the co-heir was charged by the trust to deliver to Seia the fourth interest which he had in said gardens.

41. *The Same, Digest, Book XXII.*

A husband appointed his wife and a son whom he had by her, his heirs, and charged his wife with a trust as follows: "I ask you, my wife, not to claim any share in the Titian Estate, as you know that I myself bought all of said property, but on account of the affection and respect which I owe you, I have let it be understood that we had equal shares in this purchase which I made with my own money." The question arose whether he intended the said land to belong entirely to his son. The answer, with reference to the clause in question, was that the testator intended the said land to be included in his estate, as constituting a portion of all of it, so that his wife and son should each be entitled to half of the land as constituting part of the same.

(1) Where the following provision was inserted in a will, "I wish my house, with the garden adjoining it, to be given to my freedmen," and under another head was written, "I wish my heir to transfer to my freedman Fortunius, in the house which I have given to my freedmen, the room in which I was accustomed to live, and the storeroom connected with the same," the question arose whether the heir of the testator was obliged to pay the legacy to Fortunius, although the entire house had been previously devised to all the freedmen. The answer was that he was not required to do so.

(2) A testator made the following provision in a codicil, which he confirmed by his will: "I bequeath to all my freedmen, including those whom I have manumitted during my lifetime, who are manumitted by this codicil, or whom I may hereafter manumit, and their wives, sons and daughters, except such as I have specifically bequeathed, to my wife by the terms of my will." He afterwards charged his heirs as follows: "I desire my heirs to give to my wife, their co-heir, my lands in Umbria, Etruria, and Picenum, together with all their appurtenances, including the country or city slaves, and those who transact my business, with the exception of such as have been manumitted." The question arose whether Eros and Stichus, his slaves who had transacted the business of the testator in Umbria and Picenum until the death of the latter, and who were the natural sons of Damas whom the testator had manumitted during his lifetime, should be delivered by the heirs to Damas, in compliance with the terms of the codicil, or whether they belonged to Seia, his wife, according to the terms of his letter. The answer was that, under the codicil, they belonged to their natural father, in conformity with the dictates of natural affection.

(3) A testatrix left to Felicissimus and Felicissima, to whom she had granted freedom, the Gargilian Estate, including the house, and, in another part of her will, she bequeathed to her son Titius, whom she appointed heir to a fourth of her estate, a legacy, as follows: "My son, Titius, in addition to your share of my estate, take the legacies which your father, Præsens, and Cælius Justus, your father's brother, left me." The question arose, as the Gargilian Estate had been devised to the testatrix by her husband, that is to say, by the father of her son Titius to whom the land was due under the terms of the trust, whether the said land should belong only to Titius, the son, or to Felicissima, or to all three of them. The answer was that it was not probable that the testatrix, who left nothing to Felicissimus and Felicissima except what was contained in a special bequest, intended that the legacy should, by a general statement, be transferred to her son to whom she had also left a portion of her estate.

(4) A man left certain slaves, who were children, by will as follows : "I wish five of my young slaves to be given by my heirs to my little lord Publius Mævius, the said slaves to be under the age of seven years." The testator died many years after he executed the will. The question arose of what age the slaves that were due to Mævius should be, whether they were those who, at the time when the will was made, were under seven, or whether those should be given who were ascertained to be under that age at the time of the death of the testator. The answer was that those seemed to be designated who were of that age when they were bequeathed by

the testator.

(5) A testator made a bequest to his concubine of the following legacy, among other things: "I wish the tract of land which I have on the Appian Way to be given to her, with the steward in charge of the same, and his wife and his children." The question arose whether the testator intended that the grandchildren of the steward and his wife should belong to the concubine. The answer was that there was nothing in the case stated which would prevent them being given to her.

(6) A certain man left a legacy in trust to Mævius as follows: "I bequeath whatever I possess in the city of Gades." The question arose whether, if he had any property in the suburb adjoining the city, this also would be due to Mævius under the terms of the trust. The answer was that the meaning of the words will also permit this extension. It was also asked, in the same case, certain notes having been found in the account-book of the testator, he being in the habit of loaning money in his native city of Gades, or in the environs thereof, and having left the property which he had in said city, whether Mævius would be entitled to the said notes on account of a trust having been created by the words above mentioned. I answered that he would not be entitled to them.

The question also arose whether money found in a chest in his house at Gades, or which had been obtained by the collection of different notes and deposited there, would be due under the terms of the trust. The reply was that this question had already been answered.

(7) A testator, by his will, in which he appointed his wife and his son his heirs, left a hundred *aurei* to his daughter in trust, to be paid when she married in the family, and he added the following provision: "I charge you, my daughter, when you marry in the family, and as often as you may marry, to permit your brother, and your mother Seia, each to stipulate for the return of half of the dowry which will be bestowed, if you should die during your marriage without leaving either a son or a daughter, or a divorce should take place before your dowry is returned, or satisfaction is otherwise given you with reference to it."

The father gave his daughter, who was a virgin, in marriage, and presented her with a dowry. A divorce having taken place, he received the dowry, and gave her with it in marriage to another man, stipulating that the said dowry should be returned either to himself or to his daughter. The testator died during her second marriage, leaving the same will, and his son and wife became his heirs. The husband of the girl having subsequently died, she obtained her dowry, and married a third time in the presence, and with the consent of her brother and mother, who even increased her dowry, and neither of them made any stipulation with reference to it. The son and the daughter afterwards became the heirs of their mother, and then the daughter died, leaving her husband her heir. The question arose, as the girl had not received the money composing her dowry as a legacy from the heirs of her father, but, being the mother of a family, had recovered it after the death of her second husband, whether her heir could be held liable to the brother of the deceased, under the terms of the trust, for the money which he could have received if he had made a stipulation with reference to the dowry. The answer was that, according to the case stated, he would not be liable.

(8) Where the heir or legatee of a testator is requested to adopt someone, and the following words are added, "If he should do otherwise, let him be disinherited," or, "Let him lose his legacy," the question arose, if he should not adopt the person mentioned, whether an action would lie by virtue of the trust in favor of the person who was not adopted. The answer was that a trust by which a party is requested to adopt anyone is not valid.

(9) "I wish the tract of land which is situated in such-and-such a district to be transferred to Mævius, Publius, and Gaius for a price fixed by an arbiter, and, the purchase-money having been added to my estate, that my remaining heirs shall promise, under the penalty of a hundred *aurei,* to be liable for double the amount in case of eviction, in order that the said

land may not either wholly, or in part, ever pass into the hands of Seia, or her descendants, in any way whatsoever." The question arose whether the legacy was valid, because Publius wished to purchase it, and Gaius refused to consent. The answer was that he who wished to profit by the trust could claim half of the land which was devised, even though the other declined to avail himself of his right.

Inquiry was also made as to what security ought to be furnished, in accordance with the will of the testator, for the amount to be paid to each of the heirs. The answer was that security should be given in proportion to the share to which they were entitled under the terms of the trust.

(10) A testator bequeathed to his sister certain slaves whom he designated in his will, and charged her to deliver the same slaves to his children when she died. The question arose whether the children born of said slaves should be delivered to the children who were the heirs of the deceased, after the death of the legatee, or whether they would belong to her heirs. The answer was that those which were born afterwards were not included in the terms of the trust.

(11) A father owed his daughter a certain sum of money under a trust created by the will of her husband, and, when the girl married again, her father gave a dowry to her husband without having been directed to do so by her, and stipulated for the return of the dowry to himself, if his daughter should die without issue. The woman had a daughter, and the question arose whether the father could be required to execute the trust. The answer was that if the daughter had not ratified the dowry which was given her, the right to demand the execution of the trust would survive.

Inquiry was also made, if the father should be willing to release the obligation arising out of the stipulation, whether the right to demand the execution of the trust would be denied to the woman. I replied that this had already been answered, and if the father had given the dowry in order that the woman might sanction it, and she did not do so, he could bring suit to recover the dowry in question.

(12) A woman appointed her husband Seius, her heir, and substituted her foster-child, Apia, for him; and charged her heir to transfer her estate to her said foster-child after his death, and if anything should happen to her foster-child before that time, she directed him to deliver her said estate to Valerian, her nephew. The question arose, if Seius, during his lifetime, should deliver to the foster-child whatever he had obtained from the estate, whether he would be held to have done this in accordance with the will of the deceased; especially when the said foster-child had been substituted for him. The answer was that, if Apia should die during the lifetime of Seius, the latter would not be released from the execution of the trust which had been left for the benefit of Valerian.

(13) Scævola held that when an appointed heir is asked to deliver an estate to another person, when he wishes to do so, he will not be compelled, in the meantime, to execute the trust. Claudius: For a trust of this kind is considered to have been created after his death.

(14) A testator requested his appointed heir to deliver his entire estate to his wife, Seia, and charged her as follows: "I ask you, Seia, to deliver to Mævia, our dear child, everything which may come into your hands from my estate, except what I have bequeathed to you as above mentioned; and I forbid any security to be taken from Seia, as I know that she will rather increase, than diminish my estate." The question arose whether Mævia could immediately demand the execution of the trust by Seia. The answer was that there was nothing in the case stated which would prevent her from doing so.

42. *The Same, Digest, Book XXXIII.*

Titius appointed his wife, Seia, his heir to a twelfth part of his estate, and Mævius his heir to

the remainder, and made the following provision with reference to a monument which he wished to be erected for himself: "I desire my body to be delivered to my wife to be buried in such-and-such a place, and a monument of the value of four hundred *aurei* to be erected." The wife obtained as the twelfth part of the estate not more than a hundred and fifty *aurei,* and I ask whether the testator, by this provision, intended that his monument should be erected by her alone. I answered that the monument should be erected by both the heirs, in proportion to their respective shares of the estate.

43. *Celsus, Digest, Book XV.*

Where a father ordered a dowry to be given to his daughter, to be fixed by the judgment of her guardian, Tubero says that this should be considered just as if the dowry had been bequeathed to her to the amount which would be approved of by a reputable citizen. Labeo asks in what way a dowry can be fixed for a girl in accordance with the judgment of a good citizen. He says that this is not difficult when the rank, the means, and the number of children of the party who made the will are taken into account.

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

Where a tract of land with everything upon it is devised, any property that is there only temporarily is not held to have been left, and therefore money which is there for the purpose of being loaned is not included in the legacy.

45. *Ulpianus, On Sabinus, Book XXII.*

A legacy expressed in the following words, "Which I have procured for the use of my wife," is a general one, and includes clothing as well as silver and gold plate, ornaments, and all the other things which are obtained for the benefit of the wife. But what articles should be considered to have been obtained for this purpose? Sabinus, in his work on Vitellius, says upon this point, that whatever terms are most frequently employed in making bequests to wives should be understood as designating whatever is intended for her individual use, and is , more frequently acquired for this purpose than for the common and promiscuous use of both parties. Nor does it appear to make any difference whether the head of the household obtained such articles before his marriage, or afterwards; or even if he should give anything to his wife which he himself had been accustomed to use, and then devoted it to her special use.

46. *Paulus, On Vitellius, Book II.*

The addition of the clause above mentioned sometimes diminishes, and sometimes increases the legacy; it increases it when it is written as follows, "And whatever has been acquired on her account," for this signifies that something else has been acquired for her benefit in addition to what has already been mentioned. It is diminished when the conjunction "and" is omitted, because, then it signifies that those things alone of all the articles previously designated have been procured for her benefit.

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

If the husband purchased some of these articles before he married his wife, and gave them to her for her use, it is the same as if he had obtained them with this intention afterwards. In a legacy of this kind, those articles belong to the wife which have been purchased, repaired, and retained for that purpose, and among them are included whatever belonged to a former wife, or the daughter, or granddaughter of the testator.

(1) The question arises as to what difference exists between the terms "purchased" and "prepared." The answer is that the term "prepared" is included in the term "purchased," but this is not the case with the term "prepared;" just as if anyone had purchased an article for the use of his first wife, and gave it to his second, for while the said article was prepared for his second wife, it was not purchased for her.

Hence, even though a husband might not have purchased anything for his second wife, still, by giving her the articles which the first

one had they are prepared for her use, and if they had not been transferred to her, they would be included in the legacy; but whatever was prepared for the use of the first wife will only belong to the second where they have been designated for her use, because where the husband obtained them for his first wife, he is not held to have done so with a second wife in view.

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

For no article is included in the legacy if, when it has been given to the wife, she is afterwards deprived of it by her husband.

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

Slaves are also included in a legacy of this kind, for instance litter-bearers, who usually carried the mother of the family alone, and also beasts of burden, sedan chairs, and mules, as well as other slaves, such as girls and women employed as hair dressers.

(1) If the husband should have given his wife any ornaments worn by men, they will be considered as having been acquired for her use.

(2) Hence, if there were any articles used by both husband and wife, and he was accustomed to borrow them from her, as it were, it must be said they also should be considered as acquired for her use.

(3) There is likewise a difference between articles which have been prepared for her use and such as were purchased for her, when such articles are bequeathed; for where they are prepared for her use, all that have been intended for her are included, but where they have been purchased, those alone are included which the husband bought for that special purpose; therefore where only the articles which have been purchased are bequeathed, those which were obtained in any other way by the husband, and which he destined for her, are not included. Still, whatever the husband directed to be purchased or which he himself actually bought and did not yet give to his wife, but intended to give to her if she had lived, will be embraced in the legacy under both these terms.

(4) Where anyone bequeaths a legacy to his wife or his concubine, composed of articles which had been purchased and prepared for her use, no distinction is made; for, in fact, no difference exists between the two women except that of social rank.

(5) Where gold obtained for her use is bequeathed by a husband to his wife, and it afterwards is melted, but the material still remains, she will be entitled to it.

(6) But, in order for the legacy to be valid, Proculus says that the woman must be the wife of the testator at the time of his death. This is true, for a separation will extinguish the legacy.

(7) The bequest of articles acquired for his or her use can also be left to a son or a daughter, as well as to a male or female slave; and there will be included therein any property which may have been given to them, or intended for them.

50. *The Same, On Sabinus, Book XXIII.*

Where a son under paternal control bequeaths a legacy, "When he will be his own guardian," the age of puberty is meant. And, in fact, if a legacy is bequeathed to a son under paternal control who has not reached the age of puberty, the opinion of Sabinus and the one generally adopted is that this means not when he becomes the head of a household, but when he arrives at the age of puberty. However, if a mother, who is suspicious of the life which her husband is leading, and from whom she has been divorced, should bequeath a legacy to her son, even though he may not have reached the age of puberty; she is understood to have had in view not the time when he shall have reached that age, but the time when he shall both have reached

that age, and have become the head of a household. For if he should arrive at puberty afterwards, we can say much more decisively that she had in mind the time when he should become the head of a household, than if she had said: "When he will be his own guardian, and has control over himself."

(1) If anyone should bequeath a legacy to the head of a household, who has not yet reached the age of puberty, "When he shall be his own guardian," he is considered to have had in mind the age of puberty. Sometimes this has reference to the age of twenty-five years, where the intention of the testator is apparent. If, however, he should make a bequest to a person who is over the age of puberty, but under twenty-five, there is no doubt that he had in mind the age of twenty-five.

(2) Likewise, if a bequest is made to a lunatic, a spendthrift, or a person for whom the Prætor has appointed a guardian, for some reason or other, I think that the testator should be considered to have had in view the time when the party in question would be released from curatorship or guardianship.

(3) From these instances and others of the same kind, it becomes evident that Sabinus was of the opinion that the intention of the testator was the principal point involved. And, in order that there may be no doubt where a legacy has been left to a child under the age of puberty, and especially where one has been left to a person over twenty-five years of age, the testator must be understood to have meant when the legatee should have control of himself.

(4) Moreover, this clause is susceptible of various interpretations, and depends upon the intention of the testator, just as the following one, where he says, "When he becomes his own master." For sometimes it is understood in one way and sometimes another, as frequently it means the freedom of the legatee from control, and then again it has reference to the age of puberty, or his twenty-fifth year.

(5) For my part, however, I think that, if anyone should make a bequest to an individual who has attained the age of puberty but is still under the age of twenty-five years, as follows, "When he shall reach the age of puberty," the testator had in his mind the age when he would not be entitled to complete restitution.

(6) Likewise, where anyone makes a bequest to a person, "When he shall become of age," or, "Of lawful age," the intention of the testator must be ascertained as to whether he meant the age of puberty or that of twenty-five years; just as if he had written, "When he arrives at lawful age," or "At mature age" or "When he grows up."

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

Where a bequest is made to a daughter under paternal control, "When she becomes her own guardian," it will be due when she is marriageable.

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

Under the designation of "books" all volumes are included, whether they are made of papyrus, parchment, or any other material whatsoever; even if they are written on bark (as is sometimes done), or upon any kind of prepared skins, they come under the same appellation.

If, however, the books are bound in leather, or papyrus, or ivory, or any other substance, or are composed of wax tablets, will they be considered to be due? Gaius Cassius says that where books are bequeathed, the bindings are also included. Hence, it follows that everything relating to them will be due if the intention of the testator was not otherwise.

(1) Where a hundred books are bequeathed, we must deliver to the legatee a hundred volumes, and not the hundred parts of volumes which anyone may select as he wishes, and each of which will be sufficient to include the contents of a book; hence, when the works of Homer are all contained in one volume, we do not count them as forty-eight books, but the entire

volume of Homer should be understood to mean one book.

(2) Where the works of Homer are left, and they are not complete, as many parts of the same as can be obtained at present will be due.

(3) Sabinus says that libraries are not included in legacies of books. Cassius adopts the same opinion, but he holds that parchment covers that are written upon are included. He adds, afterwards, that neither book-cases, writing desks, nor other furniture in which books are kept constitute part of the legacy.

(4) What Cassius stated with reference to blank parchments is true, for blank sheets of papyrus are not included in the term, "Books bequeathed," and books are not due under the term, "Sheets of papyrus bequeathed," unless, perhaps, in this case the intention of the testator may influence us; as for example, if one literary man should leave to another sheets of paper as follows, "I bequeath all my sheets of paper," and he had nothing else but books, no one will doubt that his books were due; for ordinarily many persons designate books as papers. But what if anyone should bequeath sheets of papyrus. In this case neither parchments, nor any other materials used for writing, nor books which have been commenced will be included.

(5) Wherefore, when books are bequeathed, the question is not inappropriately asked whether those are included which are not yet completed. I do not think they are included, any more than cloth which is not yet entirely woven is included under the head of clothing. Books, however, which have been written, but have not yet been beaten or ornamented, are included in such a legacy, as well as such as are not glued together, or corrected, and leaves of parchment which are not sewed, are also included.

(6) The legacy of papyri does not include the material for making the leaves, nor such leaves as are not yet finished.

(7) If, however, a testator should leave a library, the question arises whether the book-case or book-cases, or whether only the books themselves, are included. Nerva very properly says that it is important to ascertain what the testator intended; for the word "library" sometimes means the place where books are kept, and at others the bookcase which contains them (as when we say, So-and-So bought an ivory library), and sometimes this means the books themselves as when we say, "He bought a library;" therefore, when Sabinus stated that a library does not follow the books, this is not absolutely true, for sometimes the book-cases, which many persons call a library, are also included.

It is clear if you should mention book-cases which are attached or connected with the walls of the house, they undoubtedly will not be included, as they constitute part of the building.

(8) What we have stated with reference to a library, Pomponius discusses in the Sixth Book on Sabinus, and he says that rings are included in a legacy together with the jewel-case which was made to contain them. He bases his opinion upon the following bequest of a testator, "I bequeath my jewel-case, and any rings which I may have in addition." He says that Labeo also was of the same opinion.

(9) There are some things, however, which, under all circumstances, follow the article bequeathed, such as the bequest of a bed which also includes everything appertaining to it, and the locks and keys are always included in legacies of chests of drawers, or presses.

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

It has been established that where silver plate is bequeathed, small money boxes of that metal do not pass to the legatee.

(1) Where rings are bequeathed, jewel-cases are not included.

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

If I should bequeath a legacy to you absolutely, and then afterwards should say, "Let my heir give him such-and-such a tract of land, in addition, if a ship should arrive from Asia," the better opinion is that, by the words, "In addition," what is first mentioned is repeated. Just as when we say, "Lucius Titius gave five thousand *aurei* to the people, and Seius has given, in addition, a distribution of meat," we understand Seius to have also given five thousand *aurei.* And where it is said, "Titius received five *aurei* and Seius a tract of land in addition," we understand that Seius has likewise received five *aurei.*

55. *Ulpianus, On Sabinus, Book XXV.*

The term "wood" is a general one, and is divided into building material and ordinary wood. Building material consists of what is necessary in the construction and support of houses; ordinary wood is anything which is intended for fuel. But should this term apply only to such as has been cut down, or also to such as has not been cut? Quintus Mucius states, in the Second Book, that where wood which is on the land is bequeathed to anyone, any trees which have been felled for building material are not included, but he does not add that what has been felled for firewood will belong to the legatee, still, this is understood to be the case.

(1) Ofilius also states, in the Fifth Book on the Law of Partition, that where wood is bequeathed to anyone, all will belong to him which is not called by some other name; for example, small branches, charcoal, and olive stones, of which no other use can be made than to burn them. The same rule applies to acorns, and all other seeds.

(2) The same authority denies in the Second Book that where wood is bequeathed, trees which have not yet been cut, but only such as have been split into small pieces, are held to have been bequeathed. I think, however, that any wood which has not yet been cut up into small pieces should also be included under the said term, if this was intended to be done. Hence, if a testator owned a grove which he had destined for this purpose, the grove itself would not belong to the legatee, but any trees which had fallen down would be included, under the term "wood," unless the intention of the testator was otherwise.

(3) In a legacy of wood intended for fuel is included such as is used for heating baths, or for the furnaces of apartments, or for burning lime, or for any other purpose where heat is employed.

(4) Ofilius states in the Fifth Book of the Law of Partition, that twigs are not embraced in the term wood. But (where it is not contrary to the intention of the testator) small branches, boughs, sprouts, and the remains of materials used in building, as well as the stalks and roots of vines, are included.

(5) In some countries (as, for instance, in Egypt, where reeds are used for wood, and both reeds and papyrus for fuel), certain kinds of grass, thorns, and brambles are included in the term "wood." Is there anything extraordinary about this ? The Greek word signifying "wood" and the one indicating ships which transport wood, are derived from another Greek term which means marshes.

(6) In some provinces they use the dung of cattle for this purpose.

(7) Where wood has been prepared to be burned and made into charcoal, Ofilius says, in the Fifth Book on the Law of Partition, that material of this kind is not included in the term charcoal. But would it be included in the term fuel? Someone perhaps might say that it would not, for the testator did not have it in his possession to be used as fuel. Shall we enumerate, as belonging to a class of their own, firebrands and other wood which has been partially burned to avoid their making smoke, or shall we designate them as fire-wood, or charcoal? The better opinion is that they belong to a class of their own.

(8) The same designation will also apply to sulphurated wood.

(9) Wood to be used for torches is not included under the term fuel, unless this was the

intention of the testator.

(10) Pine cones are also included in the term firewood.

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

Beams and poles should be classed as building material, and therefore are not included in the term firewood.

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

Servius gave it as his opinion that where all material destined for any purpose has been bequeathed, no boxes or chests are embraced in the legacy.

58. *Ulpianus, Disputations, Book IV.*

Where anyone leaves to his wife articles intended for her use, and then, during his lifetime, while absent in a province, purchases purple cloth for her, but does not give it to her before he dies, it was stated in a Rescript that the purple cloth would belong to the woman.

59. *Julianus, Digest, Book XXXIV.*

Where anyone bequeaths a promissory note, it is understood that he had in mind not only the tablets upon which it is written, but also the rights of action, the proof of which is contained in the tablets. For it is clear that we use the same "note" instead of the said rights of action; so when the note is sold, we understand that the claim was also disposed of. Moreover, where anyone bequeaths a claim, he is understood to have bequeathed what can be recovered by an action at law.

60. *Alfenus, On the Digest of the Epitomes by Paulus, Book II.*

As the question has been raised what should be considered a bequest of lambs, certain authorities hold that only lambs six months old are meant. The better opinion, however, is that those are bequeathed which are less than a year old.

(1) Where urban male and female slaves are bequeathed, I gave it as my opinion that muleteers are not included in the legacy; for only such slaves should be included in this designation whom the head of the household is accustomed to have about him, for his personal service.

(2) Where wool, flax and purple destined for her use were bequeathed to a wife, as the testator had left her a great deal of wool of different kinds, the question arose whether she was entitled to all of it. The answer was that, if none of this wool had been intended for the use of his wife, but all of it was mixed together, the decision must be the same as where provisions were bequeathed, and the testator left many things which were used as provisions, and which he was accustomed to sell, for if he had drawn different kinds of wine to be Used by himself and his heir, it all should be held to be included in the term "provisions." But when it was proved that the party who made the will was accustomed to sell a portion of his provisions, it was decided that the heir should furnish the legatee with the amount of supplies which would be sufficient for his requirements during the year.

It seems to me that the same rule should apply to the wool, and that the woman should receive what would be enough for her use for the term of a year; since after what had ordinarily been required by her husband had been deducted, the remainder should not be bequeathed to the wife, but only what was especially intended for her use.

(3) Where land, and everything purchased or intended for the cultivation of the same was left, it was held that neither the slave who was the gardener, nor the forester was bequeathed, as the gardener was intended to adorn the land, and the forester was employed for the purpose of watching and protecting it, rather than for its cultivation.

A donkey, used for working a machine, is considered to have been bequeathed, as well as sheep intended to manure the land, together with the shepherd, if one had charge of sheep of this kind.

61. *The Same, Epitomes of the Digest by Paulus, Book VIII.*

Where certain weavers who belonged to the testator at the time of his death were bequeathed, the question arose whether one of them whom he had subsequently appointed porter should be included in the legacy. The answer was that he was included, for he was not transferred to another trade but was only temporarily assigned to a different task.

62. *Julianus, On Ambiguities.*

A certain man who had two mules bequeathed them as follows, "Let my heir give to Seius my two male mules, when I die." The testator had no male mules, but left two female mules. Servius rendered the opinion that the legacy should be paid, because female mules are included in the term "mules," just as female slaves are generally included in the term "slaves." Hence it comes that the male sex always includes the female.

63. *The Same, On Urseius Ferox, Book I.*

In repeating legacies which have already been granted, the following words are usually added, "Moreover, let my heir be charged to give," and Sabinus says they are equivalent to the repetition of the conditions upon which the legacies are dependent, and the dates on which they are to be paid.

64. *Africanus, Questions, Book VI.*

Where a testator appointed his son and his grandson his heirs, and gave to his grandson under a trust certain lands, and whatever might be on them at the time of his death "with the exception of his account book," and, when he died, a sum of money was found in his chest in which the notes and bonds of his debtors were kept, it was held by several authorities to be hardly probable that the testator had the said money in his mind when he created the trust.

I, however, think that, when anyone wishes his account-book to be delivered to another, it should be taken into consideration, whether it ought to be understood that he expected only the notes of his debtors to be delivered, or whether he also included the money which might be found, if it was derived from the collection of claims, and was intended to be loaned again.

I go still further, and hold that if the money had been collected and again invested in a similar manner, the change of obligations would neither annul or diminish the effect of the trust, so that if the same money was intended to be placed in the account book, that is to say for the purpose of making new loans, it would still be payable to the beneficiary under the terms of the trust.

Again, I think that it can be maintained that not only the money collected from the debtors, but also such as was obtained from any other source with the intention of being invested in the same way, would belong to the beneficiary.

65. *Marcianus, Institutes, Book VII.*

Where slaves are bequeathed with the exception of those who transact business, Labeo says that those are considered to be excepted from the legacy who have been appointed for the purpose of attending to some business; for instance, where they have been given authority to purchase, rent, or lease property, but those who take care of the rooms of a house, and walls, and fishermen, are not held as included under the head of slaves who transact business. I think that this opinion of Labeo is correct.

(1) Where a slave passes from some employment to a trade, certain authorities very properly think that the legacy is extinguished, for the reason that the employment was exchanged for a

trade. On the other hand, the same rule does not apply where a litter-bearer afterwards becomes a cook.

(2) Where a slave understands several trades, and cooks are bequeathed to one legatee, weavers to another, and litter-bearers to a third, the slave above mentioned will be considered to belong to the person to whom other slaves of the trade in which the said slave was most frequently employed, are bequeathed.

(3) Where female slaves, assigned to dress their mistress' hair, are bequeathed, Celsus says that those who have only been employed in this service for two months are not included in the legacy; others, however, think that they are, as the result might be that none of such slaves would be included, for all can still learn something, and every occupation is capable of improvement.

This opinion should rather prevail because it is conformable to human nature.

(4) Where flocks are bequeathed, Cassius says that all quadrupeds which are accustomed to feed together are included. Hogs are also included in this appellation, because they feed together. Hence, Homer says in the Odyssey: "You will find him seated by his swine, which feed Near the rock of Corax, and the Spring of Arethusa."

(5) Where beasts of burden are bequeathed, oxen are not included, and *vice versa.*

(6) Where horses are bequeathed, mares are included.

(7) Where sheep are bequeathed, lambs are not included, but it must be ascertained from the custom of the neighborhood for how long lambs are to be designated by this term, as in certain localities they are considered to be sheep when they are ready to be sheared.

66. *Paulus, Opinions, Book III.*

Where birds are bequeathed, geese, pheasants, and chickens, as well as aviaries will be due; but the slaves having charge of the pheasants and geese are not included; unless the testator expressly says so.

67. *Marcianus, Institutes, Book VII.*

Where a testator devises his woodland pasture and in addition bequeaths everything which is ordinarily there, he is not understood to have intended to bequeath the flocks which during the winter are kept in winter quarters, and during the summer are left in the pastures, but only to have meant those which are always there.

68. *Ulpianus, Opinions, Book I.*

Ulpianus stated to Julianus that the testator, by adding, "The entire Seian Estate," was understood to have left also that portion of the above-mentioned land which seemed to be appurtenant to it by the terms of the trust, and which he had obtained by way of pledge; the right of the debtor to the same being reserved.

(1) The execution of a trust cannot be demanded under the following words: "Be sure to take good care of my fields, and the result will be that my son will give you your children."

(2) Where slaves held in common with another are bequeathed by Seia, under the condition, "If they should be mine when I die," they will not be due; provided the testatrix intended that they should be due if they were entirely hers at that time.

(3) Where certain tracts of land are left, together with the stores situated thereon, the slaves who belonged to said lands when the will was made will be included in the legacy, as well as those who were subsequently attached to it; provided the testator plainly showed that this was his intention.

69. *Marcellus, Opinions.*

The ordinary signification of words in a will must never be departed from, unless it is evident that the intention of the testator was otherwise.

(1) Titius provided as follows by a codicil: "I wish all the young slaves whom I have in my service to be given to Publius Mævius." I ask at what age slaves should be understood to be young? Marcellus was of the opinion that this must be referred to the judge who had jurisdiction of the matter, in order to determine what the testator meant by the words which he made use of. For, in the case of wills, attention should not always be paid to the exact definition of terms, as very frequently persons speak incorrectly, and do not always employ appropriate names and appellations. However, a slave may be considered young who has passed the age of youth, until he begins to be included among old men.

70. *Ulpianus, On Sabinus, Book XXII.*

Where wool is left to anyone, that which is not dyed is considered to be bequeathed, that is to say, wool in its natural condition.

(1) This also applies to such as has been worked up, or is embraced in the term unfinished wool.

(2) The question arose whether under the term of "wool" only such is included as has not been spun, or whether that which is spun is also meant; as, for instance, the warp and woof. Sabinus thinks that wool which has been spun is included, and we adopt his opinion.

(3) It is held that the word wool should be employed until it is made into cloth.

(4) It must be understood that both washed and unwashed wool are included under this designation, provided it is not dyed.

(5) Cow-hair used for stuffing cushions is not included in the term wool.

(6) Moreover, wool out of which anyone can make a garment either for health or for convenience is not included.

(7) Nor will such as is prepared for application to the body or for medical treatment be embraced in the term wool.

(8) But should skins to which the wool is attached be included? It is evident that these are accessories to the wool.

(9) Where wool is bequeathed, it may in my opinion include the fur of hares and goats, and the down of geese, as well as the substance obtained from a certain plant which is called vegetable wool.

(10) Where, however, wool is bequeathed, flax is not included.

(11) Where flax is bequeathed, that which has been worked up, as well as the unfinished article, is included, as well as what has been spun, and what is in the web and has not yet been woven. Therefore, a difference exists in a bequest of flax and wool. I think that where flax has been dyed it would be included in a bequest.

(12) Where wool has changed its color, this should be taken into consideration. It was decided by the ancient authorities that wool which has changed its color should not be included under the term wool, but all which had been spun and not woven should be included. Hence the question arises whether the term "changed in color" is applicable to purple. I think that what has not been dyed is not included under this term, and therefore that neither wool which is naturally white or black, or of any other natural hue, is meant.

I hold, however, that purple and scarlet, as they are not natural colors, should be included under the term dyed wools, unless the testator intended otherwise.

(13) It is my opinion that purple of every description should be included under this name.

Scarlet should not be included, nor bluish red, or violet. No one doubts that thread already placed in the loom should be included under the term purple. Wool intended to be dyed purple is not included.

71. *The Same, On Sabinus, Book XX.*

Where the words, "my female slave, or slaves," are inserted in a will, those are held to be indicated whom the testator included in the number of such slaves as belonged to him.

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

The same must be said with reference to all other property which anyone can bequeath as his own.

73. *Ulpianus, On Sabinus, Book XX.*

By the expression "his slaves or female slaves," we understand those to be meant who belonged to the testator by a perfect title, and that those in whom he enjoyed only the usufruct are not included.

(1) Where freemen serve the testator in good faith as slaves, the better opinion is that they are included under the term "his own;" provided he intended that those who belonged to him, as well as those whom he regarded as being his property, should be included in this appellation.

(2) There is no doubt that those slaves whom a debtor has given in pledge should be held to have been bequeathed as his own; but this, under no circumstances, applies to the creditor.

(3) Therefore, if anyone has slaves of his own whose services he has leased to others, either as bakers or players, or for any other employment; should he be held to have also bequeathed them under the name of slaves? This must be presumed, unless the intention of the testator appears to be otherwise.

(4) I think that where a party pursues the calling of a slave trader, his slaves cannot properly be included among those which belong to his household, unless it was clear that this was his intention with reference to them; for where anyone purchases slaves in order immediately to sell them, he should be considered to hold them rather as merchandise, than as his slaves.

(5) Pomponius states in the Fifth Book that slaves belonging to other slaves are not included in this category.

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

Where anyone bequeaths "his slaves," those also held in common with others, as well as those in whom another enjoys the usufruct, are also included.

75. *Ulpianus, On Sabinus, Book XX.*

Where coins, in general, are bequeathed, it is understood that those of the smallest denominations are included; unless it appears from the terms of the will that the intention was to depart from the custom of the testator, or of the neighborhood.

76. *The Same, On the Edict, Book II.*

Where papers are bequeathed, no one can say that this refers to such as have been written upon, and that books already made up are included in the legacy. This also applies to tablets.

77. *Javolenus, On Plautius, Book I.*

Where legacies are repeated in making a substitution, grants of freedom are also included in the repetition.

78. *Paulus, On Vitellius, Book II.*

The question arose, where the slave Stichus had been removed from the land to which he had

been attached, and given instruction, but had not afterwards been returned, whether he should be delivered to the legatee with said land. The answer was that if he had been sent for the purpose of studying, and not to be transferred to some other land, he must be delivered to the legatee.

(1) "My son, Mævius, as I have already given you the greater part of my property, you should be content with the Sempronian Estate, and all who live thereon; that is to say, with the slaves who are there." The question arose as to the disposition of certain notes of debtors, and sums of money which were found on said land.

The same testatrix wrote the following letter: "I give you all the silver plate and furniture which I have, and whatever I possess on the Sempronian Estate." Will the furniture which is on other estates or in other houses belong to Mævius, and will he be entitled to the slaves which the testator bequeathed to others, and which formed part of the Sempronian Estate? The answer was that the notes and the money should not be considered as included, unless the intention of the deceased to bequeath them was positively proved, and that the legacy of the son should be diminished through the bequest to others of slaves attached to the said Estate.

With reference to the silver plate and furniture which were elsewhere, their disposition must be left to the judge, who will determine to whom they should belong, in order that the intention of the testator may be carried out by the legatee.

(2) A testator left certain lands as follows, "Just as they were held by me, together with whatever property may be there at the time of my death." The question arose with reference to the slaves who dwelt on said lands either for the purpose of cultivating them, or for other purposes, as well as with reference to other property which was there at the time of the testator's death, whether they belonged to the legatee. The answer was that all the property in question should be held to have been bequeathed.

(3) "I desire that my Campanian Estate be given to Genesia, my foster-child, the said Estate being of the value of two hundred *aurei,* and that it be enjoyed by her as is customary." The question arose whether the remaining rents of the tenants, and the slaves which were on the ground at the time of the death of the testator, were also due to the legatee. The answer was that whatever was due from the tenants was not bequeathed, but that everything else should be held to have been given by the words, "As is customary."

(4) It might, perhaps, be asked by someone why, under the term "silver plate" manufactured silver should be included; when, where marble is bequeathed, nothing except the rough material can be considered to have been indicated. The reason for this is that articles of such a nature that they can be readily reduced to their former condition are subject to the power of the material of which they are composed without ever losing their force.

(5) There is no doubt that scarlet, which is designated by its peculiar name, is not included in wool whose color has been changed, any more than dye made from the blood of crows, or those known as *hysginus* and *melinus* are called scarlet or purple.

(6) Where a man made a bequest as follows: "I give and bequeath to my wife those articles which have been acquired for her use," I asked the Prætor, who had jurisdiction of the trust, that the property which the wife had given to her husband, and which had been appraised, might be surrendered, so that its value might be included in the dowry, but I failed to obtain his consent, as he held the testator did not have this property in his mind at the time when he made his will.

If, however, the said property had been given to her for her use, it would make no difference whether it had been obtained by herself, or by another. I afterwards found the following case mentioned in Aburnius Valens. A woman gave certain property, which had been appraised, by way of dowry to her husband, and the latter afterwards left it to her, described as follows,

"The articles which have been acquired and purchased for her." This authority held that what is given by way of dowry is not included in the category of property purchased and acquired, unless the husband, having afterwards become the owner of said property, devotes it to the use of his wife.

(7) Where property, which is on land, is bequeathed, the legacy also includes things which, if not on it at the time, are usually there, and any articles that are there by chance are not considered to have been bequeathed.

79. *Celsus, Digest, Book IX.*

Where a chorus, or a body of slaves were bequeathed, it is just the same as if the individuals composing them had been separately bequeathed.

(1) Proculus says that, by the words: "I give and bequeath all movable property which is found there," money which is deposited in that place for the purpose of being loaned is not bequeathed, but that such as has been left there to render it secure (as certain persons were accustomed to do during the Civil Wars), will be included in the legacy; and he relates that he has heard old men in the country say that money without *peculium* is very easily lost, meaning by the term *peculium* what is put aside for safe-keeping.

(2) Where a plot of land not built upon is devised, and, in the meantime, a house is erected upon it, and the house having bean demolished, the land again becomes vacant, the legatee will be entitled to it, although he could not have claimed it while the house stood there.

(3) Where a slave is bequeathed, and then, after having been manumitted, is again reduced to slavery, he can be claimed by the legatee.

80. *The Same, Digest, Book XXXV.*

Heirs can be appointed conjointly or made joint legatees; that is to say, an entire estate, or an entire legacy can be given to them individually, so that their shares will be indivisible, unless by universal consent.

81. *Modestinus, Differences, Book IX.*

Certain authorities very properly hold that where slaves are bequeathed, female slaves are included, as the common name of "slaves" includes both sexes. No one, however, has any doubt that where female slaves are bequeathed, male slaves are not included. Where children, who are slaves, are bequeathed, girl slaves are included. It must be said that it is not the case, where girl slaves are bequeathed, for boy slaves to be included.

(1) Where female slaves are bequeathed, virgins are also included, just as where male slaves are bequeathed boys are also included.

(2) When droves of cattle are bequeathed, oxen and other beasts of burden are included.

(3) When a herd is bequeathed, it is held that oxen are included, but not flocks of sheep and goats.

(4) When sheep are bequeathed, certain authorities very properly hold that neither lambs nor rams are included.

(5) There is no doubt, however, that rams and lambs are included in the bequest of a flock of sheep.

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

When a slave, who ordinarily dwelt on a tract of land, takes to flight and the land is devised in the condition in which it is, the slave will form part of the legacy, even though he should be caught after the death of the testator.

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

Where a legacy was left as follows, "I ask you to give to So-and-So, at the time of your death, everything belonging to my estate and my property which may come into your hands," the crops which the heir, during the lifetime, as well as whatever took the place of the crops, were not considered to have formed a part of the legacy, for it could not be proved that the testatrix intended that her heir should be charged with the delivery of the crops.

(1) Where a testator left a trust for the benefit of his children, and, after substituting them for one another, desired that, after the death of the last survivor, the trust would pass to their descendants, I ask, if no one remained after the death of the last child, except his freedman, whether he ought to be admitted to the benefit of the trust. The answer was that it was perfectly evident that by the appellation his "descendants," only his children, and not their freedmen, were included in the number of those to whom the trust was bequeathed.

84. *Javolenus, On Cassius, Book II.*

Where a testator bequeathed his property, which was at Rome, to a certain person, he would also be entitled to whatever was stored for safe keeping in warehouses outside the City.

85. *Pomponius, On Quintus Mucius, Book II.*

It has recently been decided by the Emperor, that where a testator left property to anyone, but did not add the term "my," and did not intend to leave the said property unless it was his, the legacy would be valid only where it was necessary to pay more attention to the wishes of the testator than to the word "my." Wherefore this nice distinction arises, that whenever a certain article is bequeathed to be delivered immediately, the term "my" does not create the condition.

If, however, property which is not expressly designated, as, for example, "My wines, my clothing," the term "my" is held to be conditional, so that only that is left which belonged to the testator. Still, I do not think the above-mentioned opinion can be strongly maintained, but rather that, in this instance, any clothing or wine which the testator considered to be his, is bequeathed; and hence it was held that even wine which had become sour was included in the legacy, if the testator had always considered it to be wine.

It is clear that where the testator used language relating to the time of his death, for instance, "the clothing which shall be mine," I think that this undoubtedly should be understood as implying a condition. I also think that, where the testator says, "Stichus, who will be mine," the sentence ought likewise to be considered as conditional; nor does it make any difference if he should say, "Who will be mine," or "If he should be mine," in both cases the bequest will be contingent. Labeo is of the opinion that the following clause, "Who shall be mine," should only be considered by way of designation. We, however, make use of another rule.

86. *Proculus, Epistles, Book V.*

Where a legacy was bequeathed as follows, "I leave my house and its contents at the time of my death," I do not think that money collected from certain debtors of the testator, in order to again be invested in other similar claims, forms a part of the legacy. I thoroughly approve of the distinction made by Labeo, that the legacy will not be diminished because something may happen to be out of the house, any more than it may be increased because some other article happens to be there.

87. *Paulus, On the Lex Julia et Papia, Book IV.*

A trust, and a donation *mortis causa,* are included in the term legacy.

88. *The Same, On the Lex Julia, et Papia, Book V.* It has been decided that where wool is bequeathed, a garment made out of it is not included in the legacy.

(1) Likewise, where material such as wood is bequeathed, a ship or a chest of drawers made out of it cannot be claimed as part of the legacy.

(2) Where a ship, which has been bequeathed, is broken up, neither the ship itself, nor the materials of which it is composed, will be due.

(3) Where, however, a mass of metal is bequeathed, any cup made out of it can be demanded.

89. *The Same, On the Lex Julia et Papia, Book VI.*

Parties are considered joint legatees where the same article is bequeathed to them separately, by reason of the property itself, and not on account of the words employed by the testator. They are considered joint legatees on account of the words used, and not by reason of the property bequeathed, where the testator says, "I give and devise such-and-such a tract of land to Titius and Seius, share and share alike," as both legatees have their shares from the beginning. Therefore a legatee is certainly preferred to others, where he is joined with his co-legatee both by the property left and by the terms of the bequest. If he should only be joined with him by the legacy of the property, it is established that he is not entitled to any preference. But where he is joined with him by words and not by his interest in the property, the question arises whether the other will be entitled to the preference. The better opinion is that he will be preferred.

90. *The Same, On the Lex Julia et Papia, Book VII.*

A legacy is understood to have been specifically bequeathed where the party who is charged with it is known, even though his name may not be stated.

91. *Papinianus, Opinions, Book VII.*

Where a tract of land was devised to a daughter as a preferred legacy, "Together with what is due from the stewards and tenants," the legacy of the residue includes what remains of the rents of the lands under the same lease. Otherwise, it could readily be established that rent collected from the tenants and money deposited in the account-book of the testator in the same place, would not form part of what was left, as being due from either the tenant or the stewards, even though the testator may have expressly stated that he desired the stewards to belong to his daughter.

(1) It was decided that where the following words are employed, "I give to Lucius Titius such-and-such lands, with the house, in the same condition as they may be found at the time of my death," the farming implements, and all articles for the use of the house must be delivered under the terms of the legacy; but anything which is due from the tenants will not be included.

(2) A father bequeathed to his son a factory used for dyeing purple, together with the slaves appointed to conduct the business, and the purple cloth which was there at the time of his death. It was decided that neither the money obtained from the sale of the cloth, nor what was due from purchasers, nor any debts of the slaves were included in the legacy.

(3) "I give and bequeath to Titius the Seian Estate in the same condition as when I purchased it." As the Gabinian Estate had also been purchased with the other for a single price, I gave it as my opinion that the mere proof of the purchase was not sufficient, but that it must be ascertained from the letters and accounts of the testator whether the Gabinian Estate was included in the name of the Seian Estate, and whether the income of both of them had been united and carried on the books as that of the Seian Estate.

(4) It has been established that where a house is bequeathed, the baths constitute a part of the same. If, however, the testator permitted public access to them, the baths will form a part of it only when they can be entered through the building itself, and where they have sometimes been used by the head of the household, or his wife; and the rent of the baths has been carried

on the books of the testator along with that of other rooms in the house; or where both have been purchased or furnished with money paid out at the same time.

(5) A certain person who owned a house bought an adjoining garden, and afterwards devised the house. If he purchased the garden on account of the house, in order to render the latter more pleasant and healthy, and there was an entrance to it through the house, and the garden was an addition to the latter, it will be included in the legacy of the house.

(6) Under the term "house" is also understood a building joined to the same, if both were purchased for one price, and it is established that the rents of both were carried together on the books.

92. *Paulus, Opinions, Book XVI.*

"If my daughters, Mævia and Nigidia, should become my heirs, then let Mævia take from my estate, and have as a preferred legacy, such-and-such of my lands, with the cottages thereon, and the slaves who have charge of the same; and, in addition, all the fields adjoining them, which I have obtained by purchase or in any other way whatsoever, for the purpose of uniting them to said lands; together with all the slaves, flocks, beasts of burden, and other personal property to be found on said land, or any part of the same, at the time of my death, in the best and most perfect condition that I then possessed them, or (to speak more plainly) everything that may be thereon." On one of the tracts of land which had been left as a preferred legacy, there was a building used for keeping records, in which were found instruments relating to the purchases of many slaves, and others having reference to real property, various contracts and the promissory notes of debtors. I ask whether these instruments were to be considered the common property of the heirs. I answered that, according to the facts stated, neither the documents above mentioned relating to purchases or debts, which were found on the land left as a preferred legacy, appeared to be included in the bequest.

(1) Where a house is devised as follows: "I charge my heirs to permit So-and-So to have the house in which I reside, and everything included therein, without excepting any utensils whatever," the testator is not held to have had in his mind any money or obligations of debtors.

93. *Scævola, Opinions, Book III.*

Lucius Titius made the following provision in his will: "My heir shall not, under any circumstances, alienate my suburban estate, or my city residence." His daughter, who was appointed his heir, left a daughter who retained possession of the said property for a long time, and, at her death appointed foreign heirs. The question arose whether the land belonged to Julia, who was the grandniece of Titius the testator. The answer was that, in the case stated, nothing had been done against the will of the deceased to prevent the property from belonging to the heir, as the testamentary provision was a mere precept.

(1) "I direct my heirs to pay to my wife, Sempronia, a hundred *aurei,* which I have borrowed from her." The question arose whether Sempronia could demand the execution of the trust, if, having brought suit for the said sum of money as being due to her, she should lose her case. The answer was that, according to the facts stated, the money could be claimed under the terms of the trust, since it appeared that it was not due for any other reason.

(2) A man devised certain lands to his freedman, and added the following words: "As they have been possessed by me, and with whatever may be there at the time of my death." The question arose whether the slaves who remained on the land for the purpose of cultivating it, or for any other reason, at the time of the death of the testator, as well as the other personal property found there, would belong to the legatee. The answer was that they would.

(3) The question arose whether property which heirs were charged to deliver to their brothers would also belong to their sisters. The answer was that it would, unless it was proved that the

intention of the testator was otherwise.

(4) A testator left to the guild of blacksmiths a legacy, as follows: I devise such-and-such a tract of land, together with the forest belonging to it, in the best and most excellent condition in which it may be." I ask whether the personal property which was on the premises at the time of the death of the testator, for example, the hay, the fodder, the straw, the machines, the vessels for holding wine (that is to say the vats and casks attached to the warehouses), and the granaries, were also bequeathed. The answer was that anything which was not bequeathed is improperly claimed.

(5) A testator having left a certain tract of land as a preferred legacy to an heir to whom he had bequeathed half of his estate made the following request of him: "I request you to consent to accept Clodius Verus, my grandson, and your relative, as your co-heir to half of the Julian Estate, which I have directed to be given to you over and above your share." I ask whether the grandson would be entitled to half of the estate under the terms of the trust. The answer was that he would.

94. *Valens, Trusts, Book II.*

A man who left several freedmen devised a tract of land to three of them, and requested them to see that its name was not changed. The question arose if, when the first one of the three died, he would be obliged to leave his share to both of his co-legatees who were joined with him in the legacy, or only to one of them; or whether he could leave it to another who was his fellow-freedman. It was decided that although this was a question of intention, still, the wishes of the testator would be sufficiently complied with if the legatee should leave the land to another of his fellow-freedmen.

Where, however, he did not give it to any, could it not be doubted whether the claim for the execution of the trust would belong to the more diligent of the fellow-freedmen, or to all of them; or whether it would only belong to those to whom the legacy was jointly bequeathed? Julianus very properly held that the claim belonged to all the freedmen.

95. *Marcianus, Trusts, Book II.*

"Let whoever shall be my heir be required to pay, and I charge him to pay, whatever sums I mention." Aristo says that corporeal property is also included in this provision, as, for example, lands, slaves, clothing, and silver plate; because the term "whatever" does not merely refer to money, as is evident where the legacy of a dowry and stipulations relating to a purchased estate are involved, and that the word "sums" should be understood in the same sense as in the instances above mentioned.

Moreover, the intention of the deceased, which must be especially considered in the case of trusts, also depends upon this opinion; for the testator would hardly have intended his heir to only pay money when, after this preliminary statement, he added corporeal property.

96. *Gaius, Trusts, Book II.*

Where Titius was appointed heir to half an estate, and charged to deliver the entire estate to Mævius, and then his co-heir was asked to transfer to him his share, or a portion of the same, will Titius also be obliged to transfer to Mævius the share which he received from his co-heir under the terms of the trust? The Divine Antoninus, having been consulted on this point, stated in a Rescript that he was not obliged to transfer it, because neither legacies nor trusts are included in the term "estate."

97. *Paulus, Decrees, Book II.*

A certain Osidius, having appointed his daughter Valeriana his heir, and granted freedom to his steward, Antiochus, and having devised to the latter certain tracts of land together with his *peculium* and whatever was due, not only from him but from the tenants, the legatee produced

a statement written by the hand of the testator, showing what was owing from him and the tenants. The following was also inserted in this instrument: "Moreover, my steward must render an account of other property, that is to say, such as I have set aside for my use, namely grain, wine, and other articles." The freedmen demanded these things from the heir, alleging that they were included in what remained due, and obtained a judgment in his favor from the Governor.

When, on the other hand, it was stated by other interested parties that what remained due from the tenants, or even what was due from himself had not been demanded of him, and they claimed that the articles which had been set aside for the use of the deceased should not be included in the balance which was due, the Emperor interrogated the representative of the legatee, and, by way of example, asked: "Suppose there had been set aside a hundred thousand *aurei,* which were to be employed for the use of the testator, would you say that all that was left in the chest would be due to you?" He held that the appeal had been properly taken. It was alleged by the representative of the legatee, that certain sums of money had been collected from the tenants, after the death of the testator. The decision was that whatever was collected after his death should be delivered to the legatee.

98. *The Same, On the Form of a Will.*

Where there are several degrees of heirs, and the following clause appears in the will, "Let my heir give," this applies to all the degrees, just as the following words, "Whoever shall be my heir," do. Therefore, if anyone does not wish to burden all his heirs with the payment of legacies, but only some of them, he must charge them specifically by name.

99. *The Same, Concerning the Meaning of the Term Equipment.*

When urban slaves are bequeathed, certain authorities divide those living in a city, not by their place of residence but by their occupations, so that although they may be in country places, still, if they do not perform rural labor, they are held to be urban slaves. It must, however, be said that they should be considered urban slaves whom the head of the family is accustomed to include among those belonging to the city, and this can readily be ascertained from the register of the slaves, as well as from the food which is furnished them.

(1) It may be doubted whether slaves employed as hunters and bird-catchers should be included among urban or rustic slaves. It must, however, be said that they should belong to the place where the head of the household lives, and furnishes them support.

(2) Muleteers belong to the class of urban slaves, unless the testator employed them in rural labors.

(3) Some authorities hold where a child is born to a female slave belonging to the city, and it is sent into the country to be brought up,

that it belongs to neither class. Let us see whether it should not be understood to be included along the urban slaves. This appears to be the better opinion.

(4) Where slaves who are litter-bearers are bequeathed, and one of them is both a litter-bearer and a cook, he will be included in the legacy.

(5) Where slaves born in the house are bequeathed to one person, and others who are couriers are bequeathed to another, and some of the number belong to both these classes, they will be included among the couriers, for the reason that the species is subordinate to the genus. Where two slaves belong to the same genus or species, they are generally held in common.

100. *Javolenus, On the Last Works of Labeo, Book II.*

"I charge my heir to deliver my slave, Stichus, to Lucius Titius," or "Let him deliver my slave to him." Cascellius says that, under a clause of this kind, the slave must be delivered; and Labeo approves his opinion, because where anyone is ordered to deliver anything, he is at the

same time ordered to give it.

(1) A legacy of two marble statues, as well as all the marble in the possession of the testator was specifically bequeathed to a certain individual. Cascellius thinks that no other marble statue, except the two mentioned, is due. Ofilius and Trebatius are of the contrary opinion. Labeo adopts the conclusion of Cascellius, which I believe to be correct, because by leaving two statues, it can be held that the testator did not intend to leave any more when he bequeathed the marble.

(2) "I give and bequeath to my wife her clothing, jewels, and all gold and silver plate, which I have had made for her, or intended for her use." Trebatius thinks that the words, "Which I have had made for her or intended for her use," only refer to the gold and silver plate. Proculus holds that they refer to everything mentioned, and this opinion is correct.

(3) In a case where Corinthian vases were bequeathed to a certain person, Trebatius was of the opinion that the pedestals made to support them were due, as part of the legacy. Labeo, however, does not adopt this opinion, if the testator considered the said pedestals as vases. But Proculus very properly says that if the vases were not of Corinthian brass, they could be claimed by the legatee.

(4) Where articles made of tortoise-shell are bequeathed, Labeo and Trebatius are of the opinion that beds inlaid with tortoise-shell, whose feet are covered with silver, are due, which is correct.

101. *Scævola, Digest, Book XVI.*

A man who, in his native province, had certain lands of his own, as well as others which had been pledged to him as security for debts, executed a codicil as follows: "I wish to be given to my beloved country, as its share, and I give to it separately, all the lands which I possess in Syria, together with the personal property that is, the flocks, the slaves, the crops, the provisions, and all the implements which are there." The question arose whether the testator should be held also to have left to his country the lands which are held in pledge. The answer was that, according to the facts stated, these should not be considered to have been left, provided they were not included in his own estate, which might be the case if the debtor should fail to make payment.

(1) "I ask that my tract of land, in its present condition, be given to my foster-child." The question arose whether the balance due from the tenants as well as the slaves, if there were any there at the time of the death of the testator, should be included with the land. The answer was, that what was due from the tenants was not bequeathed, but that everything else appeared to have been included in the words, "In its present condition."

102. *The Same, Digest, Book XVII.*

A testator made a bequest as follows: "I bequeath to my wife my travelling bags, and everything contained therein, as well as the claims in the small register written by my own hand, which have not been collected at the time of my death, although they may have been entered on my accounts as paid, and I have transferred the securities to my steward."

The said testator, when about to make a journey to Rome, placed the notes to his debtors and his money in the said travelling bags, and, having collected the notes, as well as expended the money, he returned home after the lapse of two years, and deposited in the said travelling bags deeds for some real estate which he had subsequently purchased, and a certain sum of money.

The question arose whether he should be considered to have only bequeathed to the legatee the notes which, after his return, he placed in his bags. The answer was that, according to the facts stated, the notes which were in the bags when he died and which were not recorded by his own hand in his register were not due under the terms of the legacy.

It was also asked, when he placed in his bags the evidences of the purchase of the said real estate, whether these also were included in the legacy? The answer was that it did not clearly appear what he intended to do with reference to the lands, but if he had placed the deeds for them in the bags with the intention that, when they were given to his legatee the ownership of the same would pass to her, it could be maintained that the lands also constituted part of the legacy.

(1) The father of a family made the following bequest, "I desire the two unchased dishes, which I bought in the square where images are sold, to be given." The testator had, in fact, purchased certain dishes in that place, but they were not destitute of ornament, and he made his will only three days before his death. The question arose whether the said dishes, which he had purchased, formed part of the legacy, as he did not bequeath any others which he bought in the same place. The answer was that, according to the facts stated, those which he had purchased in the square of the images should be delivered to the legatee.

(2) A testator directed that a commission in the army should be purchased for a young man whom he had brought up, as follows: "I bequeath to Sempronius, whom I have brought up, such-and-such articles, and, when he has arrived at the proper age, I desire that a commission in the army shall be purchased for him, and that all expenses and charges arising therefrom be paid." The question arose, if Sempronius himself purchased this commission, whether he could recover the price of the same, or whatever is customary to pay under such circumstances, from the heirs by the terms of the trust. The answer was that, according to the facts stated, he could do so.

(3) The same testator bequeathed a commission to his freedman, as follows, "I give and bequeath to Seius, my freedman, such-and-such a commission," which commission the testator himself possessed. The question arose whether all the fees and expenses for admission to the army should be paid by the heir. The answer was that they should be paid by him.

103. *The Same, Questions Publicly Discussed.*

Where a father substituted a foreign heir for his disinherited son, and the said foreign heir afterwards appointed the son his heir, and the latter died under the age of puberty, I think that the legacies with which the substitute for the sum was charged will not be due, for the reason that the estate of the father did not come into the hands of the son directly, but through indirect succession.

(1) I have ascertained, besides, that in the case of a brother who was the heir of his father and appointed his own disinherited brother his heir, that his substitute will not be obliged to pay the legacy, even if he should succeed his brother, where the latter died intestate; because the property did not come into his hands directly, but through succession to his brother.

(2) Where a son was appointed heir to a twelfth of his father's estate, and was charged with a legacy, and a substitute was appointed for him, and, afterwards, his other brother came within the scope of the Edict, and he obtained prætorian possession of half of the estate; the question arose whether his substitute would be required to pay the legacies in proportion to a twelfth, or in proportion to half of the estate. The better opinion is that he would be obliged to pay in proportion to half, but if he paid in proportion to a twelfth, it must be paid to all, and payment should be made to the children and other relatives in proportion to the balance.

(3) On the other hand, if the son was appointed heir to three-fourths of the estate, and having come within the scope of the Edict, he should obtain prætorian possession of half of the property, the substitute would only owe the legacies proportionally; for just as they are increased where prætorian possession of the estate is greater, so also they are reduced, where it is less.

THE DIGEST OR PANDECTS.

BOOK XXXIII.

TITLE I.

CONCERNING ANNUAL LEGACIES AND TRUSTS.

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

When something payable every year is bequeathed without adding the place where this is to be done the heir should pay it wherever it may be demanded, just as a demand can be made in the case of a stipulation, or a note.

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

Where an heir is charged to permit me to enjoy the use of certain land by the year, and he is guilty of default at the beginning of the year, when I ought to cultivate the land, he will be liable to me for the entire year, even though he should afterwards permit me to cultivate it, because I have been excluded from putting in the crops; just as where he is charged with furnishing me the daily labor of Stichus, and he sends him to me, not in the morning but at the sixth hour of the day, he will be liable to me for the value of the entire day's work of the slave.

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

Where a legacy, for instance of thirty *aurei,* is left to me payable in one, two, and three years, ten *aurei* will be due each year, even though the words "in equal payments" were not added.

(1) Hence, if the words "in payments" were employed, even though "equal" was not added, it must be said that equal payments must be made, just as if the word "equal" was written, and the word "payments" had not been added.

(2) But if the words, "In unequal payments," are added, unequal payments must be made. But let us consider in what way they ought to be made. I think that they ought to be made in accordance with the judgment of a good citizen (unless the testator expressly left it to the choice of the heir), dependent upon the means of the deceased, and the place where his estate is situated.

(3) If, however, it was stated that payment should be made in accordance with the judgment of a good citizen, we infer from this that it must be made with reference to the situation of the estate, and without any trouble or annoyance to the heir.

(4) But if the testator directed that payment should be made in the way that the legatee might select; let us see whether the entire amount can be demanded at once. I think that this cannot be done, just as in the case of the choice of the heir; for the testator intended that several payments should be made, and that the amounts of the same should depend upon the judgment of the heir, or of the legatee.

(5) Where, however, a legacy has been bequeathed as follows, "Let my heir pay Titius ten *aurei* in three years," will the amount be payable in three annual instalments, or at the expiration of three years? I think that this should be understood as if the testator had intended the payments to be made in one, two, and three years.

(6) Where a certain sum of money is bequeathed to anyone, and it is stated that, until it is paid, something shall be given to the legatee every year, as, for example, interest, the legacy will be valid; but in order to make the payment of the interest valid, the sum to be paid annually must not exceed the ordinary rate of interest.

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

Where anything is bequeathed to a person to be paid annually, Sabinus says (and his opinion is correct), there are several legacies, and that the one for the first year is absolute, and the

other conditional; for the condition, "If he should live," seems to be implied, and therefore, if the legatee dies, the legacy will not pass to his heir.

5. *Modestinus, Opinions, Book X.*

"I also charge my other heirs to pay to my wife ten *aurei* every year, as long as she lives." The wife survived her husband five years and four months. I ask whether her heirs will be entitled to the entire legacy for the sixth year. Modestinus answers that they will be entitled to it.

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

A testator left a certain sum of money to be paid annually for the maintenance of the public games of the city, over which he expressed a wish that his heirs should preside. The successors of his heirs denied that they were liable for the legacy, alleging that the testator only intended it should be paid as long as his heirs could preside over the games. Therefore, when he mentioned their presiding, I ask whether he intended payment to be made during the duration of the trust, or perpetually. Modestinus answers that the legacy should be paid to the city annually in perpetuity.

7. *Pomponius, On Quintus Mucius, Book VIII.*

Quintus Mucius says that if anyone makes the following provision in his will, "Let my sons and daughters live wherever their mother may desire, and let my heir pay, every year, to each boy and girl among them ten *aurei,* for his or her support." If the guardians who had charge of the children were unwilling to pay the said sum of money, no action can be brought by anyone under the terms of the will; for the provision of the testator was only intended to inform the guardians what he desired, so that they could pay the money without any risk.

Pomponius says that where anything is included in the will which merely has reference to the wishes of the testator, it does not create any obligation. The following is an instance of this. If I should appoint you my sole heir, and direct you to erect a monument to me with a certain sum of money, this statement does not place you under any obligation, but you can erect a monument in order to comply with my wishes, if you desire to do so.

It would, however, be otherwise, when I made the same provision after I had given you a co-heir, for if I charged you alone to erect the monument, your co-heir could bring an action in partition against you to compel you to do so, as it is to his interest. If, however, both of you should be ordered to do this, you will be entitled to actions against one another.

The following also has reference to the wishes of the testator, for instance, where anyone directs statues to be placed in a town, for if he did not do this for the purpose of honoring the town, but to perpetuate his own memory, no one will be entitled to bring an action on this ground. Therefore the testamentary disposition mentioned by Quintus Mucius, "Let my children reside where their mother may desire," creates no obligation, but merely has reference to compliance with the wishes of the deceased; so that the children may live where their mother may direct.

Nor must the will or the order of the testator always be observed; for example, if the Prætor should decide that it was not expedient for a minor to reside where his father ordered him to, on account of the bad character of persons with whom he directed them to associate, of which fact the father was ignorant. Where, however, ten *aurei,* payable annually, are left for their support, the legacy will be valid, whether this clause had reference to the parties with whom a mother might wish the children to reside, or whether we should understand by it that the children themselves were entitled to the legacy. The better opinion is, that the testator should be considered to have made this bequest in order to provide for his children.

And, in all cases where only the wishes of the testator are concerned, they must neither be always rejected nor always observed, but such matters must be determined by the judge, and carried into effect if they do not relate to anything dishonorable.

8. *Gaius, On the Lex Julia et Papia, Book V.*

Where a legacy payable annually is bequeathed, it resembles an usufruct, as it is terminated by the death of the legatee. It is not, however, terminated by the loss of civil rights, as is the case of an usufruct, which can be bequeathed as follows: "I bequeath to Titius the usufruct of such-and-such a tract of land, and every time that he loses his civil rights, I bequeath to him the same usufruct." The legacy is, in this respect, certainly more beneficial, because if the legatee should die at the beginning of any year, he leaves the legacy for that year to his heir.

This does not apply to an usufruct, for if the usufructuary should die at the time that the crops are ripe, but before they have been gathered, he will not leave them to his heir.

9. *Papinianus, Opinions, Book VII.*

A tract of land, which a testator desired to be hypothecated to secure legacies payable annually to his freedman, can be lawfully claimed by them on the ground of a trust, for the purpose of preserving the land. Paulus states that this rule also applies to other property belonging to an estate, to enable the legatee to be placed in possession of the same.

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

"I wish my faithful friend, Seius, to receive six *aurei* every year, and the house in which he lives, if he should be willing to take charge of the business affairs of my children, just as he has taken charge of mine."

It was held that the surviving daughter of the testator was, none the less, obliged to pay the annual legacy to Seius, in proportion to her share of the estate, because two of the three children of the testator had died, and other heirs had been appointed, as the labor as well as the money was susceptible of division.

(1) "I wish my physician, Sempronius, to receive the same that I have paid him during my lifetime." The sums held to have "been left by this bequest were certain annual payments made by the testatrix, so that, as far as her liberality was concerned, no doubt of her intention could arise.

(2) "I desire a hundred *aurei* to be paid to my wife in addition to what she received from me as an annual allowance during my lifetime." It is understood that the amount should be payable annually, and that the testator also left her a hundred *aurei.*

(3) "I wish to be given to my freedmen whatever I furnished them during my lifetime." Their lodging must be provided, but the heir will not be required to allow the steward the expense of beasts of burden, which his mistress was accustomed to grant him for his own convenience. Again, where the freedman is a physician, he cannot legally demand money which he was accustomed to receive from his mistress for the purchase of medicines to be administered to his patroness and her family.

11. *Paulus, Questions, Book XXI.*

It is established that where legacies are payable annually, they are multiple, and the right of the legatee to each bequest should be regularly investigated. Where the legacy is left to a slave, the capacity of his master to take it, should also be inquired into.

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

Gaius Seius devised to Mævius and Seia certain tracts of land in different localities, and provided as follows, "I wish three hundred thousand reeds to be furnished annually by the Potician to the Lutatien Estate, together with a thousand pounds of well-cleaned osier, also, every year."

I ask whether this legacy will be extinguished by the death of the legatee. Paulus answered that a servitude, either personal or real, does not seem to have been created in accordance with

law; but that an action on the ground of a trust will lie in favor of the party to whom the Lutatian Estate was devised. Therefore, as the legacy was to be paid annually, it is considered to terminate with the death of the legatee.

13. *Scaevola, Opinions, Book IV.*

Mævia appointed her grandson, who was born to Mævius and had reached the age of puberty, her heir, and made a bequest to Lucius Titius, as follows: "I desire ten *aurei* to be paid to Lucius Titius, a good man, to whom I am indebted for favors which he has done me, as long as he lives; if he should take charge of the business of my grandson, and conduct the administration of all his affairs."

I ask, if Lucius Titius had, at some time or other, transacted the business of Mævius, and the latter had objected to his doing so any longer, whether he would be obliged to execute the trust. I answered that, if Lucius Titius had been deprived of the right to transact the business of Mævius, not on account of any fraudulent act, and no other just reason had existed for rejecting his services, and he was willing to continue to conduct his affairs, he would be entitled to the legacy.

(1) A man, having appointed his wife his heir, provided as follows, in his will: "I wish twelve *denarii* to be paid every year by my heir to each of my freedmen for his support, if they do not abandon my wife." As the testator very seldom left the town, and his wife frequently did so, I ask whether the freedmen should accompany her on her journey. I answer that a positive opinion cannot be given on this point, as many things might arise which it would be well to take into consideration; and therefore a case of this kind should be submitted to the judgment of a good citizen.

It was also asked, as when the woman went on her journeys she never offered to pay anything additional to her freedmen, and for this reason they did not accompany her, whether they would be entitled to their legacies. The answer was that this should be determined by taking into account the length, or the shortness of the journeys, and the amount of the legacies.

14. *Ulpianus, Trusts, Book II.*

Mela says that if a legacy payable annually would be left to anyone without mentioning the amount, the bequest is void. The opinion of Nerva, however, is better, namely, that the testator is considered to have bequeathed what he was accustomed to give during his lifetime; but that, in every instance, the rank of the parties must be taken into consideration.

15. *Valens, Trusts, Book VII.*

Javolenus gave it as his opinion, with reference to an heir who having been charged to pay a certain sum of money after the lapse of ten years paid it before the expiration of the time, that, if it could be proved that the trust had been left for the said period to benefit the party entitled to it, because he could not take care of the property, and the heir paid him the money before the time, knowing that he would squander it, he will, under no circumstances, be released from liability. If, however, the time had been fixed on account of the heir, in order that he might profit by the delay, it is understood that he will be released; and, indeed, it may be said that he paid more than he should have done.

16. *Paulus, On Neratius, Book III.*

A slave was ordered to be free after the expiration of ten years, and a legacy was bequeathed to him payable annually from the day of his master's death. The legacy will be due for the years when he shall have begun to be free, and, in the meantime, the heir will be compelled to furnish him with subsistence.

17. *Labeo, On the Last Epitomes of Javolenus, Book 11.*

A legacy was bequeathed as follows, "Let my heir give to Attia fifty *aurei* until she marries."

It was not stated that the money was to be paid annually. Labeo and Trebatius think that the entire sum is immediately due. It is, however, more equitable to hold that the legacy is payable annually.

(1) "Let my heir give to Attius, every year, two measures of Falernian wine which are to be taken from my estate." It was held that the two measures of wine should be furnished even for a year when no wine was made, provided they could be obtained from the vintage of former years.

18. *Scævola, Digest, Book XIV.*

A testator, having confirmed his codicil by his will, devised a tract of land to his freedmen, and forbade it to be alienated, but desired it to belong to the children and grandchildren of his freedmen. He afterwards added the following words: "I wish to be paid by them to my heir, out of the profits of said land, ten *aurei* every year, for the term of thirty-five years after my death." As the heir appointed by Titius died before the expiration of the term of thirty-five years, the question arose whether the heir of the heir would, by the words above quoted, be entitled to the benefit of the trust for the remainder of the time. I answered that he would, unless it could be proved by the freedmen that the testator had in view the thirty-fifth year of the heir as the time for the extinction of the legacy.

(1) A testator left to Stichus, whom he had brought up, a hundred *aurei,* and ten *aurei* payable every month in addition, and then, after appointing Sempronia heir to a third of his estate, charged her as follows: "I request you, Sempronia, my sister, to take from the bulk of my estate the legacies which I have left to my foster-children, and keep them until they are entitled to the same." The question was asked if Sempronia, who was charged with the trust, should refuse to accept the estate before having taken possession of the money left to the foster-children, in accordance with the will of the deceased, whether she would be liable to an action on account of the legacy brought by Stichus before he reached the age of twenty-five years? The answer was that such an action would lie.

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

Titia, having appointed Seia her heir, bequeathed the usufruct of a certain tract of land to Mævius, and charged him with a trust as follows: "I request you, Mævius, to pay to Arrius Pamphilus and Arrius Stichus, out of the income of the Speratian Estate, six hundred *aurei* every year from the day of my death, as long as they live." The question arose if Mævius should pay the annual sum for their support, and, after his death, the land should revert to the heir of Titia by operation of law, whether the provision for support under the terms of the trust would be due to Pamphilus and Stichus. I answered that there was nothing in the case stated to compel payment by the heirs of Titia, as the usufructuary was only charged with it.

The question was also asked, whether payment of the legacy should be made by the heirs of the legatee, Mævius. The answer was that nothing was due from the heirs of the legatee, unless it should be clearly proved that the testator intended payment to be made after the extinction of the usufruct, provided the receipts from the usufruct were sufficient to continue it.

(1) A certain individual who had paid an annual sum to a learned man, named Marcus, inserted the following provision into his will: "My dear wife, I know that you will take care of my friends, and allow them to want for nothing, still, I wish eighty *aurei* to be given to Marcus." The question arose whether Marcus, having received the legacy of eighty *aurei,* could also claim the aforesaid annual payments? The answer was that there was nothing in the case stated why the annual payments concerning which advice was asked should not be made.

(2) "I bequeath to Lucius Titius three pounds of gold, which I was accustomed to give him during my lifetime." Inasmuch as the testatrix gave Titius every year forty *aurei* by way of

annual salary, and a certain quantity of silver in addition, as a gift for festivals, or the value of the same, I ask whether the trust for the benefit of Titius must be executed by the heirs, or the money be paid as a legacy. The answer was that there was nothing in the case stated to prevent the money from being paid.

20. *The Same, Digest, Book XVIII.*

A testator bequeathed an annual pension under the following condition : "If they should reside with my mother, whom I have appointed heir to a portion of my estate." The question arose whether, after the death of the mother, the condition which was imposed would be considered to have failed, and for this reason neither food nor clothing should be given to the legatees. The answer was that, according to the facts stated, they should be given.

(1) Attius left a trust in the following terms, "I charge whoever shall be my heir to pay, after my death, out of the income of my apartment and my warehouse the sum of ten *denarii* to the priest, the sacristan, and the freedmen attached to the temple, on the festival day which I have established." I ask whether this legacy was only due to those who were living and in office at the time that it was bequeathed, or whether it should also be paid to those who succeed them. The answer was that, in accordance with the facts stated, although the officers had been mentioned, the legacy was bequeathed to the temple.

I also ask whether the ten *aurei* were only due for one year under the terms of the trust, or whether they should be paid in perpetuity. The answer was that they should be paid in perpetuity.

21. *The Same, Digest, Book XXII.*

A certain person left the following bequest to his freedman: "I desire the fiftieth of my entire income derived from the tenants of my lands and the purchasers of the crops, according to the custom of my household, to be paid to Philo, as long as he lives." The heirs sold the land from which the said fiftieth of the income was derived. The question arose whether the fiftieth of the interest on the price, which, according to the custom of the province, was ordinarily collected, was due? The answer was that, although the land had been sold, only the fiftieth of the income thereof was bequeathed.

(1) A testator charged his freedman, to whom he had left a tract of land that returned an income of sixty *aurei* a year, with the payment of ten *denarii* to Pamphila annually, under the terms of a trust. The question arose, if the Falcidian Law should diminish the legacy of the freedman, whether the annual allowance bequeathed to Pamphila under the trust would also be considered to be diminished; as the bequest to Pamphila was derived from income which would have to be paid, even if the Falcidian Law reduced the tract of land by half. The answer was that, in accordance with the facts stated, the bequest to Pamphila would not be diminished, unless the intention of the testator was proved to be otherwise.

(2) A certain testator having appointed his son heir to three-fourths of his estate, and his wife to one-fourth, charged his son to deliver his estate to his stepmother, and requested her "to take good care of his young son, and pay him ten *aurei* until he reached his twenty-fifth year, and, after he had attained that age, to transfer to him half of the estate." The son having deducted the fourth part of the estate to which he had been appointed heir, delivered her share to his stepmother, and afterwards reached the age of twenty-five years.

As the stepmother was entitled to the three-fourths, and one twenty-fourth, and one forty-eighth of the entire estate, the question arose whether she should surrender half of this share to her stepson? I answered that, according to the facts stated, she would have to deliver to him enough to make up half the estate; in addition to what the son had deducted by reason of the Falcidian Law.

Since the father seemed to have had in view the tender age of his son, inquiry was also made

whether the stepmother would be required to deliver to him the profits for the intermediate time. The answer was that, in accordance with the facts stated, she would be required to do so.

(3) Lucius Titius, by his will, bequeathed a hundred *aurei* to the city of Sebasta, his birthplace, in order that athletic contests might be celebrated there every other year in his name, with the interest of said sum, and added the following words: "If the city of Sebasta is unwilling to accept the money which I have bequeathed under the above-mentioned condition, I desire that my heirs shall, under no circumstances, be liable for the same, but that they keep it for themselves." The Governor of the province afterwards selected certain good notes from the assets of the estate, and delivered them to the city as its legacy, and, after his decision, the city collected the money due on most of the claims.

The question arose, if the city should not subsequently comply with the conditions of the will, whether the legacy would belong to the sons who were the heirs of the deceased. I answered that the city could be compelled to obey the wishes of the testator, and if it did not do so, the heirs could demand the amounts which had been settled by the debtors either in cash or by renewal, and so far as those claims which were not paid to the city, and of which the former obligation was not released by renewal were concerned, the heirs were not prevented from demanding from the debtors what they owed.

(4) Largius Euripianus rendered an opinion, after his advice had been requested in a case where a patron had left a certain sum of money to his foster-child, and afterwards made the following provision with reference to it in his will: "I wish the money which I have bequeathed to my freedman and foster-child, Titius, to remain in the hands of Publius Mævius, until he reaches the age of twenty-five years, and that, for the use of the same, interest shall be collected at the rate of three per cent. As for the amount of the expenses to be paid to him, Publius Mævius will estimate them, for he should entertain for him the affection of a father."

The question arose whether the heirs, when they paid Publius Mævius the money, should require him to give security. The answer was since no mention of security being required was made in the will, the heirs would be sufficiently safe if they paid the money to Publius Mævius, in accordance with the wishes of the deceased. Therefore neither Titius, the foster-child, nor his heirs should be heard, if they brought an action against the heirs of the patron on the ground that they did not exact security for, by the payment of the money; and the above-mentioned heirs will be released from liability to Titius, as well as to his heirs, unless Publius Mævius should cease to be solvent during the lifetime of the testator, for, in this case, security must be required of him.

(5) A father appointed his two sons his heirs to equal portions of his estate, an older one, and a younger who was still under the age of puberty, and he left to the latter certain lands as his share, and also bequeathed him a certain sum of money payable when he reached the age of fourteen years, which he placed in the hands of his brother, as trustee, in the following words: "I charge you, Seius, to give to your mother a certain sum of money annually, to enable your brother to pursue his studies from his twelfth to his fourteenth year, and, in addition to this, to pay the taxes assessed against him until you deliver him the property; and I desire that the income of said lands shall belong to you, until your brother reaches the age of fourteen years."

The elder brother having died and left a foreign heir, the question arises whether the condition of receiving the income every year, as well as the charge of paying the annual allowance which, if Seius had lived, he would have been compelled to pay, will be transmitted to his heir; or whether the entire amount of the legacy must be immediately delivered to the minor and his guardians. The answer was that, according to the facts stated, the testator is understood to have, as it were, addressed the guardian, so that, at the expiration of the guardianship, the allowance which he had ordered to be paid, and the income which was to be collected, should terminate; but as the elder brother was overtaken by death, everything that

had been left by the testator would, at the time when his brother died, immediately pass to the minor and his guardians.

22. *Alfenus Verus, Epitomes of the Digest by Paulus, Book II.*

"Let my heir pay a hundred *aurei* annually to my daughter every time that she becomes a widow." The question arose, if the daughter should become a widow in less than a year, whether she would be entitled to less than a hundred *aurei.* The answer was that, although the entire year had not yet elapsed, the whole amount would be due to her.

23. *Marciamis, Institutes, Book VI.*

When a certain man desired a distribution of his estate to be made to the Decurions on his birthday, the Divine Severus and Antoninus stated in a Rescript, that it was not probable that the testator had in his mind payment during only one year, but intended to leave a legacy in perpetuity.

24. *The Same, Institutes, Book VIII.*

Where a certain sum of money, for instance, a hundred *aurei,* was left to the city of Sardis for the purpose of celebrating games in honor of Apollo in four years, the Divine Severus and Antoninus stated in a Rescript that the testator appeared to have left a perpetual income, due every four years, and not merely a gross sum for payment at the end of the first term of four years.

25. *Valens, Trusts, Book II.*

Ten *aurei* can be left to be paid annually to a son under paternal control, as long as he is in the power of his father.

TITLE II.

CONCERNING USE, USUFRUCT, INCOME, LODGING, AND SERVICES LEFT BY LEGACIES OR TRUSTS.

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

Neither the use nor the usufruct of the right to traverse a path, a drive-way or a road, or to convey water by means of an aqueduct, can be left by will, because the servitude of a servitude cannot exist. Nor can such a bequest be rendered legal under the Decree of the Senate by which it is provided that the usufruct of everything included in property may be bequeathed, for the reason that this is neither included in property or excluded from it, but an action for an indeterminate amount will lie against the heir, and in favor of the legatee, as long as he lives, in order to compel the former to permit him to walk, ride, or drive through the property or the servitude may be granted, if security is furnished to return it in case the legatee should die, or forfeit his civil rights for some serious offence.

2. *Papinianus, Questions, Book XVII.*

Where the services of a slave are bequeathed, they are not lost by forfeiture of civil rights, or by non-user; and, as the legatee can profit by the labors of the slave, he can also lease them. If the heir should prevent him from making use of his services, he will be liable. The same rule applies where the slave leases himself. And, for the reason that the legatee is not considered an usufructuary, he will transmit the legacy of the slave's services to his heir, but where the title to the slave is obtained by usucaption the legacy will be extinguished.

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

The services of a freeman can also be bequeathed, just as he can be hired under a contract, or be made the subject of a stipulation.

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

Where the ownership of land is left absolutely, it will pass to the legatee, even though the usufructuary may be appointed heir.

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

If I promise the enjoyment of an usufruct "at the time of my death," the disposition will be void; and the same rule applies to a legacy, for when an usufruct is created, it is usual for it to be extinguished by death.

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

If an usufruct should be bequeathed to me to be enjoyed for two years after the death of the testator, and, I am prevented from enjoying it through the fault of the heir, he will still be liable after the two years have elapsed; just as anyone will be liable where property due under a legacy is destroyed, and he was in default in delivering the same.

Hence this usufruct cannot be claimed, because it is different from the one which was bequeathed, but its value for two years should be computed, and paid to the usufructuary.

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

Where services were left by will, when should they begin to be available, from the day when the legatee demands them, or from the time when the estate is entered upon? And who must bear the loss while the slave is ill ? I think that the services are due from the time when they are demanded, and therefore if the slave should begin to be sick after that date, the loss must be borne by the legatee.

8. *Gaius, On the Edict of the Prætor Concerning Legacies, Book III.*

Where an usufruct is bequeathed to a municipality, the question arises how long it shall be entitled to the same, for if anyone should say that it was entitled to it in perpetuity, the mere ownership, if the usufruct should be perpetually separated from it, would be worthless; hence it is established that the municipality can hold it for a hundred years, which is the longest term of life.

9. *Ulpianus, Disputations, Book VIII.*

If anyone to whom an usufruct has been bequeathed is charged with a trust, and the usufruct should not come into the hands of the legatee, the heir in whom the said usufruct remains, must execute the trust. This rule also applies to a military will, if the legatee charged with the trust should reject the legacy, or should die during the lifetime of the testator.

10. *Julianus, Digest, Book LXX.*

If a tract of land and the usufruct of the same should be left to Titius, he will have the right to claim either the land or the usufruct; and if he selects the land, he will necessarily be entitled to the full ownership of the same, even though he has rejected the usufruct. Where, however, he prefers to have the usufruct, and rejects the ownership of the land, he will only be entitled to the usufruct.

11. *The Same, On Minicius, Book I.*

It is established that the legacy of an annual lodging is due from the beginning of each year.

12. *Alfenus Verus, Epitomes of the Digest by Paulus, Book II.*

An heir built a country-house on land, the usufruct of which had been bequeathed. He cannot demolish the building without the consent of the usufructuary, any more than he can remove a tree from the land which he had planted there; but if he should demolish the house before the usufructuary forbids him, he can do so with impunity.

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

Where an usufruct is left to be enjoyed for alternate years, not only one, but several legacies are bequeathed. The case is different.

however, where a servitude to conduct water and use a right of way is left; for the servitude of a right of way is distinct, since by its nature it is subject to interruption.

14. *Celsus, Digest, Book XVIII.*

Where an heir was charged to permit two persons to separately enjoy the usufruct of a tract of land, and he suffered them to enjoy it in common, the question arose whether, under the terms of the will, he would be liable to both. I held that he would be liable, if the testator had intended that each should enjoy the entire usufruct individually; for, in this instance, he would be required to deliver the entire legacy to each one of them. Therefore, if the heir should permit one of the legatees to use part of the usufruct, he could not permit the other to use the same part. Hence, he would be compelled to give to each of them the appraised value of that of which he was deprived.

15. *Marcellus, Digest, Book XIII.*

"Let my heir be charged to permit Titius to reside in such-and-such a house, as long as he lives." This is held to be a single legacy.

(1) Where a testator had two tracts of land, and devised one of them, and then conveyed it to one person and the usufruct of it to another, I ask, if the usufructuary did not have access to the said land by any other way than through the tract which had been devised, whether the servitude would be due to him. The answer that the rule was the same as if the land had belonged to an estate through which a right of way could be granted to the usufructuary, and, according to the will of the deceased, it appeared that this was required from the heir; for in this instance, the legatee would not be permitted to claim the land, unless he had first granted the right of way through it to the usufructuary, in order that the same condition which was obtained during the lifetime of the testator might be preserved either as long as the usufruct continued to exist, or until it was reunited with the land.

16. *Modestinus, Opinions, Book IX.*

A legacy was bequeathed to a town, so that from its income an exhibition might be given there every year for the purpose of preserving the memory of the deceased. It was not lawful for the exhibition to take place there, and I ask what opinion should be given with reference to the legacy. Modestinus answered that, as the testator intended the spectacle to be exhibited in the town, but it was of such a character that this could not be done, it would be unjust for the heir to profit by such a large sum of money as the deceased had destined for this purpose. Therefore, the heirs as well as the first citizens of the place should be called together in order to determine how the trust could be changed so that the memory of the testator might be celebrated in another and a lawful manner.

17. *Scævola, Opinions, Book III.*

A man left certain lands to a town, and desired the income of the same to be devoted to the celebration of public games every year, and added the following: "I request the Decurions, and I desire that they shall not change the character of the legacy, or employ it for any other use." The town did not celebrate the games for the period of four continuous years. I ask whether the income which it obtained during the said four years should be refunded to the heir, or whether it should be set off against a legacy of another kind bequeathed by the same will. The answer was that if possession of the land had been taken contrary to the will of the heirs, any profits which had been acquired must be given up, and compensation should be made for what was not expended in accordance with the will of the deceased by the surrender of any other property which was due.

18. *Modestinus, Opinions, Book IX.*

A testator, who had several freedmen, said in his will that he left lodging to those whom he designated in a codicil. As he did not afterwards designate anyone, I ask whether all of them would be admitted to share in the legacy. The answer was that, since the patron promised to designate certain of his freedmen, and did not afterwards designate any, the legacy with reference to the lodging was held to be imperfect, as there was no one in existence to whom it could be understood that it was given.

19. *The Same, Concerning Inventions.*

If a testator should leave a tract of land to one person, and the usufruct of the same to another; and he did this on purpose in order that the former should only have the mere ownership, he committed an error, for he ought to have left the ownership of the property, with the reservation of the usufruct, as follows, "I devise such-and-such a tract of land to Titius, with the reservation of the usufruct;" or "Let my heir give the usufruct of said land to Seius;" as unless he expressed himself in this way the usufruct will be shared between them, for the reason that sometimes what is written is of more effect than what is intended.

20. *Pomponius, On Quintus Mucius, Book VIII.* If I order a slave to be free under a certain condition, and bequeath to you the usufruct in said slave, the legacy will be valid.

21. *Paulus, On the Lex Julia et Papia, Book VII.*

"I bequeath to Titius the usufruct of Stichus," or, "if a ship should come from Asia, I bequeath the sum of ten *aurei."* The legatee cannot demand the usufruct before the condition relating to the ten *aurei* is fulfilled, or has failed, in order that the heir may not be deprived of the power of giving whichever he chooses.

22. *Ulpianus, On the Lex Julia et Papia, Book XV.*

"I desire the income of my estate to be paid every year to my wife." Aristo gives as his opinion that this legacy will not pass to the heir of the wife, because it resembles either an usufruct, or a legacy to be paid annually.

23. *Julius Mauricianus, On the Lex Julia et Papia, Book II.*

A testator is allowed to repeat the legacy of an usufruct, so that it may be payable after the forfeiture of civil rights. This the Emperor Antoninus recently stated in a Rescript, for under such circumstances there is only ground for the application of this decision where a legacy is left to be paid annually.

24. *Papinianus, Opinions, Book VII.*

Where a legacy of the usufruct of property is bequeathed to a wife, ' the principal, as well as the interest which the deceased loaned, must be paid after security has been furnished in accordance with the terms of the Decree of the Senate. Therefore, it will be necessary for the interest of the notes which formed part of the assets of the estate, and were due before security was given, to be deducted from the bond.

The same rule, however, will not be observed where the money was loaned on the notes by the heir himself; for in this case, only the principal must be paid to the legatee, or whatever interest is found to be due on account of default of payment, and with reference to which no security will be required.

(1) "I wish my slave, Scorpus, to serve my concubine Sempronia." In this instance, not the ownership, but the usufruct of the slave is held to have been bequeathed.

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

A testator left his wife the usufruct of certain lands, and desired that after his death the said lands with their revenues should revert to his heirs; and by doing so he committed an error. The owner did not create a trust in favor of the heirs, either with reference to the ownership or

the usufruct of the property, for the future revenues, and not those of time which had passed, seemed to have been referred to.

26. *Paulus, Questions, Book X.*

Sempronius Attilus charged his heir after the expiration of ten years to give to Gaius his tract of land in Italy, with the reservation of the usufruct. I ask, if the heir should die before the ten years have elapsed whether, after that time, the entire tract of land will belong to the legatee. I am convinced that the time of this legacy, or that of the execution of the trust has arrived, and for this reason that it should belong to the heir of the legatee. Therefore, since the legacy was already due at the time of the death of the heir, the usufruct is extinguished and cannot belong to the successor of the latter. I gave it as my opinion that if the heir should be requested or ordered to deliver certain property, the time for the execution of the trust or for the delivery of the legacy will be when the testator dies, but the usufruct will not belong to the heir until he delivers the ownership after reserving the usufruct. Hence the usufruct cannot be lost by the forfeiture of civil rights, or the death of the heir, for the reason that he does not yet possess it.

The same thing takes place where the ownership of property is bequeathed under a certain condition, after the reservation of the usufruct, and the heir dies before the condition has been fulfilled; for then the usufruct, which terminates with his life, begins to vest in the heir of the heir.

In these instances, however, the intention of the testator must be ascertained, that is if he, at the time of reserving the usufruct, had someone in his mind who was to be joined with his heir, so that, at the death of the former, he intended the entire ownership to belong to the legatee; because no more could be transmitted to his successor, who had not yet acquired the usufruct, than if he had already begun to enjoy it.

(1) Where a tract of land is devised to two persons, and the usufruct is left to another, they all three of them do not enjoy the usufruct in common, if it is divided into two parts. On the other hand, the same rule will apply where there are two usufructuaries, and the ownership of the property is left to a third party. The right of accrual only exists between them.

27. *Scævola, Opinions, Book I.*

A husband left to his wife the usufruct of certain lands and other property and her dowry under a trust. The heirs delivered to her the usufruct in the land. Two years afterwards the marriage was declared to be null and void. The question arose whether what she had collected during that time could be recovered from her. I answered that what she had collected by way of profit could be recovered.

28. *Paulus, Opinions, Book XIII.*

I ask, where the usufruct of land is left and the said land becomes subject to temporary taxes, what will be the law in this case? Paulus answered that it would be the same in this instance as where ordinary taxes are imposed; and therefore that this burden must be sustained by the usufructuary.

29. *Gaius, Trusts, Book I.*

When anyone is requested to transfer to another an usufruct which was left to himself, and he has united it to the land for the purpose of enjoying the same; although the usufruct may be extinguished by operation of law, at the death, or by the forfeiture of civil rights by the legatee who acquired it under this title, the Prætor, nevertheless, should exert his authority in order that the right may be preserved if it was left to him under a trust, just as if it had been bequeathed as a legacy.

30. *Javolenus, On the Last Works of Labeo, Book II.*

Where an usufruct is bequeathed to a woman until her dowry has been entirely paid, and one

of the heirs gives her security for his share of the estate but the others do not; Labeo says that the woman will cease to enjoy the usufruct to the extent of said share. The same will take place where the woman is in default in accepting the security.

(1) An owner left to his tenant the usufruct of certain land which he cultivated. The tenant will have a right of action against the heir, in order that the judge may compel the latter to release him from liability under his contract.

31. *Labeo, On the Last Epitomes of Javolenas, Book II.*

Where anyone has a tract of land in common with you, and leaves the usufruct of said land to his wife, and, after his death, his heir applies to the court for partition of the land; Blæsus says that it was held by Trebatius that, if the judge should divide the land into different portions, the usufruct of the part allotted to you would not, under any circumstances, be due to the woman, but she would be entitled to the usufruct of the entire share assigned to the heir. I think this opinion is incorrect, for if, before the judgment was rendered, the woman was entitled to the usufruct of the undivided half of the entire tract of land, the judge could not, in deciding between the parties, prejudice the rights of the third. This last decision is the one adopted.

32. *Scaevola, Digest, Book XV.*

A certain man having stated his intentions in general terms, added the following in his will: "I bequeath to Felix, whom I have directed to be free, the usufruct of the Vestigian Estate, as I think that he will be entitled to the property if he does not enter into a contest with my heir, but remains on good terms with him. I ask my heir to act in such a way that he and Felix may continue to be friends, for this will be of advantage to both of them." The question arose whether Felix could during the lifetime of the heir exact the ownership of the land. The answer was that there was nothing in the facts stated which showed that the ownership of the land was left to Felix.

(1) A testatrix appointed her children by Seius, and her daughter by another husband, her heirs to equal shares of her estate, and made the following bequest to her mother: "I desire that the usufruct of my property be given to Ælia Dorcas, my mother, as long as she lives, and that, at her death, it shall go to my children, or to the survivor of them." The children of Seius died after entering upon the estate, and after the death of the mother, who was survived by the daughter of the testatrix, the question arose whether the usufruct would belong entirely to the daughter, or only in proportion to her share of the estate. The answer was that it would revert to those in whom the ownership of the land was vested.

Claudius: Scævola believed that after the death of their grandmother, the usufruct itself would revert to the children in proportion to their shares of the estate, especially because they were appointed heirs to equal portions of the same.

(2) Where a husband left to his wife the usufruct of his houses and everything contained therein, except the silver plate, and, in addition, that of his lands and salt-pits; the question arose whether the usufruct of wools of different colors which were intended for commerce, as well as of the purple which was in the houses, were also due to the wife. The answer was that, with the exception of the silver plate and the articles which would be classed as merchandise, the legatee would be entitled to the usufruct of all the other property.

(3) It was also asked, as a considerable amount of salt had been found in the salt-pits, the usufruct of which was bequeathed, whether it also would belong to the wife, under the terms of the trust. The answer was that the testator had not intended to bequeath any property which was for the purpose of sale.

(4) The question was also asked, if the testator should have made the following provision in the same will, namely, "I ask you, my wife, to be content with the sum of four hundred *aurei*

a year, which I desire you to receive for the term of fifteen years, out of the usufruct, and that you pay to my heirs anything in excess of said sum which may be derived from the said usufruct," whether it should not be held that the testator had changed his mind with reference to the former bequest, and therefore that the wife would not be entitled to more than four hundred *aurei* a year out of the usufruct. The answer was that the inquiry was clearly explained by the words which were quoted.

(5) Lucius Titius, by his will, left the Tusculan Estate to Publius Mævius, and charged him to give half of the usufruct of the same to Titia. Publius Mævius rebuilt an old country-house which had fallen into decay through age, and which was required for the collection and preservation of the crops.

I ask whether Titia should contribute to the payment of the expense of this, in proportion to her share of the usufruct. The answer was that if the legatee had rebuilt the house before he delivered the legacy of the usufruct to Titia, he could not be compelled to deliver it until she had paid her share of the expense.

(6) A man appointed his two daughters and his son, who was not of sound mind, his heirs, and bequeathed the usufruct of the share of his imbecile son to one of his daughters, in the following terms: "In addition to this, let Publia Clementiana take, by way of preferred legacy, the usufruct of the fourth part of my estate, to which I have appointed my son, Julius Justus, my heir; and I ask you, Publia Clementiana, in consideration of the usufruct of his share which I have bequeathed to you, to support and take care of him until he becomes of sound mind and recovers."

As the son continued in the same condition until the time of his death, the question arose whether the usufruct would be extinguished. The answer was that, according to the case stated, the legacy would continue to exist, unless it was clearly proved that the testator intended otherwise.

(7) A testatrix charged her appointed heir to pay ten *aurei* to her son every year, or to purchase land which would return a revenue of ten *aurei* annually, and assign the usufruct of the same to him; and the son, having received the land from the heir, rented it in compliance with the will of his mother. After his death the question arose, whether the amount remaining due from the tenants would belong to the heir of the son, who was the usufructuary, or to the heir of Seia, the testatrix? The answer was that there was nothing in the case stated which would prevent the balance of the rent from belonging to the heir of Seia.

(8) A certain man left the usufruct of a third part of his estate to one of his heirs, and the question arose whether the third of the money to which the property, after having been divided, amounted to according to the appraisement, should be paid to the usufructuary. The answer was that the heir had the choice of delivering either the usufruct of the property itself, or that of the appraised valuation of the same.

(9) It was also asked whether the taxes, in addition to what was due and required to be paid on the land or personal property might be deducted from the amount, so that payment would only be made of the remainder, if the heir should prefer to do this? The answer was that the third of the remaining sum could be paid.

33. *The Same, Digest, Book XVII.*

"I desire that there should be given to Sempronius what I was accustomed to give him during my lifetime." Sempronius lived in the testator's house, which was bequeathed to one of the heirs as a preferred legacy.

The question arose whether he was also entitled to his lodging therein. The answer was that there was nothing in the case stated to prevent him from being entitled to it.

(1) The question arose with reference to the following words of a will: "I desire to be given to

those of my freedmen, to whom I have left nothing, what I was accustomed to give them during my lifetime." The question arose whether lodging was intended to be left to those freedmen who lived with their patron until the time of his death? The answer was that it appeared to have been left to them.

(2) A testatrix inserted in a codicil: "I ask you to permit Nigidius, Titius, and Dion, my old and infirm freedmen, to pass their lives where they now are." I ask whether the above-mentioned freedmen will, under the terms of the trust, be entitled to receive the profits of the land on which they reside; inasmuch as they have obtained, without controversy, other legacies which were bequeathed to them. The answer was that, according to the case stated, the charge was that the heirs should permit them to remain where they were, in the same way as she herself had allowed them to do.

34. *The Same, Digest, Book XVIII.*

A man inserted a trust in his codicil in the following terms: "I desire that there shall be given to the men and women whom I have enfranchised by my codicil the tract of land where I have expressed my wish to be buried; and that, when one of them dies, his share may accrue to the remainder; so that, at last, it will all belong to the survivor, and I desire that, after the death of the survivor, the property shall go to the City of Aries. Moreover, I leave lodgings in my house to my freedmen and freedwomen as long as they may live. Pactia and Trophina shall occupy all the rooms which I was accustomed to use, and when they die I wish the house to belong to the said city." The question arose whether the heirs of the freedmen were charged with the trust for the benefit of the city? The answer was that, according to the facts stated, the words might be held to mean that the last survivor of the legatees appeared to be charged with the trust.

It was also asked, after certain of the freedmen to whom a lodging was left had died whether those parts of the house in which they dwelt would immediately belong to the city. The answer was that, as long as any of the freedmen lived, the trust would not be due to the city.

(1) A certain party who had appointed Sempronia heir to a tenth of his estate, Mævia to another tenth, and a foster-child to the remainder of the same, appointed a curator for the latter, thinking that he had a right to do so by law, and charged the curator not to suffer the land to be sold, and to permit his foster-child to enjoy the income of the property with Sempronia and Mævia, his nurses; and, at the end of his will, he added, "I charge all my heirs with the execution of this, my testament."

The question arose whether the nurses could claim the third part of the usufruct of the land under the terms of the trust, even though the curator, whom the testator could not legally appoint for his foster-child, had been charged with the execution of the same. The answer was that, in accordance with the facts stated, the testator had properly legally intimated his wishes by the creation of the trust, and therefore the nurses could enjoy the income of the land, along with his foster-child, in accordance to what he had given to each one of them.

35. *The Same, Digest, Book XXII.*

A man left to his wife the usufruct of his country-house for the term of five years after his death, then he added the following words, "After the said term of five years has elapsed, and the usufruct is extinguished, I wish the said land to belong to So-and-So and So-and-So, my freedmen."

The wife having died within the five years, the question arose whether the said freedmen were entitled to claim the ownership of the property immediately, or after the expiration of the five years, because the testator had left it at the expiration of that time. The answer was that the land would belong to the freedmen after the expiration of the five years.

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

The usufruct of a tract of land was left to Stichus, who was manumitted by the will, and after he had ceased to enjoy it, the testator left it to his heirs in trust, to be delivered to Lucius Titius. Stichus, however, by his will, left the ownership of said land to his grandchildren, and the heirs of Stichus, in accordance with the terms of his will, transferred the said land to his grandchildren, who were his legatees.

The said grandchildren, not being aware of the condition under which the land was devised by the former will, and having possessed it for a longer time than that provided by law to give title by prescription, the question arose whether they acquired the ownership of the land for themselves. The answer was that, in accordance with the facts stated, the legatees had acquired it.

(1) It was also asked, if, in any event, the legatees should be deprived of the land, whether an action in favor of the grandsons would lie for the recovery of the same against the heirs of Stichus. The answer was that, according to the opinion previously rendered where the property for some reason had not been acquired, if Stichus had made a will after the death of those to whom it was left, he would have been held to have intended to bequeath something which he thought belonged to him, rather than to have burdened his heirs.

37. *The Same, Digest, Book XXXIII.*

"I give to my wife the usufruct of my estate until my daughter arrives at the age of eighteen years." The question arose whether the wife should be entitled to the usufruct of both the land in the country and in the city, as well as to that of the slaves, the furniture, and the funds belonging to the estate. The answer was that, in accordance with the facts stated, she would be entitled to the usufruct of everything.

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

"I wish the income of the Æbutian Estate to be paid to my wife as long as she lives." I ask whether the guardian of the heir can sell the land and tender to the legatee, annually a sum equal to that which the testator was, during his lifetime, accustomed to obtain from the lease of the property in question ? The answer was that he can do so.

I also ask whether the legatee can with impunity be prevented from living on the said land. The answer was that the heir is not required to furnish him lodging.

I also ask whether the heir can be compelled to make repairs on the land. The answer was that if, through the acts of the heir, the income has been reduced, the legatee can lawfully claim the amount of the diminution.

I also ask in what way a legacy of this kind differs from an usufruct. The answer was that the difference can be ascertained from the opinions previously given.

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

A certain man appointed his sons his heirs, and bequeathed to his wife her clothing, her jewels, wool, flax and other articles, and added: "I wish the ownership of the articles above mentioned to pass to my daughters, or to any of them who may survive." The question arose whether the usufruct, or the ownership of said property was bequeathed. The answer was that the ownership seemed to have been bequeathed.

40. *Alfenus Verus, Epitomes of the Digest of Paulus, Book VIII.*

"I bequeath lodging for So-and-So along with So-and-So." This is just the same as if the testator had left it "To So-and-So and So-and-So."

41. *Javolenus, On the Last Works of Labeo, Book II.*

When a bequest is made as follows, "I give and bequeath to Publius Mævius all the annual crops of the Cornelian Estate," Labeo thinks this should be understood to be the same as if the

usufruct of the land had been left, because this seems to have been the intention of the testator.

42. *The Same, On the Last Works of Labeo, Book V.*

Among the crops of land is understood to be included everything which can be used by a man. For it is not necessary in this place to consider the time when they naturally mature, but the time when it is most advantageous for the tenant or the owner to gather them. Therefore, as olives which are not ripe are more valuable than they are after maturity, it cannot be held that they did not form part of the crops, where they are gathered before they are ripe.

43. *Venuleius, Actions, Book X.*

It makes no difference whether the testator bequeaths the usufruct of the third part of property, or the usufruct of the third part of certain property, for where the usufruct of property in general is left, the debts are deducted from it, and any accounts which may be due are credited. Where the usufruct of certain property is bequeathed, the same rule is not observed.

TITLE III.

CONCERNING THE LEGACY OF SERVITUDES.

1. *Julianus, On Minicius, Book I.*

A testator who had two adjoining shops left them to different persons. If either one of the buildings projected over the other, the question might arise whether the one underneath would be obliged to pay the expense of keeping up the other. I was of the opinion that the servitude appeared to be imposed, and Julianus says with reference to this: "Let us see whether this is only true where the servitude has been expressly imposed, or where the legacy was granted as follows: "I give and bequeath my shop in the condition in which it is at present."

2. *Marcellus, Digest, Book XIII.*

A right of way can be bequeathed to persons holding a tract of land in common, just as a slave held in joint ownership can legally stipulate for a right of way, and the stipulation will not be annulled where two heirs are left by him who stipulated for the right of way.

3. *The Same, Digest, Book XXIX.*

If anyone should devise a tract of land to Mævius, and a right of way to give access to the same through other land, and then should leave the same tract of land to Titius without the right of way, and both of them should claim the land; the latter should be delivered without the right of way, because a servitude cannot be partially acquired. If, however, Mævius should be the first to claim the land, while the other is deliberating as to whether or not he will accept it, if Titius should afterwards reject the estate, it may be doubted whether the right of way which was bequeathed will continue to exist. This has been held to be the better opinion.

But if anyone should devise a tract of land under some condition, and the right of way absolutely; or a part of the land absolutely, and a part of the same under a condition, and the right of way absolutely; and the devise should become due before the condition was fulfilled, the bequest of the right of way will be annulled.

The rule is the same where two neighbors of the testator owned a tract of land in common, and he left a right of way to one of them conditionally, and to the other absolutely, and before the condition was fulfilled he died; and this is the case because one of the legatees prevents the other from claiming the entire premises together with a right of way.

4. *Javolenus, Epistles, Book IX.*

Where a man who had two houses left one of them to me and the other to you, and there was a

party-wall which separated the buildings, I think that the said wall will belong to us in common, just as if it had been left to us both jointly, and therefore neither you nor I will have any right to prevent the other from inserting a beam into said wall; for it has been established that whenever a joint-owner holds any property he is entitled to all the rights appurtenant to the same. Therefore, in a case of this kind an arbiter must be appointed for the purpose of dividing the common property, if this should become necessary.

,5. *Papinianus, Questions, Book XVI.*

Although the execution of a will for the benefit of the slaves of others especially depends for its validity upon the testamentary capacity of their masters, still, any bequests made to slaves are just as valid as when left to persons who are free. Hence a right of way to obtain access to the land of his master, cannot legally be bequeathed to a slave.

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

A father left a house to his daughter, and gave her access to it through other buildings belonging to the estate. If the daughter resides in the house, the right of access will also be granted to her husband ; otherwise, it will not be considered as granted to her.

If, however, anyone should assert that this right is not merely a personal privilege, but a complete bequest of a servitude, then the right can only be transmitted to the heir. But, in this instance, such a conclusion can, under no circumstances, be admitted, lest what was granted through affection for his daughter might seem to be transmitted to foreign heirs.

7. *Paulus, Questions, Book XXI.*

Where several appointed heirs are charged with a right of way, each of them can be sued for the entire right, because the servitude cannot be divided, for each can claim his legacy, even where only one of the heirs enters upon the estate.

TITLE IV.

CONCERNING THE PREFERRED LEGACY OF A DOWRY.

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

Where a dowry is bequeathed, it is certain that everything is included in it which is embraced in the dotal action.

(1) Therefore, where an agreement has been made between husband and wife, that, if the marriage should be dissolved by the death of the husband, and a son should be born, the dowry shall remain in the hands of the heir of the husband, and the latter, at his death, shall bequeath the dowry, the agreement will not stand, because the dowry was bequeathed. It should, however, be executed if the dowry was not bequeathed; for the established rule that the condition of the dowry cannot become worse through the intervention of children becomes applicable whenever the woman dies during marriage, or a divorce takes place.

(2) It is true that there is the advantage of payment where a dowry is bequeathed, as otherwise it would only be payable annually.

(3) There is also the advantage that, according to the Decree of the Senate, no demand can be made for property donated, provided the testator did not change his mind.

(4) Moreover, expenses which have been incurred diminish the dowry to that extent by operation of law, and what we have said concerning this does not refer to separate articles, but to the entire dowry.

(5) The bequest of a dowry includes also the dotal action, so that if the husband, while living, restored it to his wife, as is permitted in certain cases, the legacy will be annulled.

(6) But if slaves, whose value had not been appraised, should be included in the dowry, and

they should be dead, the legacy of the dowry, so far as they are concerned, will be void.

(7) If the wife promised a dowry, but did not give it, and the husband, at his death, should leave it as a preferred legacy to his wife; she will be entitled to nothing more than a release from liability. For if anyone should make a bequest as follows: "I bequeath a hundred *aurei,* which I have in my chest," or "Which So-and-So has deposited with me;" and there should be no such sum, it is established that nothing will be due, because the property in question was not in existence.

(8) If anyone should bequeath the Titian Estate to his wife, as follows, "Since the said land has come into my hands through her;" the land will undoubtedly be due; for where anything is added for the purpose of pointing out something which has already been designated, it is superfluous.

(9) Celsus in the Twentieth Book of the Digest says that if a father-in-law bequeaths her dowry to his daughter-in-law, and he intends to leave a right of action with reference to the dowry, the legacy will be of no force or effect, as she is already married; but if he wished her to receive the money which she brought as dowry, he says that the legacy will be valid. When, however, she has received her dowry, the husband will, nevertheless, have the right to claim it by means of a prætorian action, whether an heir has been appointed in a suit for partition, or not.

I think that, as the father-in-law did not intend his heir to pay the dowry twice, if the woman should bring an action under the will, she should furnish him security to defend the heir against the husband. Therefore, the husband also should furnish security to defend him against his wife, if he should be the first to institute proceedings.

(10) On the other hand, it is stated by Julianus in the Thirty-seventh Book, that if a father-in-law should bequeath the dowry of his daughter-in-law to his disinherited son, while she cannot bring the dotal action against her disinherited husband, he himself can claim the dowry, on the ground of a legacy; but he cannot obtain it unless he furnishes security to defend the heir against the woman. He makes this difference between the person to whom the dowry is bequeathed, and a freedman liberated by the will, and to whom his *peculium* was bequeathed; for he says that the heir cannot be sued on account of the *peculium* for the reason that it is no longer in his possession, but the dotal action can, nevertheless, be brought against him, even though he has ceased to have control of the dowry.

(11) Julianus also asks, where the father-in-law bequeathed the dowry to the husband, and it has been paid to the wife, whether the legacy of the husband will be extinguished. He says that it will be extinguished, because there is nothing more which the heir can pay to the husband.

(12) He also asks, in case the dowry should be bequeathed to someone else who is charged to return it to the woman, whether the Falcidian Law will apply to the legacy. He says that it will apply, but that she can by the dotal action recover any deficiency which the trust may have suffered on this account. I ask whether the benefit of payment should be taken into consideration in this legacy, as if the dowry had been paid directly to the wife herself. I think that this ought to be done.

(13) Julianus also asks, if a dowry is bequeathed to a wife, and she is asked to pay it to another, whether the Falcidian Law will apply, and he says that it will not, as the trust is invalid. He thinks, however, that where anything, in addition, is bequeathed to the wife, the residue of the trust should be discharged and therefore what is paid her will be subject to the operation of the Falcidian Law.

Where, however, the husband is appointed heir to a portion of the father-in-law's estate, and the dowry is bequeathed by the latter as a preferred legacy, the bequest of the dowry will be

subject to the Falcidian Law, for the reason that, as the marriage still exists, the dowry is considered not to be due to the woman. But whatever has been deducted through the operation of the Falcidian Law can be recovered by the husband in an action for partition, just as he could recover the entire dowry if it had not been bequeathed to his wife.

(14) Mela says that if a tract of land forming part of the dowry has been especially bequeathed, and after the dowry has been bequeathed in general terms, the land will be due not twice, but only once.

(15) Mela adds, in the same place, that where land forming a part of a dowry has been leased by the husband for a certain time, the wife cannot obtain it under the bequest, unless she furnishes security to permit the tenant to enjoy it, provided she herself receives the rent.

2. *Ulpianus, Disputations, Book V.*

Where a husband bequeaths a dowry to his wife, and charges her with a trust, the trust shall be estimated in proportion to the benefit which the woman will receive from immediate payment of her dowry. Celsus also says the same in the Twentieth Book of the Digest. But if certain necessary expenses were incurred, which, by operation of law, diminished the dowry, and all of it which the husband received is bequeathed to her, it should be held that the entire amount of the expense which diminished the dowry by law must be deducted from the trust, for no one can doubt that the woman is the legatee. If, however, not the dowry, but something in lieu thereof was bequeathed to the wife, this will be understood to be the same as if the dowry was the subject of the bequest.

Julianus goes still farther, for he says that even if it should not be stated that the property was bequeathed in lieu of the dowry, it still will be considered to have been left with that intention. Therefore, if the wife was requested to give up either the dowry or something which was left to her in lieu of it, she will not be compelled to do so, except to the extent which we have stated.

Hence if she was appointed heir, and charged with the transfer of a certain portion of the estate, she would only be compelled to deliver what was in excess of her dowry, and the value of the benefit which he received from immediate payment. For if anyone who has received a dowry from his daughter-in-law should appoint his son his heir, and ask him to deliver to someone else all of the estate which might come into his hands, and he should afterwards obtain the benefit of the dowry through the death of his wife, he will not be compelled to give up the dowry which he had received, for the reason that he profited by it on account of his marriage, and not through the will of his father.

(1) A woman promised a dowry of four hundred *aurei,* and gave two tracts of land for two hundred of it, and afterwards gave the other two hundred in notes of debtors. Her husband, dying afterwards, left

to her, instead of her dowry, two tracts of land which were not the same ones which he had received as part of her dowry; and, in addition to them, the two dotal tracts of land whose value had been appraised; and he charged her by a trust that she would, at the time of her death, deliver to Seius all of his estate which might come into her hands. The question arose, what would be the amount of the trust after the death of the woman? I said that the wife, who was charged to deliver everything which came into her hands under the will, was in a position to be asked to transfer only what she had received after the deduction of the amount of her dowry; for she was entitled to the dowry rather because it was due to her, than as having received it as a legacy, with the exception of what could be claimed under the trust as constituting the benefit resulting from immediate payment.

Hence, she will not be compelled to deliver the land which her husband left to her in lieu of her dowry, unless it was of greater value or extent than that which she had brought as such.

She, however, will be obliged to give up any excess, together with the profits over and above what had been left to her. Therefore he will be entitled to the dowry with its profits, and anything which was left to her outside of this she must surrender, along with the profits which she obtained from the same.

3. *Julianus, Digest, Book XXXIV.*

Where anyone bequeaths a legacy to his wife, as follows: "Let my heir give so many *aurei* to Titia in addition to her dowry," it is clear that he also intended to leave her the dowry.

4. *Africanus, Questions, Book V.*

Where certain dates are fixed for the payment of legacies, as is customary, Africanus says that this does not refer to the legacy of a dowry, because it has its own time of payment.

5. *Marcianus, Rules, Book III.*

Where a dowry has been bequeathed, the heir should not be heard, if he wishes to defer payment of it to the woman on account of donations which have been made to her by her husband, or because of other expenses than those which, by operation of law, diminish a dowry, for it is one thing for a dowry to be diminished by necessary expenses, and another where it is retained because of a pledge; since it is but just that the woman should contribute her share of the indebtedness for which it was given as security.

6. *Labeo, On the Last Epitomes by Javolenus, Book II.*

Where the following was inserted into a will, "Let my heir give to my wife the sum of fifty *aurei,* which came into my hands through her and as much more in lieu of her dowry," Alfenus Verus says that Servius was of the opinion that, although the dowry was only composed of forty *aurei,* fifty were, nevertheless, due, because an additional sum of fifty was added.

(1) Likewise, where a husband made a bequest to his wife, who had not brought him any dowry, in the following terms, "Let my heir give the sum of fifty *aurei,* instead of the money which I received from my wife by way of dowry," Ofilius, Cascellius, and the pupils of Servius assert that the legacy is due to her; and hence it must be considered similar to the case where a slave, who is dead, has been bequeathed to someone, or a hundred *aurei* has been left in his stead.

This is correct, because by these words not the dowry itself, but money in lieu of it is held to have been bequeathed.

7. *Papinianus, Questions, Book XVIII.*

A father bequeathed to his disinherited son the dowry which he had received from his daughter-in-law. If the heir of the father should file an exception on the ground of bad faith, he will not be compelled to pay the legacy, unless security is given him that he will be indemnified in case the marriage is dissolved.

(1) But if, before the legacy has been paid to the son, the woman should recover her dowry, the son will in vain bring an action to recover the legacy.

(2) If, however, the Falcidian Law is applicable to the legacy of the dowry against the disinherited son, and the woman should have ratified the payment, she will be granted a dotal equitable action, based on the amount of the legacy which the heir retained. But if she should not ratify it, the heir must be defended against her by the husband, who promised that he would do so, but if the latter should alone be compelled to undertake the defence, an action on the judgment for the amount claimed under the Falcidian Law will be granted against the heir, if security is not furnished.

(3) But if the wife should obtain a divorce from the son before the legacy is paid, although she

cannot yet secure her dowry, the action of the son will, nevertheless, not be deferred for that reason; because when it was decided that the dowry should be paid to him at that time, it was also held that this should not be done unless he became the heir to a portion of his father's estate, and that, after the marriage was dissolved, and he had accepted the estate, would have been admitted to receive the dowry before distribution.

(4) If security for the defence of the heir should have been neglected through mistake, and the son should receive the dowry under a trust, the trust cannot be claimed again as not having been due; for the necessity of furnishing security causes delay, and does not render that not due, which actually was due. Hence it will not be inequitable to grant relief to the heir.

(5) But what if the heir of the father was not solvent ? Could not a prætorian dotal action legally be granted to the woman against her husband; for her dowry should not be lost merely because the heir failed to give security through mistake?

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

A man bequeathed a sum of money, in lieu of her dowry, to his wife, who had brought him her dowry in slaves. The slaves having died during the lifetime of the husband, his wife died after he did. The right of action to recover the legacy will pass by law to her heir, as the will of the husband must be executed.

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

"I desire that the Cornelian Estate, and whatever property my wife brought me at the time of her marriage, and which was appraised, be returned to her in kind." I held that the said tract of land which had formed part of the dowry, but had not been appraised, did not appear to have been excepted, but that the entire dowry had been bequeathed, and that not the value of the appraised property, but the property itself had been left in the condition in which it might be found.

10. *Scævola, Questions, Book VIII.*

If a tract of land of the value of a hundred *aurei* should be left to Seia, in lieu of her dowry, and the same should be devised to Mævius, the woman can recover, in addition, the amount which the Falcidian Law will take from Mævius, because they are not, so to speak, joint legatees of the same, as there is more included in the dowry of the woman than in the remainder of the land.

11. *Paulus, Opinions, Book VII.*

Seia, when she married Lucius Titius, gave him a hundred *aurei* by way of dowry, and called in Quintus Mucius, who did not pay anything, but stipulated for the return of the dowry, if the marriage should be dissolved by the death of the wife. Seia, at the time of her death, provided as follows by her will: "I wish the sum of so many *aurei* to be given to my husband, Lucius Titius, to whom I am under many obligations, in addition to what I have given him as my dowry."

I ask, if when Quintus Mucius instituted proceedings against Lucius Titius by an action founded on the stipulation, could the husband defeat him by setting out the terms of the will? The answer was that, if Quintus Mucius made the stipulation under the direction of Seia, and not for the purpose of making a donation, he will be liable to the heirs of the woman, and therefore Quintus Mucius will be barred by an exception. If, however, Seia permitted him to make the stipulation as a donation, he will be in the same position as one who had stipulated *mortis causa,* and therefore it must be said that in this instance he could have been charged with the execution of the trust.

12. *Scævola, Opinions, Book III.*

Where a husband who had received a dowry from his wife in money, and other property

which had been appraised, made a bequest to her as follows: "If my wife, Seia, should be able to show to my heir all the property contained in her dotal contract, and pay to him the amount which her father gave me for her, by way of dowry, I wish ten *denarii* over and above this sum to be paid to her."

As there was considerable property belonging to the dowry which was worn out by use and which did not exist at the time of the death of the husband, the question arose whether the legacy should be paid under an apparently impossible condition. I answered that the condition would seem to have been complied with, if what remained of the property given as dowry had come into the hands of the heir.

13. *Labeo, Abridgment of Probabilities by Paulus, Book I.*

Paulus: If a son under paternal control, who had a wife from whom he had received a dowry, should afterwards become the head of a household, and, as is customary, bequeath the dowry to her, the legacy will still be due, even though he did not become the heir of his father.

14. *Scævola, Digest, Book XV.*

Theopompus, having made a will, appointed his two daughters and his son equal heirs to his estate, and inserted the following provision in a codicil: "I wish my daughter, Crispina, to be married to someone of whom my friends and relatives will approve; and Pollianus, who knows my intentions, will provide for her dowry, in proportion to the equal shares of my estate which I have left to her and her sister." Pollianus, having been sworn at the instance of the husband of the girl, stated that her father had intended the young daughter to receive as much, by way of dowry, as the elder one.

I ask whether the co-heirs will be required to give the same sum to the younger daughter, over and above her share of the estate. The answer was that the magistrate, who had jurisdiction of the case, should decide that the same amount, after having been taken from the bulk of the estate, shall be given to the younger daughter, by way of dowry.

15. *Gaius, Concerning Legacies under the Prætorian Edict, Book II.*

Although it is established that property which the heir is ordered to deliver, and which has been pledged or publicly hypothecated, must be released, still, where a husband has received property of this kind by way of dowry, and bequeaths it, his heir will not be compelled to release it, unless the testator specially desired this to be done.

16. *Paulus, On Vitellius, Book II.*

A certain man received a dowry from the mother of his wife, and, after having entered into a stipulation with her, left the dowry to his wife by his will. The question having arisen whether the wife could recover the amount of the dowry, Scævola was of the opinion that it did not seem to be necessary to return to the mother what had been given to the wife; or in other words, he held that unless the wife could clearly prove that this was the wish of the testator, it did not appear that he intended to burden the heirs with a double payment of the dowry.

17. *Scævola, Opinions, Book III.*

A man made a bequest to his wife as follows: "Let my wife take from the bulk of my estate whatever I have obtained for her use,

and what she has given to me." I ask whether it should be held that a preferred legacy of her dowry had been bequeathed. The answer was that, in accordance with the facts stated, the legacy of the dowry should also be understood to be meant, unless it was proved that the intention of the testator was otherwise.

(1) "I give to my wife Titia, the money which came into my hands as her dowry, or has been stipulated for as such, which is evidenced by two dotal instruments, duly sealed, and amounts

to the sum of a hundred *aurei."* The question arose whether the woman can recover both sums. The answer was that there seems to be no reason why she cannot do so.

TITLE V.

CONCERNING THE OPTION OR CHOICE OF ARTICLES BEQUEATHED AS A LEGACY.

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

The Divine Pius stated in a Rescript addressed to Cæcilius Proculus, that, where a choice of slaves was bequeathed, the legatee could select three.

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

Whenever the choice of selection of a slave is bequeathed, the legatee can choose anyone that he wishes.

(1) When a slave is bequeathed in general terms, the right of selection also belongs to the legatee.

(2) Therefore, where an option is given, and the legatee chooses a slave belonging to another, or a freeman, it should be considered whether he has lost his right of selection. I think that he has not done so.

(3) Where a legatee, to whom has been left the choice of a hundred measures of wine, selects vinegar, he is not, by doing so, considered to have lost his right of selection, if the testator did not include vinegar under the head of wine.

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

This, of course, will be the case, if he should select the vinegar before the wine was shown to him, and before it was tasted.

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

Where the choice of a cup is left as a legacy, if the legatee makes a selection before all the cups have been shown to him, it is held that he still retains his right; unless he intended to choose one of those which he has seen when he knew that there were others.

5. *Africanus, Questions, Book V.*

The above-mentioned rule applies not only when this takes place through the fraud of the heir, but also when it happens for any other reason whatsoever.

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

The choice of several slaves is bequeathed. In order that the sale of the slaves belonging to the estate may not be hindered while the legatee is making his choice, it is the duty of the Prætor to decree that unless he avails himself of his right within a certain time fixed by the latter, he will not be entitled to an action to recover the legacy. But what if, after the time had elapsed, and before the heir had sold the slaves, the legatee should desire to make a selection? The Prætor is accustomed to appoint a time, in order that the heir may not sustain any loss.

What course should be pursued, if the time prescribed by the Prætor having expired, the heir should manumit some or all of the slaves? Would not the Prætor be obliged to maintain their freedom? The action must not be refused where everything remains intact.

The same rule will apply where the heir has given away some of the slaves, or sold them, after the prescribed time has elapsed.

7. *Paulus, Questions, Book X.*

Moreover, if the heir has sold some of the slaves and kept others, the legatee should not be

heard if he wishes to make his selection out of those retained by the heir, as the latter has already disposed of the slaves belonging to the estate.

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

Where the choice of a slave is left to you, and the rest of them are bequeathed to me, it must be held by the Prætor that, unless you make a selection within a certain time, the right of action will be lost.

(1) Where, out of four bracelets, the two which I may choose are bequeathed to me, or only two are left; or where, in the first place, there were only two; the legacy is valid.

(2) Where the choice of a single slave is bequeathed to you and myself, and I make my selection, and do not change my mind, and you select the same slave, he will belong to both of us in common. If, however, I should die, or become insane, before you make your choice, the slave will not belong to us in common, because, as I have lost my mind, I am not considered to have given my consent. The more equitable rule, in this instance, will be that, as I have once made my choice, the slaves will belong to us as joint owners.

(3) If the choice of articles deposited with someone else is bequeathed to me, I can bring suit for the production of the same against the person with whom it was deposited; or I can proceed against the heir to compel him to bring an action on deposit against the party having the property, to compel him to give me an opportunity to make my selection.

9. *Julianus, Digest, Book XXXII.*

Where a bequest is made as follows, "I give and bequeath Stichus to Titius, if he does not select Pamphilus," it is the same as if the bequest had been, "I do give and bequeath to Titius, either Stichus or Pamphilus, whichever one of them he may select."

(1) If Stichus was ordered to be free under a condition, and I was left the choice of a slave, or one was bequeathed to me in general terms, the question arose, what would be the law? I said that it would be more convenient to decide that he who grants freedom to Stichus under some condition, and then bequeaths the choice of slaves, did not have Stichus in his mind at the time; just as it is established that he did not have him in view on whom he bestowed freedom without delay. In accordance with this, if I should choose or select Stichus, my act will be void, and I will still be entitled to make my selection from the others.

(2) In the same case, when I have been left the choice of slaves, and before I have made my selection the condition on which the freedom of a slave depended fails, the question arises, can I select Stichus ? I think that the opinion of Mucianus should be adopted, by which it is held that freedom itself, and not the mere grant of it which has been resolved upon, annuls a legacy. Hence, if the condition upon which the grant of freedom depended should fail either during the lifetime of the testator, or after his death, and before the estate was entered upon, the legacy will be valid; for freedom which is granted absolutely, as well as where it is left under a condition, takes effect at the time when the estate is entered upon, and therefore I can select Stichus.

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

Where a slave is bequeathed in general terms to Pamphilus, the slave of Lucius Titius, and then the master of Pamphilus manumits him after the time that the legacy becomes due, and Titius claims the slave, the legacy of Pamphilus is extinguished, because there is no slave belonging to the estate who can be selected. If, however, Titius should reject the legacy, it is established that Pamphilus can make his choice of a slave bequeathed to him; for although by the manumission of Pamphilus two persons, Titius and Pamphilus, are constituted legatees, still, the bequest of one and the same thing is left to them, and if Titius claims it, the option of Pamphilus is extinguished, and if he rejects it, Pamphilus can make his selection.

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

If Eros is bequeathed to Seius, and a tract of land to Eros, and then the option of a slave is left to Mævius, and he chooses Eros, the land alone will belong to Seius, since at the time when the estate was entered upon he was the only one to whom the legacy could belong. For, where one of two joint-owners of a slave leaves him a bequest, the entire legacy will belong to the other joint-owner, as he is the only one who can acquire the legacy through the slave at the time when it becomes due.

12. *The Same, On Minicius, Book I.*

Where a slave is bequeathed in general terms, the better opinion is that all the heirs, if the choice is left to them, should give the same slave, and if they do not agree, they will be liable under the terms of the will.

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

Where the selection of a slave is left to me, and the testator bequeaths something to Stichus without granting him his freedom, the second legacy will only stand where the entire body of slaves is reduced to one individual, that is to say, Stichus; and the legacy will be valid, just as if it was bequeathed unconditionally.

The opinion of Cato cannot be quoted in opposition to this, if a voluntary heir has been appointed, for the reason that the body of slaves may be diminished before the estate is entered upon, even if the testator should die immediately. Where, however, a necessary heir is appointed, the second legacy will be void in accordance with the rule of Cato.

(1) Pomponius says that where the purchaser of an estate asks that the party to whom the choice of slaves has been bequeathed shall make his selection, it should be considered whether the Prætor must compel the legatee to do so, just as if the appointed heir should make such a demand, for the reason that the purchaser can accomplish this by applying to the heir. I do not see why it cannot be done.

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

Where the right to select a slave from the entire body of those forming part of an estate is bequeathed, and the heir manumits one of them before the choice is made, he cannot, in the meantime, confer his freedom upon him, but he will lose the slave whom he manumitted, because if he is chosen by the legatee, he will belong to him, but if he is rejected, he will then become free.

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

I made a bequest to a slave without granting him his freedom, and I then bequeathed to Mævius his choice of my slaves. He selected the same slave, and I ask whether what was bequeathed to the latter is also due to him. The answer was, I do not think that the legacy left to the said slave will belong to his master.

16. *Terentius Clemens, On the Lex Julia et Papia, Book XV.*

It is established that where the choice of certain articles is bequeathed, it cannot be made before the estate is entered upon, and if it should be made, it will be void.

17. *The Same, On the Lex Julia et Papia, Book XVII.*

Where the choice of two slaves is bequeathed to Titius, and the remaining ones are left to Mævius; if the first legatee should fail to make his selection, all of the slaves will belong to Mævius, under the term "the remaining one."

18. *Scaevola, Questions, Book XIII.*

Where a slave is bequeathed, Neratius says that if Pamphilus is rejected the act will be void,

and therefore the legatee will still have the right of selection.

19. *Paulus, Opinions, Book III.*

"The legatee may select such-and-such an article, or such-and-such an article." Where no choice was made by the legatee, and he died after the time when the bequest was due, it was decided that the right of selection was transmitted to his heir.

20. *Labeo, Epitomes of the Last Works of Javolenus, Book II.*

It is stated in the First Book of Aufidius, that when a bequest was made as follows, "Let him take and have for himself any coverings for table-couches which he may wish," if he mentioned those he wanted, and then, before he took them, should say that he wanted others, he cannot change his mind and take the others; because he had disposed of his entire right of selection under the legacy by his first statement, in which he indicated those which he would take, as the articles become his immediately, just as if he had said that he would take them.

21. *Scaevola, Digest, Book XXII.*

A testator appointed his son and his wife his heirs, and disinherited his daughter, but left her a legacy of a hundred *aurei,* payable when she married in his family, and made the following provision in his will: "In addition to this, I bequeath to her ten slaves, to be selected by her mother, Sempronia, whom I wish to be selected by the said Sempronia, my wife, immediately after my estate is entered upon. I desire the said slaves to be given to my daughter when she marries in the family, and if any of the slaves should die before she marries, then I wish others, also to be selected by her mother, Sempronia, to be given in their stead, until the full number of said slaves come into her hands, but if her mother, Sempronia, should not select them, then she herself can choose those whom she may desire." The mother having made the selection, the question arose whether the offspring of the slaves born before her marriage would belong to the girl, in addition to the original ten. The answer was that, as the testator had deferred the legacy of the slaves until the time of the marriage, any of the offspring of the female slaves born in the meantime would not belong to the daughter.

It was also asked whether her mother, Sempronia, would be entitled to the use and enjoyment of the said slaves before the marriage of the daughter. The answer was that there was nothing in the case stated why they should not entirely belong to the mother.

22. *The Same, Digest, Book XVII.*

A husband by a codicil left to his wife certain lands in trust, and also four silver dishes which she might select. The question arose

whether she could make her selection from all the dishes which were found at the time of the death of the testator. The answer was that she could do so.

TITLE VI.

CONCERNING BEQUESTS OF WHEAT, WINE, AND OIL.

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

Where wine is bequeathed, any vinegar which the head of the household kept with his wine is also included.

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

Where provisions are left to one person, and wine to another, all the provisions will belong to the first legatee, with the exception of the wine.

(1) Where a hundred jars of wine are left to you to be selected as you may desire, you can institute proceedings under the will in order to obtain the opportunity to taste the wine; or you can bring suit to compel the wine to be produced, or to recover any damages you may have

sustained because you were not permitted to taste it.

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

If a hundred measures of wine should be bequeathed to anyone, leaving none for the estate, the heir can purchase and deliver wine, but he cannot deliver vinegar which was found among the wine of the testator.

(1) Where wine is bequeathed, let us see whether the legatee is also entitled to the vessels in which it is contained. Celsus says that where wine is bequeathed, even though the vessels may not be included in the legacy, they are held to be bequeathed; not because they are a part of the wine, to the same extent as the chasing constitutes a part of a cup or a mirror, but because it is probable that the intention of the testator was that he wished the vessels to be accessory to the wine; and hence he says it is usual for us to say that we have a thousand jars, referring to the quantity of the wine.

I do not think that this opinion is correct with reference to casks, so that where wine is bequeathed, the casks will also be due; especially if they are fastened in the wine cellar, or it is difficult to move them on account of their size. With reference to vats, however, or small receptacles, I think that they are included, and will be due, unless they are likewise fixed immovably in the ground, and are there as utensils belonging to the same. Where wine is bequeathed, I hold that neither leathern bags nor bottles are included.

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

Where a certain quantity of oil, without mentioning the quality, is bequeathed, it is not the practice to ask what kind of oil the testator was accustomed to make use of, or what kind of oil men ordinarily use in that neighborhood. Therefore the heir is at liberty to give to the legatee oil of any kind that he may wish.

5. *Julianus, Digest, Book XV.*

Where a certain number of measures of wine out of that obtained from the Sempronian Estate were bequeathed, and a smaller quantity was obtained, it was decided that more was not due, and that the following words, "That obtained," operated as a kind of limitation of the legacy.

6. *Proculus, Epistles, Book V.*

Where an heir is charged with the delivery of wine, he will be obliged to deliver whatever is contained in vases or jars, even though no mention was made of vessels. Moreover, although the wine may have been left with the vases and jars, still, that which is contained in casks is held to have also been left; just as where a testator bequeaths all his slaves with their *peculium* of each of them, those who have no *peculium* are considered to have likewise been bequeathed.

7. *Javolenus, On the Last Works of Labeo, Book II.*

A certain individual charged his heir to give to his wife wine, oil, grain, vinegar, honey, and salt-fish. Trebatius said that the heir was not obliged to deliver any more of each article to the woman than he desired, since it was not stated how much of each article was to be given. Ofilius, Cascellius, and Tubero think that the entire amount of the said articles which the testator left was included in the legacy. Labeo approves of this, and it is correct.

(1) "Let my heir deliver to Lucius Titius a hundred measures of wheat, each of which shall weigh a hundred pounds." Ofilius holds that nothing is bequeathed, and Labeo agrees with him, as wheat of this kind does not exist; which opinion I think to be true.

8. Pomponius, Epistles, Book VI.

When an heir is charged with the delivery of wine which is contained in casks, and it is the fault of the legatee that he did not receive it, the heir will assume the responsibility if he pours

out the wine; and if the legatee should bring suit to recover the wine from the heir, it was held that he would be barred by an exception on the ground of bad faith, if he does not pay the amount of damage sustained by the heir on account of his delay.

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

Where anyone bequeaths wine, everything is included which, having originated from the vine, retains the nature of wine. If, however, mead is made, it will not properly be included in the term wine, unless the head of the household had this intention. And, in fact, as the beverage called *zythum,* which is made in some provinces from wheat, barley, or bread, will not be included, so neither beer nor *hydromeli* is included. But what would be the case with wine mixed with other substances? I do not think that it will be included, unless the intention of the testator was that it should be. It is clear that wine mingled with honey, that is to say, very sweet wine, will be included; and the drink made of raisins will also be, unless the intention was otherwise. New wine, boiled down and spiced, is not included, because it rather resembles a compound. Wine made of water and grapes is evidently included. The beverage of quinces, and any other drinks not derived from the vine, are not embraced in the term wine, likewise vinegar does not come under that category. None of these things will be included in the term wine, if they were not classed as such by the testator.

Sabinus, however, stated that everything will be included under the appellation of wine which the testator considered to be such. Therefore, vinegar which the testator considered as wine, as well as *zythum,* beer, and all other beverages which, according to the taste and use of man, are classed as wine, will be included. If all the wine which the testator possessed had become sour, the legacy will not be extinguished.

(1) If anyone should bequeath vinegar, that vinegar which the testator kept as wine will not be included. Fruits preserved in vinegar will be included, because they come under the head of vinegar.

(2) Likewise, where anyone bequeaths wine which he had in his possession, and it should afterwards become sour, even though it may have subsequently been placed with the vinegar by the testator, it will be included with the wine which was bequeathed, because that was designated which was wine at the time when the will was executed. This also is true unless opposed to the intention of the testator.

(3) Where wine which came from the estate of the testator's father is bequeathed, that only is held to have been left which the former kept as wine, and not what his father considered to be such. Moreover, where wine belonging to a *peculium* is bequeathed, that only is included which the slaves regarded as wine.

What is the reason for this distinction? It is because the wine of the testator's father has already begun to belong to him, but that forming part of the *peculium* remained for the use of the slaves.

(4) The same rule applies where old wine is bequeathed.

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

The age of wine when bequeathed is established according to the custom of the testator, that is to say, how many years he considered necessary to render wine old, that is, if this was not known.

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

"Old wine" is understood to be such as is not new, that is to say, wine of the preceding year will be included under the term "old."

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

For where persons do not concur in this opinion, any end, or any beginning, can be taken to designate the age of wine.

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

"Let my heir give to So-and-So, every year, ten measures of wine out of that obtained from such-and-such an estate." Sabinus thinks

that where no wine was made during one year, the heir must furnish the amount to the legatee from the yield of the preceding year. This opinion I also adopt, if it is not contrary to the intention of the testator.

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

Where wine is bequeathed, it also includes the vessels, where they are not such as are reserved for constant use, for instance, jars and measures.

15. *Proculus, Epistles, Book II.*

A man bequeathed his wine and the vessels containing it. Trebatius denies that any wine, which is in casks, is included; and he holds that the intention of the testator was different from what is expressed in his words, and, moreover, casks are not classed as wine vessels. Although casks are not included in the term "wine vessels," still, I do not agree with Trebatius in his opinion that the wine included in the casks, that is to say, which is not in vessels, is not bequeathed.

I think, however, that it is true where wine is bequeathed to anyone with the vessels, that the measures and jars into which it is drawn are also bequeathed to the legatee; for we pour out wine into jars and measures, in order that it may remain in them, until we require it for use; and, again, we sell it together with said jars and measures. We place it in casks, however, with a different intention, that is to say, in order to draw it out of them into jars and measures, or to sell it .without the casks.

16. *The Same, On the Last Works of Labeo, Book III.*

A certain testator kept wine of Surrentum in earthen urns, and he bequeathed it to you in jars. Labeo and Trebatius gave it as their opinion that all the wine contained in the urns was bequeathed.

(1) Where sweetened wines are bequeathed, and no other designation is contained in the will, all the following are included in the legacy, namely: wine mixed with honey, wine made of raisins, new wine boiled and spiced, and similar beverages, including all those made of grapes, figs, dates, and dried fruits.

(2) Where a legacy is bequeathed as follows, "I give and bequeath the wine in my jars, my Aminisean and Greek wine, and all my sweet beverages," Labeo thinks that nothing will be included under the latter term, except the beverages which have been made by mixing other substances with the wine contained in the jars of the testator. This opinion I do not reject.

TITLE VII.

CONCERNING LEGACIES OF EQUIPMENT OR IMPLEMENTS.

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

Where a tract of land furnished with everything is devised, or where it is devised with its equipment, two separate and distinct legacies are understood to have been left.

(1) Where land is devised with its equipment, and it has been alienated, the equipment cannot be recovered in accordance with the will of the deceased.

2. *Papinianus, Opinions, Book VII.*

Where a father, after having appointed several of his children his heirs, bequeathed to two of them, as a preferred legacy, the property of their grandmother, in addition to their shares of his own estate; it was held that the legatees would be entitled to equal shares in proportion to those of the co-heirs.

(1) Gifts of land, when the implements for its cultivation, called ..... in the Greek language, are not left with it, are not delivered to the devisee.

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

A patron left a tract of land, with its equipment, to his freedmen by his will, and he afterwards requested in a codicil that the legatees, at their death, should give their shares of the land to the survivors; but he did not make any mention of the equipment. It was held that the land which was devised should be considered just as if it had been left under a trust; but that the increase of animals and slaves which took place in the meantime, as well as the losses caused by death, should be included in the trust.

(1) A minor of twenty years of age desired a tract of land with all its equipment to be given to his female cousin, and, during his lifetime, manumitted certain slaves who were attached to said land. The manumitted slaves should not be delivered to the legatee, although they cannot obtain their freedom under such circumstances.

The same rule of law applies where freedom is not obtained for any other reason whatsoever.

4. *Javolenus, On the Last Works of Labeo, Book II.*

A certain testator had two adjoining tracts of land, and the oxen used on one tract, after the work there was completed, were then removed to the other. He bequeathed both tracts, with all the equipment. Labeo and Trebatius think that the oxen ought to belong to the land where they worked, and not where they were accustomed to remain. Cascellius holds the contrary opinion. I adopt the view of Labeo.

5. *Labeo, Abridgment of Probabilities by Paulus, Book I.*

If you wish to devise to anyone a tract of land with its equipment it makes no difference what form you use, whether you devise the land with its equipment or the land and its equipment, or the land furnished with its equipment.

Paulus: I indeed am of the contrary opinion, for there is this difference between legacies, namely, if the testator who made the devise should employ the following form, "I leave the land with its equipment," and the land should be alienated, the devise will be of no force or effect; but if he used either of the other forms it will be valid.

6. *Scævola, Digest, Book XVI.*

A testatrix left to her grandson the lands which she possessed in a certain district, as they were equipped, together with the wine, grain, and a book of accounts; and added the following words: "Everything to be found in that district, when I die, and all property of every description which is there, or which may belong to me." Judgment having been taken against one of her debtors, during the lifetime of the testatrix, he did not satisfy it. The question arose whether what was due under the decision of the court would belong to the grandson. The answer was that there was nothing in the case stated to prevent his being entitled to it.

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

A certain person left to Pardula, whom he had manumitted by his will, a shop and an apartment, together with the merchandise utensils and furniture contained therein, and also a warehouse for wine, along with the wine, vessels, utensils, and slaves in charge of the same, which he had been accustomed to have with him. The question arose whether Pardula could claim the entire legacy, as the house which contained the apartment that had been devised was

burned during the lifetime of the testator, and had been rebuilt in the same place, after the lapse of two years, and the warehouse which had been left to the same party had been disposed of by the testator, but the sale of the wine had been deferred in order to obtain a higher price. The answer was that that portion of it with reference to which the testator had changed his mind was not due.

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

Sabinus says clearly in his works on Vitellius that everything is included in the equipment of land which is used for procuring, gathering, and preserving the crops. For instance, in order to procure the latter some slaves are employed to cultivate the soil, and others are placed in charge of them to compel them to labor, and among the latter are the stewards and overseers, and, in addition, are oxen, broken to work, and flocks provided for manuring the ground, and implements and utensils for cultivation, such as plows, hoes, weeding hooks, pruning knives, forks, and other tools of this kind.

For the purpose of gathering the crops, implements such as presses, baskets, sickles for cutting grain, scythes for mowing hay, baskets in which grapes are picked and carried, are included.

For preserving the crops, casks, for example, even though they may not be buried in the ground, and vats, are used.

(1) In some districts, for instance, if a farmhouse is of the better class, there are added, as accessories, slaves who are porters, and floor-cleaners ; and if there are pleasure-gardens, gardeners. If the land has woods and pastures, droves of cattle and their shepherds and foresters are included.

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

With reference to flocks of sheep, the following distinction must be observed, namely, that if they were kept in order to obtain the profits from them, they will not be due under the legacy; but this will not be the case if the profits of the woodland cannot otherwise be acquired, as these profits are obtained therefrom by means of flocks of sheep.

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

If the income of the land also consists of honey, the bees and their hives will be included.

11. *Javolenus, On Cassius, Book II.*

The same rule applies to birds which are kept in houses near the sea.

12. *Ulpianus, On Sabinus, Book XX.*

The question arose whether grain which was intended for the support of slaves who cultivated the land would form part of the equipment of the latter. The greater number of authorities do not think that it would, because it is to be consumed; as the equipment in general includes everything which is intended to remain on the land for a considerable time, and without which the possession of it cannot be maintained. Food prepared for the support of the slaves is considered as accessory, rather than as something destined to promote cultivation.

I think, however, that grain and wine intended for food should be included in the equipment, and the pupils of Servius state that this was also his opinion. Likewise, it is held by some authorities that grain reserved for seed is included in the equipment, and I believe this to be correct, because it has reference to the cultivation of the soil, and is consumed in such a way that it is always replaced. Grain reserved for seed differs in no respect from that intended for the food of slaves.

(1) We have mentioned granaries, for the reason that the crops are kept therein, and earthen vessels, and bins in which they are arranged, as belonging to the class of things used for the

preservation of crops. Whatever is intended for the transportation of the crops is also included in the equipment of the land, for example, beasts of burden, vehicles, ships, barrels, and sacks.

(2) Alfenus, however, says that if the testator should make a bequest of certain slaves who were not attached to the land, those who were attached to it will not be included in the equipment of the same, because he is of the opinion that no animal is an implement. This is not correct, for it is well established that the slaves who are on the land for the purpose of cultivating it are included in its equipment.

(3) The question arose whether a slave who was a tenant on land is included in a devise as an implement. Labeo and Pegasus very properly hold that he is not, because he is not on the premises as an appurtenance to the same, even if he were accustomed to exercise supervision over others employed thereon.

(4) Labeo thinks that a forester who has been appointed to see to the preservation of the crops is included in the legacy, but that one who is charged with the maintenance of boundaries is not. Neratius, however, holds that he is. The latter opinion, at present, prevails, so that all foresters are included.

(5) Trebatius goes still farther, and thinks that the baker and the barber who are employed for the benefit of the slaves of rustic estates are included, as well as the mason whose duty it is to repair the buildings, and the female slaves who bake the bread, and take care of the house, and likewise the millers employed on the estate and the cook and stewardess, provided they assist any male slave by their service; and also women who are spinners and weavers, and make clothing for the slaves and prepare their food.

(6) The question, however, arises whether any accessories to the equipment are included in a legacy of the latter; for slaves employed for the benefit of the farmers, such as spinners, weavers, barbers, fullers, and cooks do not, properly speaking, form part of the equipment of the land, but are they accessory to the same? I think that cooks are included as well as spinners and weavers, together with the others above enumerated, and the pupils of Servius assert that this was also his opinion.

(7) It must be held that the testator intended that the wives and children of those above mentioned, and who were members of the same household, should be included in the legacy; for it is incredible that he would have directed such a cruel separation to take place.

(8) Where flocks are pastured for a part of the year upon the land, and food is purchased for them during the remainder; or where the land is cultivated for a portion of the year by the slaves, and they are hired out for pay during the remaining portion, they will, nevertheless, be included in the equipment.

(9) It is well established that the steward also (that is to say the slave who is charged with seeing that the accounts are properly rendered) , as well as the porter and the muleteer, are also included in the equipment.

(10) The millstones, machinery, hay, straw, the ass used to turn the wheel and all the apparatus of the mill are included; the brazen cauldron in which the juice of the grape is boiled and spiced, and those which contain water intended for drinking and washing by the slaves are also part of the equipment, as well as the hand-barrows and carts used for the transportation of manure.

(11) Cassius says that anything attached to the soil does not constitute any part of the equipment of the land, as reeds and osiers before they are cut, because the land cannot be an equipment of itself. If, however, they should be cut, I think that they will be included, because they serve for the production of crops.

The same rule applies to stakes.

(12) If there is game on the land, I think that the slaves who are hunters and trackers, as well as the dogs, and everything else necessary for hunting, are included in the equipment, especially if the land derives an income from this source.

(13) Likewise, if an income is derived from bird-catching, the slaves who are fowlers and their nets, and any other apparatus used for this purpose, are included in the equipment. This is not extraordinary, as Sabinus and Cassius think that birds themselves are included in the equipment of the land, for instance, such as have been domesticated.

(14) Where a man uses the same implements on different tracts of land, the question arises, to which one will they belong as equipment? I think that if the intention of the testator is plain as to which tract of land he intended them to belong, they will be accessory thereto, for the other tracts have, as it were, borrowed the said implements from this one. If his intention is not clear, they will be accessory to none of them, for we cannot divide implements proportionally.

(15) Any furniture, or other articles found on the land, which the owner intended to be placed in better order, will not be included in the equipment of the same.

(16) It should be considered what comes under the head of household equipment, where the latter is bequeathed. Pegasus says that the equipment of a house includes everything used for protection against the weather, or for the prevention of fire; but not what is employed for purposes of pleasure; and therefore neither the glass screens nor awnings which are kept in the house to provide against cold or to furnish shade are due. This was the opinion of Cassius, who was accustomed to say that a great difference existed between utensils and ornaments, as utensils are articles which are employed for the protection of the house, and ornaments are things which contribute to the pleasure of the owner, as for instance, paintings.

(17) Cassius thinks that the hair-cloth curtains used to prevent buildings from being affected by wind or rain belong to the equipment of a house.

(18) Pegasus and many other authorities say that vinegar kept for the purpose of extinguishing fire, mops made of rags, siphons, poles, ladders, mats, sponges, buckets and brooms are included.

(19) If the owner should have obtained any tiles or beams for his house, they will be included in the equipment of the same, if they were intended for this use, and were not employed in any other. Hence, if he had a scaffold required for this purpose, it would also be included in the equipment of the building.

(20) Celsus says with reference to curtains extending over the thresholds and window sills, and also concerning such as are suspended from columns, that they should rather be classed as furniture; and Sabinus and Cassius are of the same opinion.

(21) Pipes and grappling hooks are also included in the term equipment.

(22) Likewise, long rods used for removing spider webs, sponges with which columns, floors, and the feet of furniture are cleansed, and ladders employed for the purpose of washing ceilings, are utensils, because they render the house cleaner.

(23) Papinianus says, in the Seventh Book of Opinions, that ornamental plaster work, and statues fastened to the walls, are not included in the equipment of a house, but are part of the house itself; and, indeed, where they are not attached to it, they are not included, for they come under the head of furniture; with the exception of brass clocks which are not fastened to the walls; for he thinks that these, like the cloth curtains suspended before a house, form part of its equipment.

(24) Pipes, gutters and basins, as well as other things required for fountains, together with locks and keys, rather constitute a part of the house itself than accessories thereof.

(25) Panes of glass, attached to a house, I incline to believe belong to it, for when a house is

bought, the panes and the shelves are included in the purchase; whether they are in the building at the time, or have been temporarily removed. If, however, they have not been replaced, but are, nevertheless, kept to be restored to their original position, they will be embraced in the equipment.

(26) I think that lattices should be included under the head of equipment.

(27) Where a tract of land is not devised with its equipment, but in order that it may be furnished with it, the question arose whether more is included than if the land had been merely left together with its equipment. Sabinus stated in his works on Vitellius, that it must be confessed that more is left where land is devised to be provided with the means of cultivation than where it is devised furnished with them, which opinion we see is increasing in importance and validity every day.

Therefore let us consider in what respect this legacy is more advantageous than the other. Sabinus lays down the rule, and Cassius, in a note on Vitellius, says that everything that has been brought upon the land in order that the owner of the same may be better prepared for cultivating it is included; that is to say, whatever he has there in order that he may be more abundantly supplied. Thus, by such a legacy he is held to have left not the implements which belong to the land, but those that constitute his own private property.

(28) Hence, if land already provided with the necessary implements is devised, and the furniture which was there for the use of the testator himself is included, together with clothing, not only outer garments, but also those which the testator was accustomed to wear while there, and tables of ivory or of any other material, vessels of glass, gold, and silver, as well as wines, if there were any intended for his own use, and any other utensils; they will also be included.

(29) Where, however, the testator had collected certain articles, not for his own use but for safe-keeping, they will not be included. Wines contained in warehouses are also not included.

We have adopted this rule so that whatever the head of the household has collected there, as, for instance, in a granary, may not be embraced in the legacy.

(30) Celsus also states, in the Nineteenth Book of the Digest, that where fruits are collected on the premises in order to be sold, or for any other purpose than for the use or benefit of the land itself, they will not be included among the equipment of the same.

(31) Celsus also says, in the same Book, that slaves who have care of the furniture and other slaves of this kind are included; that is to say, household slaves, who are employed on the land, with the exception of those who have received their freedom, and who are accustomed to reside in the country.

(32) If a testator should devise land already provided with the means of cultivation, young slaves who are being instructed in the service of the table, and whom the testator was accustomed to have there, whenever he came, are embraced in the legacy.

(33) The members of the slaves' families, that is, their wives and children, are undoubtedly included in the devise of land with its equipment.

(34) Where land with its equipment is devised, it is well established that the library, and any books upon the premises, which the head of the household made use of whenever he came, are included. If, however, a warehouse should be used for the storage of the books, the contrary opinion must be held.

(35) Neratius, also, in replying to Rufinus, stated, in the Fourth Book of the Epistles, that the devise of a tract of land with its equipment includes the furniture, the wines, and the slaves, not only those employed in the cultivation of the soil, and the care of the same, but also those attached to the personal service of the head of the household.

(36) Only such pictures are considered to have been bequeathed as were used for the adornment of the country-house.

(37) Papinianus holds that where land is devised with its equipment those slaves are not included who were there only temporarily, and who had not been brought by the testator either for the purpose of being employed on the land, or for his own service.

(38) The same authority was of the opinion that where land was devised with its equipment, and the steward who had charge of the same was sent back into the province to resume his former duties, after having transacted the business for which he came, he will be included in the devise of the land, even though he may not yet have returned.

(39) He also says, where a testator devised his gardens with their equipment, that even the wines which were there for the purpose of having the table of the owner better supplied, are included. It is otherwise, however, if he kept the wines in warehouses, from whence he transported them either to the city, or to other estates.

(40) He also holds that where a house was devised by Umbrius Primus, under a trust, together with its furniture, to Claudius Hieronianus, a most illustrious man, that the tables and the other furniture which the head of the household, being about to start on a journey to assume the proconsulate of a province, had stored in warehouses in order that they might be in a safer place, were included.

(41) He also gave it as his opinion that a certain antidote against poison, and other drugs, together with any clothing which he had deposited there on account of his departure, were included in the devise of the land with its equipment.

(42) He also held, where a house was devised with its equipment and all the legal rights attaching thereto, that the city slaves, as well as those who were skilled workmen, and whose services were also employed on other tracts of land, were not included in the bequest; but he he says that the doorkeeper, the gardeners, those having charge of the rooms, the water-carriers, and slaves who only worked in the house will be included. However, what he states with reference to the skilled workmen is not true, if they were destined for the service of the house, even though they were lent to other estates to be employed thereon.

(43) He also gives it as his opinion that where a house is devised with its equipment, ivory tables and books are not included. This, however, is false, for everything in the house by means of which the owner may be better provided and rendered more comfortable will be included. No one doubts that the furniture is something which contributes to the convenience of the head of a household.

Finally, Neratius, in the Fourth Book of Epistles, informs his brother Marcellus that clothing is included in the devise of a house with its equipment; and he says that this is especially true in the case stated, for it was alleged that the testator who devised the property excepted the silver plate and the accounts, for anyone who excepted these things cannot have had in his mind any other articles which were there.

Papinianus himself, however, says in the same Book of Opinions, that where a father who was a merchant and a money-broker, and had two sons and as many daughters, appointed them his heirs as follows, "I do give and bequeath to my sons my house, furnished as it is, and I order it to be delivered to them," the question may be asked whether the merchandise and pledges are contained in this bequest. It would be easy for the judge to ascertain the intention of the testator by examining his other property.

(44) Celsus says that where anyone bequeaths the slaves residing on the land, their under-slaves are not included, unless it should be evident that the testator had them also in his mind.

(45) Papinianus also held, in the Seventh Book of Opinions, that a wife, to whom her husband had left everything that was in his house, could not require his daughter, who was his heir, to

surrender the obligations of debtors and the bills of sale of slaves that did not appear to have been bequeathed, unless (he says), it is clear that the testator had had the slaves in his mind, so that he would seem to have bequeathed to his wife the evidences of the transfer of said slaves whom themselves, he intended should belong to her.

(46) If anyone should devise a tract of land "With its equipment, just as it is," and should afterwards add, "Together with its furniture, and its slaves, and everything else which was not expressly mentioned,"

the question arises whether, by adding this clause, he will diminish the bequest, or not. Papinianus answers that it will not be considered to have been diminished, but rather to have been unnecessarily increased by this superfluous addition.

(47) Papinianus likewise, in the Seventh Book of Opinions, says, if certain gardens with all their equipment are devised by a mother to a son, and she also bequeaths to her daughter her silverware intended for the use of women, that his opinion is if the said silverware, which she kept in her gardens, was there for her own personal convenience, it will belong to her daughter.

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

Neratius thinks that where a tavern with its equipment is devised, even the slaves who conduct it are included. It must, however, be considered whether a difference does not exist between the utensils of a house used for drinking purposes, and those of a warehouse for the storage of wine, as only the following are utensils of the latter, namely, casks, vats, large jars, cauldrons, pitchers for pouring out wine, and which are ordinarily passed at supper; brazen urns, large and small measures for liquids, and other things of this kind; but in the word "tavern," as it is a commercial term, slaves who transact the business are also included.

(1) Neratius gives it as his opinion that where a bath is devised as equipped, it also includes the slave in charge of the same.

14. *The Same, On Vitellius, Book II.*

The slave employed in the vaults to keep up the fire is also included.

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

Where the following clause was inserted into a will, "I do give and bequeath all the utensils which are intended for the purpose of carrying on the business of my shops, and for furnishing the same, and for that of my mill and warehouse," Servius held that the horses which were in the mills, and the slaves who were millers, as well as those employed in the shops, the woman who cooked, and the merchandise contained in the shop, were all considered to have been bequeathed.

(1) Where a house, fully equipped, is devised it was decided that the furniture is included, but not the wine; because where a house is devised ready furnished, wines cannot be understood to be there for that purpose.

(2) A female slave who was left constantly in charge of a country-house, and bequeathed as belonging to the same, is included in the devise just as a forester is, and for the same reason; since houses require guardians as well as land, on the one hand, to prevent the neighbors from trespassing, or appropriating the fruit, and on the other, to prevent anyone from removing any of the property contained in the house. The building, however, is undoubtedly considered a part of the land.

16. *Alfenus, Epitomes of the Digest by Paulus, Book II.*

Where the utensils of a country-house are bequeathed, the better opinion is that the furniture is not included.

(1) Servius gave it as his opinion, where a vineyard and everything appertaining to it was left, that there were no such things as implements used for the cultivation of a vineyard. Cornelius, when his opinion was asked upon this point, replied that stakes, poles, and hoes are implements which belong to a vineyard; which is correct.

(2) A certain man left to his wife a tract of land where he himself resided, equipped for cultivation just as it was. When advice was taken whether the female slaves, who were spinners and weavers, were included in the devise, the answer was that they did not, properly speaking, constitute part of the equipment of the land; but, as the testator who devised the property lived upon it, there could be no doubt that the female slaves and other property which were on the premises for the use of the head of the household should be held to be embraced in the bequest.

17. *Marcianus, Institutes, Book VII.*

When the studio of a painter is bequeathed with its equipment, the wax, the colors, and everything of this kind is included in the legacy, as well as the brushes, the implements for finishing encaustic tiles, and the flasks for oil.

(1) When the equipment of a fisherman is bequeathed, Aristo says that it includes the boats used for catching fish. The better opinion is that it also includes the fishermen themselves.

(2) Where the utensils of a bath are bequeathed, it has been established that the slave in charge of the bath is included; just as where a wood is devised, the forester, and where a wineshop is devised, the slave in charge of the same, are included; for baths cannot be used without the bathers.

18. *Paulus, On Vitellius, Book II.*

Whenever, in the case of the bequest of the implements of a butcher, any question arises, after excluding the meat, we leave the tables, the weights, the cleavers, the balances, the knives, and the axes as the equipment.

(1) Where the equipment of anything is bequeathed, it is sometimes necessary to take into consideration the persons of those who leave the legacy; as, for instance, where the equipment of a mill is bequeathed, since the slaves who are the millers will only be included when the head of the household conducted the business of the mill himself; for it makes a great deal of difference whether the utensils were intended for the use of the millers, or for that of the mill.

(2) Neratius says that the ass which turns the wheel of the mill and the millstone are not included in the equipment which goes with the transfer of the land.

(3) Likewise, we say that pots and pans are included in the equipment of a tract of land, because, without them, cooking cannot be done, nor is there much difference between the pots and the cauldrons which are suspended over the fire; as in the latter drinking water is heated, and in the former food is boiled. If, however, the cauldrons are included in the equipment, the pitchers also, with which water is poured into the cauldrons, come under the same head; and thus one vessel follows another in regular succession. Therefore, Pedius says that it is best not to adhere too closely to the literal meaning of words, but above all things to find out what the testator intended to designate, and then ascertain the opinion of those residing in different districts of the province.

(4) Where a question arises with reference to a farmer who is a slave, as to whether he is included as part of the equipment of the land, and there is any doubt on the subject; Scævola, having been consulted, held that the slave should be included, where he was the confidential agent of his master, and did not cultivate the land for a certain amount of the income from the same.

(5) The same authority, having been interrogated with reference to the lower millstone of a

mill, answered that it also was included, if it was operated for the benefit of the slaves employed in the labors of the farm. The lower part of a millstone is called *meta,* and the upper part *catillus.*

(6) Where inquiry was made with reference to a plowman, the answer was that, no matter whether one who actually tilled the land, or one who fed the oxen used in cultivating it, was meant, he was included in the legacy.

(7) He also answered that trimmers of trees were included, if they were specially considered to be attached to the land.

(8) Shepherds and excavators also belong to the legatee.

(9) Likewise, where a tract of land is devised as follows, "I give to Mævius the Seian Estate in the very best condition in which it may be found, together with all the implements, rustic and urban, and the slaves who are there," the question was asked whether grain for seed would be included. The reply was that it certainly would be, unless the heir could prove that the intention of the testator was otherwise.

The same authority rendered a similar opinion with reference to grain reserved for the maintenance of slaves.

(10) Cassius says that in the equipment of a slave-physician eyewashes, plasters, and other things of this kind are included.

(11) A testator left certain of his slaves, whom he mentioned by name, to a person to whom he had devised a tract of land with its equipment. The question arose whether his remaining slaves, whom he did not enumerate, were included in the equipment. Cassius says it was decided that, although the slaves constituted part of the equipment of the land, only those who were designated by name were considered to have been bequeathed, as it is evident that the head of the household did not intend that the others should also be classed as such.

(12) Sabinus says that where a tract of land with everything thereon is devised, the soil itself, and whatever is ordinarily kept there, and remains for the greater part of the year, as well as those slaves who are accustomed to betake themselves thither for the purpose of residing on the land, are held to have been left, but anything which has been designedly conveyed there for the purpose of increasing the amount of the legacy will not be considered to have been bequeathed.

(13) Where a testator made a bequest as follows, "I leave my country-house in the same condition as I myself possessed it, together with the furniture, tables, and the urban and rustic slaves which shall be sent there, and the wines that may be in said house at the time of my death, and ten *aurei* in addition," as upon the day of the testator's death he had books, articles of glass, and a small clothes-press in the house, the question arose whether these articles should be included among those enumerated in the bequest. Scævola answered that only such articles as were specifically mentioned formed part of it.

(14) A testator left his house furnished, together with everything attached to the same. The question arose whether the legatee was entitled to the obligations of debtors. The answer was that, in accordance with the facts stated, he was not entitled to them.

19. *Paulus, Opinions, Book XIII.*

I gave it as my opinion that if, after the execution of the will, any slaves were placed by the testator upon the land devised to Seia, for the purpose of cultivating the same, they belonged to the said land and were also included in its equipment; even though the testator enumerated the slaves who were there at the time that he made the devise, as he mentioned them not for the purpose of diminishing the legacy, but in order to increase it.

Moreover, there is no doubt that slaves who have been brought on land for the purpose of

cultivating it are included in its equipment.

(1) Paulus held that neither crops which are stored, nor a stud of horses, are included in the devise of a country-house with its equipment, but that the furniture forms part of it. A slave skilled in the art of building, who pays his master a certain sum of money every year, is not included in the equipment of the house.

20. *Scaevola, Opinions, Book III.*

A testator left Seia, whom he had appointed heir to a portion of his estate, certain lands as a preferred legacy, together with the farmers who cultivated them, and any rent not yet paid by tenants, if she should become his heir; and then he made the following provision in a codicil: "It has afterwards occurred to me to mention that I wish Seia, to whom I devised my land, to also have all the farming implements, furniture, cattle, farmers, rent due from tenants, and supplies." The question arose whether those articles which were on the land and were intended for the daily use of the head of the household, were included in the legacy. The answer was that, in accordance with the facts stated, property over and above the land had been bequeathed to Seia; but that no more was due to her than the testator had specifically mentioned in the codicil which he had drawn up after having forgotten to clearly indicate this in his will, and which he showed he intended to be included in the term equipment.

(1) A testator devised to his freedman certain lands as follows: "I do give and bequeath to my freedman, Seius, such-and-such and such-and-such tracts of land, provided with implements as they are, together with all dowries, and balances due from tenants, and also with the foresters, and their wives and their children." The question arose whether the slave, Stichus, who cultivated one of the said tracts of land and owed a considerable sum of money, was due to Seius under the terms of the trust. The answer was if he cultivated the land, not as a trusted agent of his master, but for the payment of rent, as foreign tenants are accustomed to do, Seius would not be entitled to him.

(2) "I wish such-and-such tracts of land, provided with all implements, and the upper house, to be given to my foster-child Gaius Seius." The question arose whether the testator designed that the house should be given, fully furnished. The answer was that, in accordance with the facts stated, he seemed to have intended it to be so given, unless the party of whom it was demanded could clearly show that his intention was otherwise.

If, however, he had bequeathed the equipment of the lodging, that is to say, of the building, any slaves who were destined for other purposes and whose services were employed elsewhere would not be included in the legacy.

(3) A man left certain lands, provided as they were with implements, together with all property and balances due from tenants and farmers, with the slaves and cattle, and including the *peculia* and the steward. The question arose whether the balances due from tenants who, after their lease had expired and they had given security, had left their farms, would be included in the devise, under the words above mentioned. The answer was that the testator did not seem to have had these claims in his mind.

(4) With reference to the steward who was bequeathed, the question was also asked whether his wife and daughter were included in the legacy, as the steward did not reside on the land, but in the city. The answer was that there was nothing in the case stated to show that they were included.

(5) It was also asked, if a testator, after having made his will, should go on a journey into a province, whether those slaves who, after his departure, or after his death, had voluntarily and without the authority of anyone, betaken themselves to their relatives and acquaintances on the lands which had been devised, were included in the legacy. The answer was that those who were, so to speak, passing back and forth, were not bequeathed.

(6) "I desire that the Titian Estate, provided with its equipment along with everything else that is there, be given to Pamphila, my freedwoman, when I die." The question arose whether the slave, Stichus, who a year before the death of the testator had been removed from the land to be educated, and afterwards did not return, would be included in the legacy. The answer was if the testator had sent him away merely for the purpose of instruction, and had not transferred him from the said tract of land to another, he would be included.

(7) "I leave to my sister, Tyranna, my Grecian estate, together with the barn, and all the farming implements." The question arose whether the pastures, which the testator obtained at the same time with the said land, and which he had always kept for the use of the same, were included under the appellation, "Grecian estate," and were embraced in the devise. The answer was that if he had united them with the Grecian estate, so that they were included under one denomination, they would form part of the devise.

(8) Where a house was left completely furnished, a silver-gilt bedstead, having temporarily been stored in a warehouse, was not found there at the time of the death of the testatrix, Titia. I ask if it also should be delivered to the legatee. The answer was that if it was ordinarily kept in the residence, and had, in the meantime, been taken to the warehouse in order to be in a safer place, it ought nevertheless, to be delivered to the legatee.

(9) Where the testator added the following phrase, "Just as I have possessed it," does this refer to the way in which the land was equipped at the time of his death, that is to say, with slaves, cattle, and farming implements? The answer was that this has no reference to the legal rights of the legatee.

21. *Pomponius, Trusts, Book I.*

Where a tract of land is devised without its equipment, the casks, olive-mills, presses, and everything else fastened to or built upon the land, are included in the devise; but none of these things which can be moved are, with very few exceptions, included under the designation real-property.

Where any question arises concerning mills attached to the land, or erected upon it, they are considered as parts of the buildings.

22. *Paulus, Opinions, Book III.*

Where land is devised, "In the very best condition in which it may be found," the nets, and all other apparatus for hunting which refers to the equipment, are included in the devise, if the revenue of the land is principally derived from the chase.

(1) Where a tract of real property was devised, "Together with the slaves and cattle, and all its rustic and urban equipment, the *peculium* acquired by the steward before the death of the deceased, if it was derived from the same land, is held by the greater number of authorities to belong to the legatee."

23. *Neratius, Opinions, Book II.*

When the question is asked what is the equipment of a shop, it is usual to ascertain what kind of business is transacted therein.

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

A tract of land which had been leased was devised with its equipment. The implements which the tenant had on the farm are included in the legacy. Paulus: Does this refer to what belonged to the tenant, or only to what belonged to the testator? It must be said that the better opinion is that this is the case, unless none of the implements belonged to the owner.

25. *Javolenus, On the Last Works of Labeo, Book II.*

When the equipment of a tract of land is devised, Tubero thinks that all the cattle which the

land can support are included in the devise. Labeo is of the contrary opinion, for he says if, when the land could support a thousand sheep, two thousand were kept there, how many of them should we decide ought to be included in the devise? No inquiry should be made as to how many sheep the testator ought to have had there for the purpose of constituting the number to be included in the devise, but how many he actually had on the land; for the estimate should not be made from the number or the amount that was left. I concur in the opinion of Labeo.

(1) A certain individual, who had potteries on his land, employed the services of his potters for the greater portion of the year in farm labor, and afterwards devised the land with its equipment. Labeo and Trebatius think that the potters should not be included in the equipment of the land.

(2) Where all the equipment of a tract of land was left with the exception of the cattle, Ofilius improperly holds that the shepherds and the sheep are included in the bequest.

26. *The Same, On the Last Works of Labeo, Book V.*

Earthenware, and leaden vessels in which earth is placed, and flowers planted in pots, Labeo and Trebatius think constitute a part of the house. I think this to be correct, if they are fastened to the house so as to always remain there.

(1) Ofilius says that hand-mills should be classed with household goods, but those moved by animal power are appurtenant to the land. Labeo, Cascellius, and Trebatius think that neither should be classed as household goods, but rather as appurtenances. I think that this is true.

27. *Scævola, Digest, Book VI.*

A testator left to the man who had reared him his land near the sea, together with the slaves who were thereon, and all the implements and crops belonging to the same, as well as the balances due from his tenants. The question arose whether the slaves, who were fishermen, who were attached to the personal service of the testator, and accustomed to follow him everywhere, and whose names were carried on the accounts in the city, and at the time of the death of the testator were not found on the land which was devised, should be considered to have been bequeathed. The answer was that, in accordance with the facts stated, they were not bequeathed.

(1) A testatrix made the following bequest to one of her relatives: "I desire the Cornelian Estate, provided that everything, just as it is, together with all the personal property and slaves, and the amounts due from the tenants, to be given to Titius." This testatrix having come, on account of a lawsuit, to Rome from Africa, brought with her certain slaves belonging to the aforesaid land, in order that she might avail herself of their services during the winter. The question arose whether the said slaves were embraced in the trust, as some of them had been removed from their duties on the farm at the time of the journey, and had left their wives and children, while others had left their fathers and mothers behind them. The answer was that, in accordance with the facts stated, the slaves which were the subject of the inquiry should be delivered under the terms of the trust.

(2) It was also asked whether the crops of the same tract of land which had already been gathered and remained there at the time of the death of the testatrix were included in the trust; since it was evidently her intention to display the greatest liberality towards her relative, as was proved by her desire that the balance due from the tenants should also belong to him. The answer was that, when a provision of this kind was made, it should only be ascertained whether it was perfectly clear that the deceased intended to bequeath the property with reference to which the inquiry is made.

(3) A testator devised a tract of land as a preferred legacy to his freedman, whom he had appointed heir to a portion of his estate, as follows: "Pamphilus, my freedman, I desire you to

have, as a preferred legacy my Titian Estate, together with my small Sempronian Estate, with all their appurtenances, and the personal property which shall be there at the time of my death, together with the slaves who reside on said land, with the exception of those whom I shall hereafter manumit."

As the testator had a certain quantity of wine in casks on the said land, all of which he had sold during his lifetime, and the third part of the price of which he had received, the question arose whether the wine which remained in the casks would belong to the freedman under the terms of the preferred legacy. The answer was that, in accordance with the facts stated, it would be included, unless the co-heirs could prove that the intention of the testator was otherwise.

The testator also left the claims in his account-book, and the money which was on said land. The opinion with reference to the money was the same as that above given.

(4) A devise was made as follows: "I desire half of the Seian Estate, which came to me from my father, to be given to my sister Septitia, just as it is at present, and the other half in the condition in which it may be found at the time of my death." The question arose whether, under the words above quoted, the beams and joists already in position and prepared to be inserted into the building, as well as the urban and rustic equipment, and the slaves employed on the land would belong to the legatee. The answer was that the following words, "Just as it is," can have reference to the equipment of the land.

(5) A testator devised certain lands as follows: "I also leave to my brother, Sempronius, my Cassian and Novian Estates, equipped just as they are, together with their willow-groves and woods." As the woods and willow-groves did not form part of the aforesaid land, but were in small tracts adjacent to the same, which the testator had purchased at the same time and without which the former lands could not be cultivated, the question arose whether they were included in the legacy. The answer was that that property only formed part of the legacy which was specifically designated by the testator.

28. *The Same, Digest, Book XXIII.*

Lucius Titius devised a tract of land with all its equipment. The question arose how it should be delivered, whether as it was equipped at the time of the death of the testator, so that any slaves born, or taken to the land in the meantime should belong to the heir; or whether as it was equipped at the time that the will was executed; or whether it should be delivered in the condition it was when the land was claimed, so that any of the equipment found there at the time would be for the benefit of the legatee. The answer was that, in accordance with the terms of the legacy, the property found on the land at the time the devise was made, and which was in the same condition when the will was opened, would be included in the equipment.

29. *Labeo, Probabilities, Book I.*

If you purchase a ship with its equipment, the boat belonging to it should be delivered to you. Paulus: By no means; for a ship's boat is not part of its equipment, as the boat differs from it in size, but not in kind. It is necessary for the equipment of anything to be of a different description, no matter what it may be. This opinion is adopted by Pomponius, in the Seventh Book of the Epistles.

TITLE VIII.

CONCERNING LEGACIES OF PECULIUM.

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

Where a slave is bequeathed with his *peculium,* and he is either alienated or manumitted, or dies, the legacy of the *peculium* is also extinguished.

2. *Gaius, On the Provincial Edict, Book XVIII.* For those things which occupy the place of accessories are extinguished when the principal property is destroyed.

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

Where, however, a female slave is bequeathed with her children, and either dies, or is alienated or manumitted, her children will belong to the legatee, because there are two distinct legacies.

4. *Gaius, On the Provincial Edict, Book XVIII.*

When, however, a slave is bequeathed with his sub-slaves, the legacy of the sub-slaves will continue to exist, if the slave dies, or is alienated or manumitted.

5. Paulus, On Sabinus, Book IV.

When *peculium* is bequeathed, it is well established that the heir can collect any debts due to the *peculium,* and be required to pay them to the legatee, over and above anything which he himself may owe to the slave.

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

Where a *peculium* is bequeathed which consists of tangible property (as, for instance, lands or houses), it can be claimed in its entirety, if the slave is not indebted to his master, to his fellow-slaves, or to the children of his master. If, however, he owes anything to the latter, or to the other persons above mentioned, the property should be diminished *pro rata.*

Julianus and Celsus are of the same opinion.

(1) If a *peculium* should be bequeathed without the deduction of the indebtedness of the slave, it is to be apprehended that the legacy will be void, because what is added is contrary to the nature of the legacy. I think, however, that it is true that the validity of the legacy is not impaired by this addition, but the testator has also added nothing of the amount of it, as the claim to the *peculium* cannot be increased in this manner.

It is clear that if you suppose that the legatee has obtained possession of the property, he can avail himself of an exception on the ground of bad faith against the heir, if he brings an action against him; for he is protected by the will of the testator, who directed that the debt should not be deducted.

If, however, the master had stated that what the slave owed should be given to him, or indicated that the latter did not owe him anything, the addition above mentioned will be valid; because a master can, by the mere expression of his wishes, give to the slave what the latter owes him.

(2) However, where my sub-slave has been bequeathed to me, the question arises whether the *peculium* of said sub-slave will be mine. We think that his *peculium* is included in the legacy of the sub-slave, unless this is contrary to the intention of the testator.

(3) Where a slave and his sub-slave are directed to be free by a will, and their *peculia* are bequeathed to them, the words of the bequest ought to be interpreted in accordance with the intention of the testator, as if the latter referred to separate and distinct *peculia.* In accordance with this, a sub-slave will not be held in common where there are two freedmen, unless such was the intention of the testator.

(4) As on the one hand, the debt of the slave, that is to say what is due to his master, diminishes the legacy of the *peculium;* so, on the other, what the master owes to the slave should increase it. A Rescript of Our Emperor and his father, which is as follows, is however, opposed to this opinion: "Where a *peculium* is bequeathed to a slave, the right is not granted to the latter to recover from the heir any money which he may say he has expended on his master's account." But what if this was the intention of the testator, could he not then recover

it? What he has expended for this purpose should certainly be subject to set-off against that which was due to his master. Will what his master stated in writing was due from him to the slave be included in the legacy of the *peculium?* Both Pegasus and Nerva say that it will not.

When Gneus Domitius bequeathed his daughter her *peculium,* but he had not paid her, for two years, the allowance which he was accustomed to give her, but retained it for his own purposes and stated that he owed his daughter fifty *aurei,* Atilicinus held that this was not included in the legacy.

This opinion is correct, for the reason that it agrees with the Rescript.

(5) Not only what is due to the master is deducted from the *peculium* bequeathed, but also anything that may be due to the heir.

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

If anyone should give himself to his creditor to be arrogated, and proceedings based on the *peculium* are instituted against the arrogator, I think that the same rule will apply with reference to the heir.

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

Finally, Pegasus gives it as his opinion that if an heir should lend money to a slave, who is to be free under a certain condition, before the condition is fulfilled, the amount will be deducted by operation of law, and each individual part of the *peculium* will be diminished by this debt.

(1) Hence, if a slave should receive his freedom unconditionally, and the heir should lend him money, either during the lifetime of the master, or before the estate was entered upon, a legacy of the *peculium* will be diminished, according to the opinion of Julianus, although the heir may never have become the master of the slave.

(2) Where a testator owned the slaves, Stichus and Pamphilus, and, having manumitted them by his will, bequeathed to each of them his *peculium,* it was decided that what one of the slaves owed to his fellow-bondman should be taken from his *peculium,* and be added to the legacy of the other.

(3) Where freedom was granted to a slave if he should pay the heir ten *aurei,* and his *peculium* was bequeathed to him, it was also asked whether the ten *aurei* which he had paid to the heir should be deducted from the *peculium.* Sabinus holds, and this is correct, that the legacy of the *peculium* is diminished to this extent.

(4) Sabinus goes still farther, and says that if a slave to be free upon a condition should sell to the heir one of his own slaves, the latter must be deducted from the *peculium* just as if he had been sold to a stranger.

(5) Consequently, the question is asked if, where a slave has made an agreement with his master with reference to the price of his freedom, and he pays a portion of the money, and before he pays the remainder his master should die, and the latter, by his will, directs that the said slave shall be free and receive the legacy of his *peculium,* must what he paid to his master be included in his *peculium?* Labeo says it should be deducted from it. It is evident, if he has not yet paid it but has kept it in his hands as a deposit until he could pay the entire amount, that it should be included in his *peculium.*

(6) Likewise, where his *peculium* is bequeathed to a slave, and the heir has been forbidden to collect from a debtor to said *peculium* a claim which was due; it is a fact that this should be deducted from the *peculium* bequeathed, that is to say, that what was left to the said debtor should be taken from the *peculium.*

(7) Sometimes, where the *peculium* is not bequeathed, this is understood to have been done, as appears from the following example. A certain man granted a slave freedom if he should

render his accounts, and pay a hundred *aurei* to his heirs. With reference to this Our Emperor, together with his lather, stated in a Rescript that while the *peculium* was not due unless it was bequeathed, still, he said, if the slave complied with the conditions prescribed, he concluded that it was the intention of the testator that he should keep his *peculium,*

especially as he had directed him to pay a hundred *aurei* out of his *peculium* to his heirs.

(8) Moreover, shall we understand the *peculium* to be the amount of the latter at the time of death, or shall we add to it any subsequent accessions, or subtract from it any subsequent diminutions? Julianus says that where the *peculium* is bequeathed, a difference should be understood to exist when it was left to the slave himself, and when it was left to others. If it was left to himself, the time of the vesting of the legacy must be considered, but if it was left to a stranger, the time of death should be taken into account; but in such a way that the increase of the property composing the *peculium* may come into the hands of the legatee; as, for instance, the offspring of female slaves, or the increase of cattle. Any accession, however, derived from the labor of the slaves or from any other source, will be due to no one else than the slave to whom the *peculium* was bequeathed.

Julianus says that both of these cases should be decided in accordance with the intention of the testator; for, when his own *peculium* is bequeathed to the slave, it is probable that the testator intended the entire increase of the same to belong to him, in whom, after his manumission, his patrimony would vest.

This is not the case where the *peculium* is bequeathed to another; still, you may say that the rule will apply if it is evident that the testator had the same intention with reference to the other party.

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

Anything which is due from one slave to another to whom the former is bequeathed with his own *peculium,* of which the legatee forms a part, is not deducted from the legacy, even though the legatee may be his fellow-slave.

(1) If one slave should wound one of his fellow-slaves, and, by doing so, depreciate his value, Marcellus says that there is no doubt that the amount due to the master as damages should be deducted from the *peculium* of the slave. For what difference is there if one slave should wound his fellow-slave, or should cut to pieces, break, or steal any other property? In this instance, his *peculium* will undoubtedly be diminished, but not to a greater extent than the actual amount of the injury.

(2) If, however, the slave should wound himself, or even commit suicide, nothing ought to be deducted from the *peculium* on this account. We would be of a different opinion if he should take to flight, for the amount of depreciation of his value, in consequence, should be deducted from his *peculium.*

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

If you wish to bequeath his *peculium* to your slave, or to your son as a preferred legacy, the property included in the *peculium* must be specially bequeathed, to prevent what he owes you from being deducted from the same.

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

A *peculium* can also be bequeathed to someone who has none, for such a bequest can be made not only of *peculium* owned at the present time, but also of any which may subsequently be acquired.

12. *Julianus, Digest, Book XXXVII.*

A bequest of *peculium* is void where the slave dies during the lifetime of the testator, but if he

should be living at the time of his death, the *peculium* will be included in the legacy.

13. *Celsus, Digest, Book XIX.*

The rule is different where the slave is bequeathed with his clothing.

14. *Alfenus Verus, Digest, Book V.*

A certain individual inserted the following provision into his will: "When I die, let my slave Pamphilus have for himself his own *peculium* and let him be free." It was asked whether or not the *peculium* should be held to have been legally bequeathed to Pamphilus, for the reason that he was directed to take the *peculium* before he became free. The answer was that there was no order to be observed in the two provisions, which in this instance were joined, and that it did not make any difference which of the two was mentioned or written first; and therefore that the *peculium* was held to have been legally bequeathed, just as if the slave had been directed to be free first, and to receive the *peculium* afterwards.

15. *The Same, Epitomes of the Digest by Paulus, Book II.*

His own *peculium* was bequeathed to a manumitted slave. By another clause of the will the testator left all his female slaves to his wife. One of these formed part of the *peculium* of the slave who had been manumitted, and it was decided that she belonged to the said slave, and that it did not make any difference which bequest had been made first.

16. *Africanus, Questions, Book V.*

Stichus had Pamphilus in his *peculium,* and the master defended him in a noxal action, and, having lost the case, paid the amount of the damages assessed. Then he manumitted Stichus by will, and bequeathed to him his *peculium.* The question arose whether what had been paid on account of Pamphilus, as damages, should be deducted from the *peculium* of Pamphilus himself, or from that of Stichus. The answer was that the deduction must be made from the *peculium* of Pamphilus, no matter what the sum might be; that is to say, even if it should be expedient to surrender him in satisfaction of the damage committed, for everything that is paid out by the master on account of a slave makes him a debtor to his master. If the *peculium* of Pamphilus was not sufficient, an amount not more than the value of Pamphilus should be deducted from the *peculium* of Stichus.

(1) The question arose if Pamphilus, for some other reason, owed a sum of money to his master, and this could not be obtained from his *peculium,* whether an amount to the extent of his value could be deducted from the *peculium* of Stichus. This was denied, for the case is not similar to the former one. The reason why the price of the sub-slave should be deducted is because Stichus himself became the debtor to his master on account of the defence of the sub-slave by the latter. But, in the instance proposed, nothing can be deducted from his *peculium,* because Stichus owes nothing, but the deduction must only be made for the *peculium* of Pamphilus, who certainly cannot himself be understood to form part of his own *peculium.*

17. *Javolenus, On Cassius, Book II.*

A certain individual who had bequeathed the *peculium* of his slave undertook to defend him in court, and afterwards died. It was decided that the heir was not compelled to deliver the *peculium* on account of the legacy, unless security to indemnify him for any loss arising from the defence of the slave was furnished.

18. *Marcianus, Institutes, Book VI.*

If his own *peculium* should be bequeathed to a manumitted slave, there is no doubt that no action will lie against him in favor of the creditors of his *peculium,* but the heir will not be obliged to deliver it, unless security is furnished to defend him against the said creditors.

19. *Papinianus, Opinions, Book VII.*

Where a master wishes to manumit his slave, and directs him to furnish him with a list of the property of which his *peculium* is composed, and, after doing so, the slave receives his freedom, it is evident that any property belonging to the *peculium* which the slave had withheld from his statement will not have been tacitly given to him when he was manumitted.

(1) Where freedom is granted by a will, and the testator also bequeaths the *peculium,* and afterwards manumits the slave, the freedman can, under the terms of the will, demand that the rights of action for claims belonging to the *peculium* shall be assigned to him.

(2) A son under paternal control, to whom his father bequeathed his *peculium,* manumitted a slave who formed part of the same, during the lifetime of his father. This slave became the common property of all the heirs, and was removed from the *peculium* on account of the intention of the son, because that part of the *peculium* only belongs to the legatee which is found to be included in it at the time of the father's death.

20. *Marcianus, Institutes, Book VII.*

In a case of this kind, it makes no difference whether the bequest of the *peculium* was made first, and the illegal manumission was granted afterwards; or *vice versa.*

21. *Scævola, Questions, Book VIII.*

If, after Stichus has been manumitted, his *peculium* should be left to him, and a slave belonging to said *peculium* is bequeathed to Titius, Julianus says that the amount deducted from the *peculium* on account of the debt due to the master will be added to that received by him to whom the sub-slave was bequeathed.

22. *Labeo, Last Epitomes by Javolenus, Book II.*

A master manumitted his slave by his will, and left him his *peculium.* The slave owed his master a thousand *sesterces,* and paid them to the heir. I rendered the opinion that all the property composing the *peculium* was due to the enfranchised slave, if he had paid the money which he owed.

(1) A master manumitted his slave, who held a sub-slave in common with him, left the former his *peculium,* and then bequeathed specifically the sub-slave himself, who was held in common by them, to him and to his freedwoman. I held that a fourth part of the slave would belong to the freedwoman, and that the remaining three-fourths would belong to the freedman; which is also the opinion of Trebatius.

23. *Scævola, Digest, Book XV.*

A master, by his will, bequeathed freedom to his slave Stichus, who transacted the business of one of his freedmen, to half of whose estate the master was the testamentary heir; a list of claims being included among the assets. The bequest of freedom was dependent upon the condition that he should render an account; and he left him his *peculium* under a trust. Stichus rendered an account of the sums of money which he had collected from the claims, as well as those which he had obtained from other sources, the debtors in whose behalf he himself had paid the heirs of his patron still remaining liable for their obligations; and having obtained his freedom, he died.

The question arose whether, by virtue of the trust, the heirs of the patron could be compelled to assign to the heirs of Stichus their rights of action against the debtors for whom Stichus had made payment, when there was nothing else due from Stichus to the patron. The answer was that they could be compelled to do so.

(1) A certain testator manumitted his slaves by his will and a codicil, bequeathed them their *peculium,* and made the following provision with reference to Stichus: "I wish my slave Stichus to be free, and that ten *aurei* be given to him, together with whatever money he may have in my purse, and I desire that he render an account to my heirs. I also wish the *peculium*

of all the slaves whom I have manumitted to be given to them."

The question arose whether Stichus should receive from the heirs any excess over and above the contents of his master's purse, which he had expended for his benefit at the time of his death, as it was the custom of the household that, where he expended anything more than the contents of the purse, for him to be reimbursed for the same by his master. The answer was that, according to the facts stated with reference to the custom of the household, that also was included in the *peculium* bequeathed which was due to him from his master, and which the latter was accustomed to return to him.

(2) A testator granted freedom to his slaves, left them certain legacies, and then prescribed the following condition: "I desire that no accounts be required from the slaves whom I have manumitted, and to whom I have bequeathed legacies." The question arose whether their *peculium* should be considered to have been bequeathed to them by this clause. The answer was that, according to the facts stated, the *peculium* was not considered to have been bequeathed.

(3) It was also asked whether, under this provision, the slaves could retain as part of their legacies anything that remained due to them from their master, either if they had any of his property in their hands, or if, where they were his tenants, they owed him rent. The reply was that the answer has already been given.

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

Where a slave is bequeathed, it is unnecessary to except his *peculium,* because, unless expressly specified, it is not included in the legacy.

25. *Celsus, Digest, Book XIX.*

When a slave is ordered to be free by a testator, and his *peculium* is left to him, the sub-slaves of his sub-slaves are embraced in three legacies.

26. *Scævola, Opinions, Book III.*

"Let my son Titius take from the assets of my estate, as a preferred legacy, such-and-such a house, and a hundred *aurei."* Then, under another article, the testator left to his children their *peculia* as preferred legacies. The question arose, whether the hundred *aurei* and the interest on the same would be included in the preferred legacy of the *peculium,* together with the account-books containing the amounts due, both principal and interest, to the other creditors. The answer was if the father had lent money in the name of his son, and had credited the latter with interest on the same, as might be suggested, this also would be included in the legacy of the *peculium.*

TITLE IX.

CONCERNING LEGACIES OF PROVISIONS.

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

An heir was ordered by the testator to furnish the wife of the latter with a certain quantity of provisions every year, and in case he should not do so, he charged him to pay her a sum of money. The question arose whether she could bring an action to recover the provisions bequeathed, or whether the delivery was merely voluntary, and if the provisions were not furnished, whether they could be demanded. And, indeed, if such a legacy was only bequeathed once, and not payable annually, there is no doubt (as Marcellus observes in the Thirty-ninth Book of the Digest on Julianus) that the delivery of the articles themselves is not required, but that suit can be brought to recover the amount in money. Therefore, the heir will have the right to tender the provisions, or the cash, until issue is joined in an action to recover their value in money; unless the testator, either by implication, or expressly, indicated some other time for payment. Where, however, the legacy of provisions was to be paid annually, it

must still be furnished in kind every year, or, if it is not, suit for the amount due can be brought annually.

But what if a single sum of money was bequeathed, and the provisions were not furnished at the end of the first year? Can it be doubted that the whole sum would be payable, just as if the entire amount of the legacy of the provisions was due; or should the estimated value of the provisions to be furnished during the first year merely be taken into consideration? I think that the intention of the testator should be followed, and the entire sum ought to be paid at once, after the heir has failed to furnish the provisions to the wife, and that he should be punished for his want of filial piety.

2. *Marcianus, Rules, Book III.*

Where a certain kind of provisions is bequeathed, together with the vessels in which they are contained, and they have been consumed, the vessels are not included in the legacy, as in the case of the *peculium.*

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

Where anyone bequeaths provisions, let us see what is embraced in the legacy. Quintus Mucius says, in the Second Book of the Civil Law, that whatever can be eaten or drunk is considered as forming part of a legacy of provisions. Sabinus also says, in his Books on Vitellius, that everything is included in such a legacy that is ordinarily consumed by the head of the household, his wife, his children, or his slaves, and that this also applies to such beasts of burden as are destined for the use of the testator.

(1) Aristo, however, remarks, that some things which are not eaten or drunk are included in the legacy; for instance, those that we are accustomed to use with them, as oil, sauce made from fish, brine, honey, and other articles of this kind.

(2) If articles used with food are bequeathed, it is clear (as Labeo says in the Ninth Book of his Last Works) that none of them should be embraced in the legacy, because we do not eat these things, but, by means of them, we are accustomed to eat others. Trebatius is of a different opinion so far as honey is concerned, and with good reason, because we are in the habit of eating honey. Proculus, however, very properly holds that all articles of this kind are included in the legacy, unless it is evident that this was not the intention of the testator.

(3) Where a bequest is made of provisions, does this include articles which we are accustomed to eat, or those by means of which we eat others? It should be held that the latter are also included in the legacy, unless the intention of the testator is shown to be otherwise. It is certain that honey is always classed among provisions. Labeo himself does not deny that fish, together with the brine in which they are pickled, are also included.

(4) All drinkables which the head of the household considered as wine are classed as provisions, but none of those above mentioned are included.

(5) No one doubts that vinegar is also included in the term "provisions," unless it was kept for the purpose of extinguishing fire, for then it cannot be eaten or drunk. This Ofilius stated in the Sixteenth Book of Actions.

(6) What we have said with reference to the clause, "Destined for the use of the testator," should be understood to apply to his friends, his clients, and all the persons whom he has about him, but not to his slaves, or to those who are not attendant upon him or his people; for example, the slaves who are employed upon his estates; and Quintus Mucius thinks that those only are included in bequests of provisions who do not perform any labor. This gives occasion to Servius to remark that food for the maintenance of male and female weavers is embraced in such a legacy. Mucius, however, only intended to designate those who are in attendance upon the testator.

(7) Likewise, food intended for the subsistence of beasts of burden is included in the legacy; but this does not apply to such beasts of burden as are used by the testator himself and his friends. Food for such animals as are employed in farm labor, or are hired out, are not included in this legacy.

(8) Any grain or vegetables which the testator kept in a storehouse are included in a legacy of provisions, as well as any barley for the subsistence of his slaves, or his beasts of burden; as Ofilius stated in the Sixteenth Book on Actions.

(9) The question arises whether firewood, charcoal, and other combustibles by which food is prepared, are embraced in a legacy of provisions. Quintus Mucius and Ofilius deny that this is the case, and they say that these are not included, any more than millstones are. They also deny that either incense or wax is included. Tutilius, however, holds that both firewood and charcoal, if they are not kept for the purpose of sale, come under this head. Sextus and Cæcilius also state that incense and wax tapers, kept for domestic use, are included.

(10) Servius, On Mela, says that perfumes and papyrus for letters also should be classed as provisions. The better opinion is that all these articles, including perfumes, should be included, and that sheets of papyrus intended for the daily accounts of the testator belong to the same category.

(11) There is no doubt that vessels for table-service are also included. Aristo, however, says that casks are not, and this is correct, in accordance with the distinction which we previously made with reference to wine. Nor are receptacles for grain or vegetables, or boxes, or baskets, or anything else of this kind, which is kept to be used in warehouses or cellars, where provisions are stored, included, but only those articles without which provisions cannot properly be made use of.

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

As liquids cannot be kept without receptacles, they take with them as accessories any articles without which they cannot be preserved. Vessels, however, which are accessories of the legacy of provisions, are not bequeathed. Finally, after the provisions have been consumed, the vessels which contained them will no longer be due. But even if the provisions were expressly bequeathed with the vessels, the latter will not be due after the provisions have been consumed, or the legatee has been deprived of them.

(1) Where provisions contained in a storehouse are left to anyone, all the provisions of the testator are not the subject of the legacy.

(2) Likewise, if anyone who is accustomed to sell his crops should bequeath provisions, he is not held to have left everything which he had in his hands as merchandise, but only what he had set apart as supplies for himself.

But if he was accustomed to make use of what he had indiscriminately, only the quantity which would be sufficient for the annual consumption of himself, his slaves, and the other persons whom he had about him, will be embraced in the legacy. Sabinus says that this usually occurs in the case of merchants, or when a warehouse containing oil or wine which was accustomed to be sold, forms part of an estate.

(3) I have been informed that the term "provisions" is applicable to every kind of food.

(4) Where a bequest is made of provisions which are at Rome, are those bequeathed which are situated in the suburbs, or only such as are within the walls ? While, indeed, almost all towns are enclosed by walls, Rome is enclosed by its suburbs, and the City of Rome is bounded by its suburbs.

(5) Where a legacy of provisions in a city is left, Labeo says that everything of the kind to be found anywhere should be considered as bequeathed, even articles which are at a country-

seat, but are destined for urban consumption; just as we call those slaves "urban" whose services we are accustomed to make use of outside of the city. If, however, the provisions are situated outside of the City, they will, nevertheless, be considered to be at Rome, and if they are in the gardens adjoining the City, the same rule will apply.

(6) Where provisions, with the exception of wine, are bequeathed to anyone, all the provisions except the wine will be considered as included in the legacy. Where, however, it was set forth explicitly in a will that all provisions, except the wine which was at Rome, were bequeathed, only the provisions which were at Rome were held to be embraced in the legacy. This was stated by Pomponius in the Sixth Book on Sabinus.

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

Everything which can be drunk is not included in the term "provisions," otherwise, it would be necessary for all medicines which are fluids to be included in the legacy. Hence, only such are included as are drunk for the purpose of nourishment, and antidotes do not belong to this category; as Cassius very properly remarks.

(1) Certain authorities deny that pepper, lovage, caraway seed, assafœdita, and other articles of this kind, are included in provisions, but this opinion is not accepted.

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

The utensils of a bakery, and all the vessels used for cooking, are not included in a bequest of provisions.

7. *Scaevola, Opinions, Book III.*

"I wish all my provisions to go to my mother, or to my children who are with her." I ask, if the guardians of a ward should say that only the provisions contained in his residence were bequeathed, and certain jars of wine were found in his storehouses, whether these are included in the legacy. The answer was that any provisions which he had anywhere for his own use were included.

TITLE X.

CONCERNING BEQUESTS OF HOUSEHOLD GOODS.

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

Furniture, or any domestic utensils belonging to the head of a family, but not including articles of silver or gold, or clothing,

2. *Florentinus, Institutes, Book XI.*

That is to say, movable property, but not animals, is classed under this head.

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

The following are embraced in bequests of household goods, namely: cupboards, benches, bedsteads, beds, even such as are inlaid with silver, mattresses, coverlets, pillows, vases for water, basins, candelabra, lamps, and ladles.

(1) Ordinarily, brazen vessels, for example, those which are not fastened to any certain place, are included.

(2) In addition to these are strong boxes and coffers. Some authorities very properly hold that wardrobes and chests of drawers, if intended for the storage of clothes or books, should not be classed as household goods, because the articles for which they are designed are not included in that category.

(3) Glass vessels for the table, used both for eating and drinking, are included among household goods, as well as earthenware vessels,

not only common ones, but also such as are of great value. For there is no doubt that silver basins and bowls, tables and bedsteads inlaid with gold or silver and set with jewels, are included in the term household goods, even to the extent that the same rule applies where they are entirely made of these precious metals.

(4) There is some doubt with reference to vases of iridescent glass, and of crystal, whether they form part of the household goods on account of their rarity and value, but the same rule must be said to also apply to them.

(5) Nor does it make any difference of what material the articles composing the household goods are made, but neither silver cups, nor silver vases are included, on account of the severity of the age, which does not admit of silver furniture. At present, however, if a silver candlestick is placed among silver-ware, on account of a misconception of ignorant persons, it will be considered to form part of it, and the error will establish the right.

4. *The Same, Concerning the Meaning of Equipment.*

A four-wheeled chariot and its cushions are included in the term household goods.

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

With reference to tapestry, and the other coverings of seats and chairs, it may be asked whether they are included under the head of clothing, as coverlets, or under that of household goods, as pillows, which, properly speaking, are not coverlets. I think that the better opinion is that they should be classed as household goods. So far as cloths or linen coverings which are placed over vehicles are concerned, is there any doubt whether they should be included among household goods? It must be said that they ought rather to be classed as baggage for a journey, just as skins in which clothing is wrapped up and with the straps with which the said skins are usually fastened.

6. *Alfenus, Epitomes of the Digest by Paulus, Book III.*

I think that such things as are intended for the ordinary use of the head of the family should be included among household goods, where they have no distinct name peculiar to them. Therefore, articles which are employed in some trade, and are not adapted to the ordinary use of the head of the family, are not embraced in the term household goods.

(1) Small writing tablets and memorandum books are not classed as household goods.

7. *Celsus, Digest, Book XIX.*

Labeo says that the term *"supellex"* is derived from the custom of persons who, when about to start on a journey, were accustomed to place in skins such articles as would be of use to them.

(1) Tubero attempts to explain the term household goods as utensils destined for the daily use of the head of the family, which do not come under some other designation, as, for example, provisions, silver plate, clothing, ornaments, implements intended for farming or for a house.

It is not strange that the name has changed with the manners of the citizens, and their use of different articles; for, in former times, household goods were composed of earthenware, wood, glass, or copper, and afterwards they were made of ivory, tortoise-shell, and silver, and, at present, gold and even jewels are employed as material for such things. Hence, it is necessary to consider the nature of the articles, rather than the material of which they are composed, in order to determine whether they should be classed as household goods, silver plate, or clothing.

(2) Servius admits that it is necessary to ascertain the intention of the person who made the bequest, and the category in which he was in the habit of placing the articles bequeathed. If, however, anyone is accustomed to designate as household goods things which there is no doubt should be classed otherwise (as, for instance, silver plate for the table, cloaks, and

togas), it should not, for that reason, be held that the articles which he left are also included among his household goods; for the names should not be derived from the opinions of individuals, but from the custom of people in general.

Tubero says that this does not seem to be clear to him, for he asks of what value are names unless to show the intention of the person who uses them. And, indeed, I do not think that anyone would say something which he did not intend, especially if he used the term by which the article was commonly designated; for we make use of speech, and no one should be presumed to have said what he did not have in his mind. However, although the judgment and the authority of Tubero has great weight with me, still, I do not dissent from the opinion of Servius, that a man should not be considered to have said anything because he did not make use of the name by which it is indicated. For although the intention of the person speaking is preferable, and more important than his words, still, no one is held to have said anything without speech, unless indeed, those who cannot talk, and by their gestures and the utterance of certain sounds, that is to say, by inarticulate expressions, are considered to have spoken.

8. *Modestinus, Opinions, Book IX.*

A husband having devised to his wife a house with all its appurtenances, its utensils, and its furniture, the question was asked whether the silver table service, both for eating and drinking, was included in the legacy. The answer was that if anything made of silver was found among the furniture, it would be included, but that the silver for table service would not be, unless the legatee could prove that the testator had the intention of bequeathing it also.

9. *Papinianus, Opinions, Book VII.*

Where a bequest of household goods is made, and the description of the articles is, through ignorance, set forth with unnecessary minuteness, it does not affect the general legacy. If, however, the number of the articles specified is stated, the amount is understood to have been reduced with reference to the kind of household goods referred to. The same rule shall be observed where land with all its equipment is devised, and a certain number of different kinds of implements are mentioned.

(1) It is well established that tables of every kind of material (for instance, those of silver or inlaid with silver) are included in household goods. The custom of the present age classes silver bedsteads and silver candelabra among household goods; for, as Homer says, Ulysses ornamented with gold and silver a bedstead made of the trunk of a green tree, by which Penelope recognized her husband.

(2) Where a testator bequeathed all of his household goods, certain silver plate which had been received by way of pledge was not held to be included, because he only bequeathed his own effects, especially as the said silver plate had not been used by the creditor, with the debtor's consent, but he had put it aside as security for the payment of the obligation, to be returned when the latter was discharged.

10. *Javolenus, On the Last Works of Labeo, Book III.*

A certain man who was accustomed to set down in his expense account all his clothing, as well as articles of different kinds, as "furniture," bequeathed his household goods to his wife. Labeo, Ofilius, and Cascellius very properly deny that the clothing was embraced in the legacy, because it cannot be said that clothing is classed as furniture.

11. *The Same, On the Last Works of Labeo, Book X.*

Labeo and Trebatus think that brass vases placed under jets of water, and also other articles designed for pleasure rather than for use, are not included among household goods.

Vessels of iridescent glass and of crystal, which are to be used for drinking purposes, it is said, should be classed as household goods.

12. *Labeo, Epitomes of Probabilities by Paulus, Book IV.*

Just as urban and rustic slaves are distinguished, not by the place in which they are, but by the nature of their employment, so, likewise, urban provisions and household goods should be classified according to their use in a city, and not from the mere fact of their being situated there, or elsewhere; and it makes a great deal of difference whether provisions and household goods which are in the city are bequeathed, or where they are bequeathed as belonging to the city.

13. *Modestinus, Opinions, Book IX.*

He gives it as his opinion that where a husband bequeaths his household goods to his wife by will, he should never be considered to have devised to her the residence in which the said household goods were situated; and therefore there is no doubt whatever, if the woman should claim the residence for herself, that this would be contrary to the intention of the deceased.

14. *Callistratus, On Judicial Inquiries, Book III.*

When a tract of land is devised, its equipment will not be embraced in the legacy, unless this was expressly mentioned; for where a house is devised, neither its utensils nor its furniture are included, unless this was explicitly stated by the testator.

THE DIGEST OR PANDECTS.

BOOK XXXIV.

TITLE I.

CONCERNING LEGACIES OF SUBSISTENCE OR FOOD.

1. *Ulpianus, On All Tribunals, Book V.*

Where maintenance is bequeathed, it can be said that water is also included in the legacy, if the bequest is made in the region where water is ordinarily sold.

2. *Marcianus, Institutes, Book VIII.*

Where anyone bequeaths maintenance to slaves whom he has enfranchised, even though the slaves themselves were bequeathed, and the legatees were requested to manumit them, they will be admitted to the benefit of the trust; as the Divine Severus and Antoninus stated in a Rescript.

(1) And even if the property from which the maintenance is derived should be forfeited to the Treasury, the maintenance must still be furnished, just as if it had passed to any successor whomsoever.

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

When bequests for maintenance are made to freedmen judges are accustomed to divide with the latter in proportion to the number of heirs, in order that they may not be compelled to obtain their means of support in small quantities from each of them; and this division should be sustained, just as if the head of the household himself had divided the freedmen. They have adopted the practice of selecting one heir, by whom the means of support shall be provided, either in compliance with the wishes of the deceased, or according to their own judgment, as the following Rescripts show: "I send you a copy of the petition presented to me by the freedmen of Favilla, for the reason that many persons, in their wills, order necessaries to be furnished to their freedmen, which, as they are of small amounts, are reduced to almost nothing where there are several heirs to an estate. Hence, I think that you will act properly, if, after having called together the heirs of Favilla, or their representatives, you decide to which one of them a sum of money shall be given, out of the interest of which the maintenance of the said freedman may be paid for. He who receives this money must furnish security to those who contribute it, that, in case any one of said freedmen should die, or should, in any other way, cease to be a citizen, he will refund as much of the principal as the computation *pro rata* may amount to."

The Divine Pius stated, as follows in a Rescript addressed to a certain Rubrius Telesphorus: "The Consuls, after having called together all those who have been charged with furnishing you with maintenance under the terms of the trust, shall determine whether all of the legatees shall receive what is due them from one of the heirs, or whether the distribution shall be made *pro rata,* and who shall be notified, and by whom this shall be done. If anything should be due from the testator to you on this ground, the Treasury also shall pursue the same course; and know now that the shares of those who are insolvent will not cause the burden of the remaining heirs to be increased."

4. *Modestinus, Opinions, Book X.*

"I desire the lands which I have in the island of Chios to be given to my freedmen and freedwomen whom, during my lifetime, I have manumitted by my will or my codicil, or whom I may manumit hereafter, in order that they may obtain from them their food and clothing, as they did while I was living."

I ask what signification these words have; do they mean that the freedmen shall themselves

obtain their support from the said lands, or that they shall receive from the heir their food and clothing, in addition to what is obtained from the lands? And was the ownership or the usufruct of the lands left? If the ownership was left, and a sum greater than what is needed for the supply of food and clothing should be obtained from the income of the lands, will the excess belong to the heir of the patron ? And if some of said freedmen should die, will their shares pass to the surviving beneficiaries of the trust; and if they should die after the time appointed for the trust to take effect, will their shares belong to their heirs, or will they revert to the heirs of the testator?

Modestinus answered: "It seems to me that these lands, and not merely the usufruct in the same, were left to the freedmen, in order that they might have full control over them; and, therefore, if anything more than is necessary for their support is obtained from the income of said lands, this will belong to the freedman. Even if one of the beneficiaries of the trust should die before it takes effect, his share will belong to the other beneficiaries, and those who die after the trust becomes operative will transmit their shares to their heirs."

(1) Lucius Titius, by his will and without imposing any condition, ordered food and clothing to be furnished to his freedmen and freedwomen by his children who were his heirs. I ask if said freedman should institute proceedings without communicating with the children of their patron, whether they can obtain their food and clothing. Modestinus answered that there was nothing in the case stated to prevent suit being brought by them, where the legacy was unconditionally bequeathed by will.

5. *The Same, Opinions, Book XL*

The following words were inserted in a will: "You will furnish food to all our freedmen according to your judgment, as you are aware with what affection I regard them." Also, in another place, the testator said, "I commit Prothymus, Polychronius, and Hypatius, to your care, in order that they may live with you, and I ask you to provide them with food." I ask whether food should be given to all of them, or only to those whom he recommended to his heirs, and ordered to reside with them. Modestinus answered that, according to the case stated, subsistence was left to all of the freedmen, the amount of which was to be determined by the judgment of a good citizen.

6. *Javolenus, On Cassius, Book II.*

Where maintenance is bequeathed, food, clothing, and lodging are included, because without these the body cannot be sustained; but things which have reference to instruction are not embraced in the legacy,

7. *Paulus, Opinions, Book XIV.*

Unless it is proved that the testator intended otherwise.

8. *Papinianus, Opinions, Book VII.*

It has been decided that where the principal of a sum of money, intended for the support of freedmen, has been left as a preferred legacy to one of several heirs, in accordance with the will of the deceased, he cannot be compelled to give security to deliver to his co-heirs the shares of any of the freedmen who may die. Therefore, in this instance, no action on the ground of money not due will lie, nor will a prætorian action be granted, even after the death of all the freedmen.

The case is different, however, where the heir has been directed to make a distribution of the legacy; for this matter only requires momentary attention, but the necessity of furnishing support extends over months and years, and is also a source of trouble to the party responsible for it.

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

A testator, having appointed two heirs, inserted the following provision into his will: "I request you, Gaius Seius, out of whatever you may obtain from my estate, to give to such-and-such of my foster-children ten *aurei* apiece, and I desire you to retain an equal sum in your hands, in order to support them with the interest thereof; and to pay the remainder to Numerius, our common freedman." The opinion rendered was that, although Gaius Seius could not sell the property of the estate, because another heir had been appointed, still, he had a right to claim the money which has been left to the foster-children in order that he might keep it and pay it to them, subject to the provisions of the Falcidian Law; but this will not apply to any excess of the sum bequeathed.

(1) I have thought that where a patroness left to a certain freedman twenty *aurei,* payable annually, and a certain quantity of wheat and wine to be delivered every month, the benefit of a trust under which she bequeathed the same amount of food and clothing to others that she had been in the habit of furnishing them during her lifetime, could be legally claimed.

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

Where one of several heirs was directed to take a certain sum of money as a preferred legacy, to be used for the purpose of supporting the freedmen of the testator, it was decided that the heir of the heir should also be permitted to receive the said preferred legacy. If, however, the said heir should himself have several heirs, the wishes of the deceased will, at first sight, appear to have been disregarded, but no other course should be adopted. For what if the testator did not desire to charge the other heirs, and having in his mind the welfare of his freedmen, and desiring to have the distribution made quietly and honorably by a party who was solvent, preferred to have this done by a single member of the household? Therefore, the maintenance should be furnished by all the heirs of the heir aforesaid.

(1) Where a slave is manumitted unconditionally by the terms of a trust, support must be furnished for the past time, even though he may have obtained his freedom after the others, and the heir was not in default in granting it; for the cause of the delay must be ascertained where a question arises with reference to interest due under a trust, but not where the trust itself is concerned.

(2) Where maintenance was left to a daughter, the amount of which is to be determined in accordance with the judgment of a reliable citizen, I gave it as my opinion that the bequest with which the son, who was the heir, was charged should correspond with the dowry payable at the time of her marriage, which the father had left to his said daughter whom he had disinherited, according to her increase in age, and not in proportion to the value of his estate.

11. *Paulus, Questions, Book X.*

A certain individual to whom support had been bequeathed, payable annually, having been condemned to the mines, was afterwards restored to his rights by the favor of the Emperor. I held that he had lawfully received the support for the preceding years, and that he was entitled to it for those which followed.

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

Lucius Titius left food and clothing for the support of his freedmen, devoting a certain sum of money annually to that purpose, and

made the following provision in the last part of his will: "I leave such-and-such and such-and-such tracts of land in trust for the benefit of my said freedmen, in order that they may receive the maintenance above mentioned from the income of the same." The question arose, if at any time the income from said lands should be less than what was required to provide food and clothing for the freedmen, whether the heirs should not be burdened with making up the deficiency; or if, in any year, there should be an excess, would they be entitled to this to supply what they had lost during the former year? Paulus answered that the food and clothing

must be furnished entirely to the freedmen of the deceased, and that the testator did not intend to have the legacy which he bequeathed to them either increased or diminished because he afterwards desired the said lands to be held by way of pledge, so that the freedmen might receive their support from the income of the same.

13. *Scævola, Opinions, Book IV.*

A man bequeathed three hundred *aurei* to Gaius Seius, in order that out of the interest of the said sum he might provide his freedmen with food and clothing, as he had specified; but afterwards, by a codicil, he forbade the said sum to be given to Gaius Seius, but desired it to be paid to Publius Mævius. I ask whether Mævius was required to execute the trust for the benefit of the freedmen. I answered that Mævius, according to the intention of the testator, appeared to be charged with the duties for which the said sum of money was left, which were transferred to him by the codicil; unless he could prove that some other obligations had been imposed upon him by the testator which are not at present under discussion.

(1) The Emperor Antoninus Pius to the freedman of Sextia Basilia, Greeting: "Although the terms of the will indicate that you shall be furnished with food and clothing as long as you reside with Claudius Justus, still, I think that the intention of the deceased was that this should be given to you after the death of Justus." The opinion was rendered that this clause must be understood to mean that the requirement to provide support shall be perpetual.

(2) I, myself, was consulted with reference to the following clause in a will: "And I wish that they shall always remain with you." I ask, where freedmen have been manumitted by the heir, and remained with him for a long time, but finally departed because the services he required of them were too severe; whether they would be entitled to the support with which he refused to furnish them, unless he had the benefit of their services. The answer is that, according to the facts stated, he would be obliged to furnish them support.

14. *Ulpianus, Trusts, Book II.*

Mela says that where maintenance is bequeathed to a boy or a girl, it must be furnished till he or she reaches the age of puberty. This, however, is not correct, for they should only be provided with it as long as the testator wished, and if his intention was not evident, they must be supported for life.

(1) But if maintenance is bequeathed until the age of puberty, and anyone desires to follow the former custom with reference to boys and girls, he is hereby informed that Hadrian decided that boys shall be supported until their eighteenth year, and girls until their fourteenth. Our Emperor stated in a Rescript that this rule promulgated by Hadrian must be observed. But although the age of puberty is not ordinarily fixed in this way, still, it is not illegal for it to be so established in the individual instance of the matter of support, where natural affection is involved.

(2) Where a testator bequeaths maintenance to the same extent that he furnished it during his lifetime, only such provision must be made as he was accustomed to make at the time of his death. Therefore, if different amounts were furnished at different times, that amount must be considered which was furnished just prior to the death of the testator. But what would be the case if the testator provided less at the time that he made his will, and more at the time of his death, or *vice versa?* In this case it must be held that the amount must be governed by what he provided last.

(3) A certain man bequeathed to his freedmen food and water by a trust. Advice was taken with reference to the trust, as the question was raised in that part of Africa or Egypt where water was sold. Therefore, I stated that the benefit to be derived from the trust depended upon whether the party who left it had cisterns or not, and whether it was included in the trust in order to provide for any amount which the beneficiary might have to pay for water for

himself, and whether the trust did not appear to be void, as it was not the bequest of a servitude upon a tract of land for the benefit of a person who was not the possessor of one that adjoined it; for while the drawing of water, and the right of driving cattle to water, is a personal servitude, still, it is void if left to one who is not the owner of neighboring property.

Under the same head are classed the right of conveying burdens, or of pressing grapes, or of threshing wheat and other grain on the premises of someone else; but in this instance, the right to obtain water is bequeathed for the benefit of the person himself.

15. *Scævola, Digest, Book XVII.*

A testator, having appointed his son his heir, by a codicil charged him with the payment of ten *aurei* to Seia, and provided for a foster-child as follows: "I desire forty *aurei* to be given to my foster-child, Mævius, which sum I ask Seia to take charge of, and to pay to Mævius the interest on the same at the rate of five per cent per annum, until he reaches the age of twenty years; and I also ask her to take charge of him, and rear him."

The question arose, if Seia, after having received her legacy, should refuse or neglect to take charge of the money left for the benefit of the foster-child, whether she would be compelled to assume the obligation of furnishing support for him from the time of the death of the testator. The answer was that, according to the facts stated, she would

be compelled to provide support, as she had been charged with the execution of the trust.

It was also asked whether the heir of Seia would be required to furnish Mævius support until he reached his twentieth year? The answer was that he would be required to do so.

(1) A testator bequeathed to his concubine eight slaves belonging to his country seat, and directed her to provide them with food as follows: "I wish the said slaves whom I have bequeathed, as above stated, to be furnished with food by my heirs, just as they were during my lifetime." As the slaves during the life of the testator were always employed in farm labor during harvest, and when the grain was threshed, and, with the exception of the steward in charge of the land at that time, never received any food provided by their master; the question arose whether the heir would be obliged to furnish the concubine, at that time also, that is to say during the season of harvest and threshing, with provisions for the said slaves belonging to the farm. The answer was that this must be left to the court having jurisdiction of the case.

Claudius: This is reasonable, for if the slaves were to be employed in the same way by a concubine, as they had been by the testator, it would not be necessary for food to be furnished them during the time in question. If, however, they had been bequeathed for service in the city, food must be furnished them.

(2) Titia, at the time of her death, provided as follows in her will: "I wish the food and clothing which I have been accustomed to furnish them during my lifetime to be given to all my freedmen and freed-women." As during her lifetime she only furnished food and clothing to three of them, which was shown by her accounts, the question arose whether her heir could be sued by the remaining freedmen, or whether he would only be liable to the three who were found by the accounts of the testatrix to have previously received food and clothing. The answer was that he would be liable to all.

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

A certain testator bequeathed food and clothing to his freedmen. The question arose, as the testator had ordered the trust to be discharged by Moderatus, one of his heirs, whom he mentioned by name, whether Moderatus alone would be responsible so that his heirs would not be liable after his death. The answer was that his heirs would be liable.

(1) A testatrix left to her freedmen and freedwomen, whom she also manumitted by her will and codicil, suitable maintenance such as she had furnished during her lifetime, and she also

directed certain lands to be given to all of them. The question arose whether the freedman of a freedman of the father of the testatrix, whom she was accustomed to address as follows: "To our freedman, the son of Rufinus," should be admitted to share in the legacy. A letter was also sent by her to the magistrates of her native city, in which she requested that a salary be paid to him out of the public funds, for the reason that he was a physician, and stated that he was her freedman. The answer was that this point should be decided by the court having jurisdiction of the matter; and that the freedman could be admitted to share in the benefit of the trust, if the testatrix, during her lifetime, had provided him with support; otherwise he could not.

(2) A testator bequeathed ten *aurei* to his freedwoman, Basilica, which he wished to remain in the hands of his freedmen Epictetus and Callistus, to be paid to Basilica with interest at the rate of five per cent, until she reached the age of twenty-five years, so that she might be supported by the interest of the money according to her age. The question arose whether Basilica was entitled to support under another clause of the same will, by which the testator, in general terms, left food, clothing, and lodging to his freedmen and freedwomen. The answer was that, according to the facts stated, she would not be entitled to it, unless it could be proved that it was given to her along with the others.

Claudius: Because the testator intended the interest of a sum of money, which he has especially bequeathed to her, as a preferred legacy, to be employed for her support.

(3) A certain individual, who had held all his property in partnership with his wife for more than forty years, left her and a grandson by a son of his, heirs to equal shares of his estate, and provided as follows: "I also bequeath to my freedmen, whom I have manumitted during my lifetime, what I have been accustomed to furnish them."

The question arose whether those slaves who had been manumitted by both of the parties while the partnership existed, and had become the freedmen of their joint-owners, could, under the terms of the trust, claim the entire amount which they had been accustomed to receive during the lifetime of the husband. The answer was that they were not entitled to any more than what the husband was accustomed to furnish as his share.

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

A testator left certain slaves for the guardianship of a temple, and charged his heir with a legacy for their benefit as follows: "I ask, and I charge you in memory of me, to give and furnish to my footmen whom I have left to take care of the temple, such-and-such a quantity of food, every month, and such-and-such an amount of clothing every year." As the temple had not yet been erected, the question arose whether the slaves were entitled to receive their legacy from the day of the death of the testator, or from the time when the temple was completed. The answer was that it would be the duty of the judge to compel the heir to furnish the slaves with what was left to them until the temple should be built.

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

A man bequeathed to his freedmen, whom he had manumitted by his will, ten *aurei,* payable monthly, for their support; and afterwards, in general terms, bequeathed by a codicil seven *aurei* to all his freedmen, payable monthly for food, and ten *aurei,* payable annually, for the purpose of providing them with clothing. The question arose whether the heirs were charged with one trust under the terms of the will, and with another under the codicil, for the benefit of the freedmen. The answer was that, in the case stated, there was reason why the heir should not furnish what was left by the codicil, for by the bequests contained in the latter, the testator seems to have revoked those relating to food which he had bequeathed by his will.

(1) A testator having manumitted his slaves by his will, left them, in trust, food for their annual maintenance, if they should reside with his mother. The mother survived her son three years, but did not furnish the freedmen either food or clothing, because they did not demand

the execution of the trust; and the daughter, who subsequently became her mother's heir, during the fourteen years which she lived, was not applied to for payment of the legacy by the slaves.

The question arose whether, after the death of the daughter, the freedmen could demand from the last heir, for the past, as well as for the future time, the legacies which had been left to provide them with food and clothing. The answer was that, if the condition had been complied with, there was nothing in the case stated to prevent them from presenting the claim.

(2) A testator wished Stichus to be manumitted by his heirs, and directed food and clothing to be furnished him by Seius, if he should reside with him, and then he added the following words: "I also ask you, Seius, when you reach the age of twenty-five years, to purchase a commission in the army for him, if he should not leave you before that time." As Stichus obtained his freedom immediately, and Seius died before he reached the age of twenty-five years, the question arose whether the commission in the army should be purchased for Stichus by those who acquired the estate of Seius; and if it was decided that this should be done, whether it should be purchased without delay, or at the time when Seius would have completed his twenty-fifth year, if he had survived. The answer was that, as was decided that the commission should be purchased, it was not necessary for this to be done before the time fixed by the testator had expired.

(3) Where his posthumous children, together with the father and mother of a testator, were appointed his heirs, and then he, having made a substitution, manumitted the slaves who were his stewards, and bequeathed them their *peculium,* as well as an annual sum for their subsistence, and also left legacies to certain of his freedmen, and to strangers; and finally, a daughter having been born to him, after his will had been executed, he inserted the following provision in a codicil: "I wish that any property which, previous to this time, I have bequeathed to anyone to be given to them; and I ask them to deliver the third part of the same to my daughter Petina." A pupillary substitution having been made, he desired the freedmen who had not reached puberty and whom the testator had charged his parents to liberate, to receive, in addition to the bequest of food and clothing, as much again as he had left them in money.

As his daughter survived the opening of the will and the codicil, but afterwards died, and transmitted to her heirs the trust by which she was charged to deliver the third part of the legacy, the question arose whether the third part of the food and clothing could also be claimed under the terms of the trust. The answer was that it could not

It was likewise asked whether the third part of the property bequeathed in trust by the codicil would belong to the daughter. The answer was that it would not. Inquiry was also made whether the provision included in the substitution by which the freedmen who had not yet reached puberty would be entitled to as much again as they had been left in money, and the third part of the legacies bequeathed by will having been deducted, the calculation should be made so that two-thirds of the amount, in addition to what was left by the codicil, would be payable; the third part of which legacies the testator desired should belong to his daughter. The answer was that the entire amount mentioned in the substitution should be paid.

(4) A certain testator left food and clothing in trust to his freedmen, and added: "I desire that they, my freedmen, shall reside where my body is buried, so that every year they may celebrate the anniversary of my death, at my tomb, in the absence of my daughters." The question arose whether support should be furnished to one of the freedmen who, after the death of the testator, did not present himself to the heirs, and refused to reside near the tomb. The answer was that it should not be furnished him.

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

The following provision was inserted into a will, "I desire that food, and whatever else I was

accustomed to give my freedmen, shall be furnished them by my heirs." One of the said freedmen, with the consent of his patron, was absent for four years before the death of the testator, for the purpose of transacting his private business, and on this account he did not, at the time of the testator's death, receive the food which he formerly had received. Nevertheless, the patron left him a legacy of five *aurei* by the same will, just as he did to the others, whom he had manumitted during his lifetime. The question arose whether this freedman was also entitled to the food and other articles which were bequeathed to the remaining freedmen. The answer was, why not?

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

"Let Stichus, the grandson of my nurse, be free, and I also wish ten *aurei* to be paid to him every year." Then the testator, having set aside certain credits for his benefit, bequeathed to the said Stichus his wife and children, and to the latter what he had furnished them during his lifetime; and afterwards, under another head, he directed to be given to all of his freedmen what he, while living, had been accustomed to furnish them. I ask whether Stichus will, in addition to his legacy, be entitled to maintenance. The answer was that, according to the facts stated, he will not.

(1) The same testator having charged the municipality of a city to provide support for his freedmen of both sexes, to be paid out of certain lands which he devised to it; I ask whether the daily allowance and the clothing which the testator had, while living, given to Stichus and his wife and children, should be given to them by the appointed heir, or by the municipality. The answer is that, in accordance with the most liberal interpretation of the will, it must be said that they should be furnished by the city.

(2) Titia bequeathed the usufruct of a tract of land to Mævius, and charged him to pay Pamphila and Stichus a hundred *sesterces* annually, out of the income of said land, as long as they lived; I ask whether, after the death of Mævius, the heir of Titia will be required to provide support. The answer is that there was nothing in the case stated which would require it to be furnished by the heir of Titia, or by the heir of the legatee either; unless it was clearly proved that the testator intended it to be furnished after the extinction of the usufruct, provided that the amount obtained from the usufruct should be sufficient.

(3) A mother, having appointed her son her heir, granted freedom to her slave Pamphilus, under a trust, and bequeathed him five *aurei* for the purpose of providing him with food, and fifty *aurei,* payable annually, for his clothing, on condition that he lived with her son. I ask whether the support must be furnished after the death of the son. The answer is that if the condition was complied with, it must be furnished after his death.

21. *Ulpianus, Trusts, Book II.*

Where a daily allowance or food is bequeathed, it is clear that neither lodging, clothing, nor shoes, are to be furnished, as the testator only had the provision of food in his mind.

22. *Valens, Trusts, Book I.*

Where maintenance is left by the terms of a trust, and the amount is not stated, what the deceased was accustomed to furnish the legatee must be learned before anything else is done, and then what he left to others of the same rank must be ascertained. If neither of these things can be found out, the amount must then be determined according to the means of the deceased, and the affection which he entertained toward the party for whose benefit the trust was created.

(1) A testator, who was already under obligations to provide support for the freedmen of his brother, bequeathed to them certain vineyards by his will, with the following addition: "That they may have them in order to provide themselves with food." If he left them these vineyards instead of the support which he was obliged to provide, they should not be transferred under

the terms of the trust, unless the heirs are freed from the obligations imposed by the will; for if this should fail to be done, and he should afterwards bring suit under the will, the heir could protect himself by an exception on the ground of fraud; that is to say, if the vineyards were not worth less than the amount furnished for support.

The addition, "That they may have them in order to provide themselves with food," rather shows the reason for making the bequest, than an intention to establish an usufruct.

23. *Paulus, On Neratius, Book IV.*

If you are asked to educate someone, you can be compelled to furnish him with the necessaries of life. Paulus: Why is the scope of a legacy providing for support more extensive where it is stated that clothing and lodging are included? This is not the case, for both are equal.

TITLE II.

CONCERNING LEGACIES OF GOLD, SILVER, ORNAMENTS, JEWELS, PERFUMES, CLOTHING, TAPESTRY AND STATUES.

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

Where clothing in general is left to one person, and women's garments separately to another, the women's garments will be removed and given to the party to whom they were specially bequeathed, and the remainder will belong to the other. The same rule applies with reference to silver articles included in ornaments, where ornaments suitable for women are bequeathed to one person, and all silver articles are bequeathed to another. Likewise, where two marble statues are left to you, and afterwards all the marble belonging to the testator is left to another legatee, no marble statue, excepting those two, is left to you.

The same rule applies where the urban slaves of a testator are bequeathed to you, and the steward of the testator is bequeathed to me.

(1) Where an heir is directed to deliver a certain weight of silver to someone, he is discharged from liability by operation of law if he pays him money, provided that the money is of the same value as the silver; which opinion is correct, if a certain kind of silver was not bequeathed.

2. *Africanus, Questions, Book II.*

Where anyone directed you to purchase certain ornaments for the use of his wife, and he then, as is customary, left his wife everything which he had provided for her use; and you, after the death of the testator and while you were not aware that he was dead, make the purchase, the woman will not be entitled to the ornaments, since the words employed have reference to the time of the testator's death.

If, however, you should make the purchase during the lifetime of the testator, but after the death of his wife, it may not improperly be held that the legacy will be void, since it cannot truly be maintained that the ornaments were provided for the use of one who is already dead.

The same must be said in the case of a woman who is still living, but has been divorced, when the question is asked whether she is entitled to what has been purchased after her divorce, as it does not appear to have been provided for her use as a wife.

3. *Celsus, Digest, Book XIX.*

A certain man left his wife everything which he had provided for her use, and obtained a divorce from her before his death. Proculus says that she will not be entitled to the property, because it appears that it was taken from her. This, however, is a question of fact, for even though he may have repudiated her, he could not have intended to deprive her of the legacy.

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

A certain individual sent his freedmen into Asia for the purpose of buying purple, and by his will bequeathed his purple wool to his wife. Servius gave it as his opinion that the goods which the freedman had purchased during the lifetime of the testator belonged to her.

5. *Africanus, Questions, Book II.*

The following is contained in the Second Book of Questions by Phuphidius: "If a woman should direct you to purchase pearls for her use, and you should do so after her death, but while you thought that she was still living," Atilicinus denies that the pearls were left to a person to whom the woman made the following bequest: "I bequeath all the jewels which have been or shall be obtained for my use," for they cannot be considered to have been obtained for her use as she was already dead at the time when the purchase was made.

6. *Marcellus, Opinions.*

Seia charged her heir, Publius Mævius, with a bequest as follows: "I give and bequeath to Antonia Tertylla such-and-such a weight of gold, and my large pearls set with hyacinths." She afterwards disposed of the pearls, and at the time of her death did not leave any among her jewels. I ask whether the heir will, under the terms of the trust, be compelled to furnish the value of property which does not form part of the estate. Marcellus answers that he will not be required to do so.

(1) I also ask, if it can be proved that Seia converted her necklace of pearls and hyacinths into some other kind of ornament, which afterwards became more valuable through the addition of other jewels and small pearls, whether the legatee can demand the said pearls and hyacinths; and whether the heir will be compelled to remove them from the other jewelry and deliver them. Marcellus answers that the demand cannot be made. For how can a legacy or a trust be held to exist when what is given by a will does not retain its original character? For the bequest is, as it were, extinguished, so that in the meantime it is lost sight of, and hence by this dismemberment and change the intention of the testatrix also appears to have been altered.

(2) Lucius Titius made the following provision in his will, "I charge my heir to erect a public portico in my native town, in which I desire my silver and marble statues to be placed." I ask whether the legacy is valid. Marcellus answers that it is, and that the bequest of the labor, and of the other things which the testator desired to be placed there, will belong to the municipality, for he understood that the city would receive some adornment therefrom.

7. *Paulus, On Plautius, Book VIII.*

When a bequest is made as follows, "Let my heir be charged to give my clothing and silver plate," whatever belonged to the testator when he executed his will will be considered to have been bequeathed; for the reason that the present time is always understood to have been meant, where something else is not included; for when he says, "My clothing and silver plate," by the pronoun "my" he indicates the present and not the future. The same rule will apply where anyone makes a bequest of "My slaves."

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

Plautius: A woman made a bequest as follows: "I charge my heir, whoever he may be, to give my clothes, my toilet articles, and my feminine ornaments to Titia." Cassius says, if it cannot be ascertained what the intention of the testatrix was, that all her clothing will be considered to have been bequeathed, according to the terms of the will.

Paulus: Javolenus says the same thing, because, as he remarks, it is probable that the testratrix intended to limit her bequest to jewels, to which she gave the designation "feminine ornaments." It may be said, in addition, that the term "feminine" is not, in accordance with the

proper manner of speaking, applicable to either clothing or toilet articles.

9. *Modestinus, Rules, Book IX.*

Where a certain weight of gold or silver is bequeathed, and the kind is not indicated, not the material itself, but its value at the present time must be delivered.

10. *Pomponius, On Quintus Mucius, Book V.*

Quintus Mucius says that where the head of a household bequeaths to his wife vases, clothing, or anything else whatsoever, as follows, "Which has been purchased and provided for her use," he is held to have bequeathed what was obtained for her individually rather than for their common use.

Pomponius: This is true, not only where the articles were procured for the use of both husband and wife, but also when this was done for that of their children, or anyone else; as such a provision would seem to indicate that the property was acquired for the private use of the wife herself. But when Quintus Mucius stated that vases, clothing, or anything else is included, the falsity of what we have stated appears to be established; since, as a rule, there is a great deal of difference where articles of this kind are generally or specially bequeathed, for if they are bequeathed in general terms (as, for instance, "Which have been procured for the use of my wife"), his explanation is correct.

If, however, the subject of the bequest should be described as follows, "Such-and-such a purple garment," by which a certain garment was indicated, even though the words, "Which I have purchased or intended for her use," were added; for the reason that it was neither purchased nor intended for, nor given to her for her use, the legacy will undoubtedly be valid, because when a certain article is left, a false description of the same does not annul the legacy; just as if the following had been written, "Stichus, whom I purchased at the sale of Titius;" for if the testator did not purchase him at all, or bought him at some other sale, the legacy will, nevertheless, be valid.

It is clear that if the legacy was bequeathed as follows, "The vases, or clothing, or articles, intended for the use of my wife," then the opinion of Quintus Mucius will also be correct in this instance. It must be observed that even if the articles mentioned belonged to another, but the testator was under the impression that they were his, the heir will be obliged to furnish them.

11. *Proculus, Epistles, Book V.*

Where anyone bequeaths gold, silver, and pearls which are set in the gold, gold in which neither jewels nor pearls are set will be held to have been bequeathed.

12. *Papinianus, Questions, Book XVII.*

If the heir should deface a painting which was bequeathed, and deliver the board on which it was painted, it may be said that an action will still lie under the will, because the legacy consisted of a painting and not of a board.

13. *Scævola, Digest, Book XV.*

A certain man made a bequest to his wife as follows: "I wish all the toilet-articles and jewels, and whatever else I have given or donated to my wife, or acquired, or made for her use during my lifetime, to be given to her." The question arose whether a four-wheeled carriage for sleeping purposes, together with its mules, which the wife had always made use of, was included in the legacy. The answer was that if it had been acquired for her use, she was entitled to it.

It was also asked whether, under the same clause, the garments which the testator had purchased for the female slaves or the litter-bearers of his wife should also be given to her.

The answer was that they should be given.

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

If I bequeath a statue, and afterwards add an arm to it taken from another, the entire statue can be claimed by the legatee.

15. *Scævola, Digest, Book XV.*

A testator bequeathed a certain kind of gold and silver to Seia, and made the following request of her: "I ask you, Seia, at the time of my death, to deliver any gold or silver which I have specifically bequeathed to you, to So-and-So, my slaves, and the usufruct of said property will be sufficient for you while you live." The question arose whether the usufruct alone of the gold and silver should be given to the legatee. The answer was that, in accordance with the facts stated, the ownership of the articles was also bequeathed under the terms of the trust.

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

A mother appointed her daughter her heir while she was still under paternal control, substituted her father Mævius for her, and made the following provision in her will: "Whoever my heir may be, I charge him not to sell any of my jewelry, or my gold or silver-ware, or the clothing, which I make use of; but let them be kept for my daughter." The daughter having refused to accept the legacy, and the father, who was the heir under the substitution, having died intestate, the question arose whether she could still demand the execution of the trust. The answer was that, according to the facts stated, it appeared that the execution of the trust legally devolved upon the father's successor.

Claudius: Because, by the term "to keep," which was used by the testatrix, the trust seems to have been deferred until the party for whose benefit it was created should be released from paternal control.

17. *Ulpianus, On Sabinus, Book XXL*

Where a jewel set in a ring, or any other ornaments or articles which are joined together are bequeathed, this is in accordance with law, and they should be separated and delivered to the legatee.

18. *Scævola, Digest, Book XXII.*

A testator left the tenth part of his estate, his slaves, and certain silver articles which he specified, to his wife, and he charged his heirs to give her his rings and his clothing, just as if they were her own private property. If these things did not actually belong to her, the question arose whether she would be entitled to them by virtue of the legacy. The answer was that it appeared that the testator intended to bequeath them to her, unless the contrary could be proved by the heir.

(1) The same testator, under the terms of a trust, charged his wife to transfer to their common foster-child whatever came into her hands by his will. The question arose whether the heir would be compelled to deliver to the said foster-child any property which the testator knew belonged to his wife, and which he directed to be given to her. The answer was that, if the articles were her own property, the heir would not be required to deliver them, but if they were acquired by virtue of the legacy he would be compelled to give them up.

(2) A certain woman under a trust inserted in her will and afterwards by a codicil, left specially several kinds of clothing and silverware which she stated that she had made herself, or had in her possession. The question arose whether any other articles not found among the assets of the estate would belong to the legatees. The answer was that only those which were found there would belong to them.

a19. *Ulpianus, On Sabinus, Book XX.*

When gold or silver is bequeathed, any gold or silver which was left is included in the legacy, whether manufactured or not. It is, however, well established that money, which is coined, is not included in the legacy.

(1) Hence, if a certain weight of gold or silver is bequeathed, the amount of the same is considered to have been left in bulk, and the legacy to have no reference to vases.

(2) If, however, a hundred weight of manufactured silver is bequeathed, the legacy is due in manufactured silver. Wherefore it was asked by Celsus whether small vessels should be excluded. He was of the opinion that they could not be excluded, even if the choice of them had been left to the heir.

(3) Celsus, in the Nineteenth Book of Questions, also asks where a hundred weight of silver is bequeathed, whether the leaden joints must be unsoldered, so that the silver can be weighed. Both Proculus and Celsus say that it must be weighed after the removal of the lead, for silver is delivered to purchasers unsoldered, and the weight of the same is taken into account; which opinion is reasonable.

(4) It is clear that where small silver vessels, for instance, square plates, are bequeathed, the lead with which they are soldered goes with them.

(5) Likewise, where silver-ware is bequeathed, the question arises whether any gold ornamentation united with it is included. Pomponius, in the Fifth Book on Sabinus, says that it makes a great deal of difference whether a certain weight of manufactured silver is bequeathed to him, or merely manufactured silver. If a certain weight of silver is bequeathed, it will not be included; if manufactured silver is bequeathed, it will be included, as anything united with any kind of silver-ware is, as it were, an accessory to the same; just as gold braid and purple form part of clothing. Pomponius, in the Books of the Epistles, says that braid is included in a legacy of clothing, even if it is not sewed to it.

(6) Celsus also states, in the Nineteenth Book of the Digest and the Seventh of the Commentaries, that where gold is bequeathed, neither articles which are gilded, nor gold ornamentation on silver plate will be due.

(7) Are gold rings included under the term "gold?" is asked. Quintus Saturninus says, in the Tenth Book on the Edict, that they are included.

(8) It is evident that a silver bed is not included under the term silver-ware, nor any other silver furniture, if the testator did not consider it as such. I know that I decided that this was the case with reference to a silver clasp, because the head of the household did not regard it as part of his silver-ware. And, neither can candelabra, nor silver lamps, nor small images kept in the house, nor silver statues, be included under the term "silver-ware." Nor are mirrors attached to walls and which women use for their toilet included, provided they do not consider them as part of their silver-ware.

(9) Where a bequest of silver-ware is made, Quintus Mucius says that silver vessels are included; as, for example, chafing dishes, oil-pots, bowls, basins, and other utensils of this kind which, however, are not classed as furniture.

(10) Where vases are bequeathed to anyone, not only those are included which are intended for eating and drinking, but also such as are used to support something, as, for instance, saucers and trays. The sideboards in which they are kept are also included, for the term "vases" is a general one, by which we designate vessels to hold wine as well as those employed for refrigerating purposes.

(11) The expression "unmanufactured silver," includes raw material, that is to say, such as has not been worked up. But what if some labor has been expended on the silver, but it has not yet been completed? There might be some doubt in this case whether or not it would come under the term "unmanufactured," but I think that the term "manufactured silver" will be more

applicable. It would certainly be manufactured, and be included under that designation, if it was in the hands of the goldsmith to be adorned with gold. Where the gold ornamentation has been begun, should it be included under the term adorned with gold? I think it should be, if the silver ware was bequeathed, and the gold ornamentation had not been finished.

(12) Where a bequest is made of silver-ware for the table, that only will be due to the legatee which the testator included in his own table service, that is to say such as he used for eating and drinking. Hence, there is some doubt concerning the basin for washing the hands; still, I think it would be included, because it has reference to the service of the table. It is certain that, if the testator had silver pots or caldrons, or kitchen utensils, or any other articles used for cooking purposes, it may be doubted whether these will be included in the legacy. It is my opinion that such things rather belong to the equipment of the kitchen.

(13) Let us now discuss jewels set in gold and silver. Sabinus says that they are accessory to the gold and silver, as smaller things are accessory to those that are greater. This is correctly stated, for as we are sometimes at a loss to determine which of two articles is accessory, we must consider which one of them is used for the purpose of ornamenting the other, as the accessory follows the principal. Therefore, jewels inserted in drinking cups, or in gold or silver plates, are accessories to the same.

(14) So far as the crowns of tables are concerned, their jewels are accessory to the crowns, and the latter are accessory to the tables.

(15) The same rule applies to pearls set in gold, for if the pearls are inserted into the gold for the purpose of ornamenting it, they will be accessory to it; if the contrary is the case, the gold will be accessory to the pearls.

(16) The same rule applies to jewels set in rings.

(17) Jewels are of transparent material. Servius distinguished them from precious stones, as Sabinus states in his Books on Vitellius, for the reason that jewels are transparent; as, for instance, emeralds, chrysolites, and amethysts, while precious stones are of a different nature, as, for example, obsidian, and those that are found near Veii.

(18) Sabinus also says that pearls should neither be classed as jewels nor as precious stones, which has frequently been established, because the shell on which they are found is formed and grows near the Red Sea.

(19) Moreover, Cassius says that vessels of iridescent glass are not classed as jewels.

(20) Where gold is bequeathed, vases of that metal are included, and where jewels are bequeathed, vases set with gems constitute part of the legacy. In accordance with this, where gold or silver vases are inlaid with jewels, they are accessory to the gold or silver; as we must consider which of the articles was intended for the ornamentation of the other, and not which of them is the more valuable.

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

Where jewels are set in gold, in order to be more easily preserved, we then say that the gold is accessory to the jewels.

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

With reference to silver vessels used for drinking purposes, a doubt may arise whether those only used for actual drinking, or such as are employed for the preparation of beverages, as, for instance, strainers, and small pitchers are included. The better opinion is that they also should be included.

(1) Where perfumes are bequeathed, not only those which are used for pleasure, but also such as we employ in illness as comagena, essences distilled from lilies, roses, and myrrh, as well

as pure nard, which women use for the purpose of appearing more elegant and clean.

(2) Cassius says with reference to basins used for washing the hands that, when his advice was asked, he gave it as his opinion where there were two legatees, to one of whom vessels for eating, and to the other those for drinking purposes were bequeathed, these should be considered as accessory to the table service of food.

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

Under the term clothing is included any fabric which has been woven, even if it has not been cut off, that is to say made up. Material is classed as cloth, which is not yet completely woven, or finished. Therefore, where anyone bequeaths a garment, neither the warp nor the woof of a web will be included.

23. *The Same, On Sabinus, Book XLIV.*

It makes no difference whether garments or clothing is bequeathed.

(1) Under the term "clothing" are included all goods made of wool, flax, silk, or cotton, which are intended to be worn or used as garments, girdles, cloaks, wraps, carpets, or coverlets, and any designs, stripes, or embroidery sewed to such articles, are classed as accessories of the same.

(2) Clothing is either intended for the use of men, women, or children, or is common to both sexes, or is used by slaves. That peculiar to men is such as is designed for the use of the head of the household, for instance, togas, tunics, small capes, mantles, military cloaks, and other things of this description.

Garments peculiar to children, are such as are used for no other purpose, as for example, the toga prætexta, short tunics, Greek cloaks, and capes such as we purchase for our offspring.

Women's clothing is that intended for the use of the mother of the family, and which a man cannot readily wear without censure; as for instance, gowns, mantles, tunics, capes, belts, and hoods, which are designed rather to protect the head than for the purpose of ornament, veils, and travelling cloaks.

Those are common to both sexes which both women and men use indiscriminately, such as cloaks, capes, and other garments of this kind, which either a man or his wife can wear without rendering themselves liable to unfavorable comment.

The garments of slaves are such as are intended to clothe them, for example, capes, tunics, linen gowns, cloaks, wraps, smock frocks, and other articles of this description.

(3) Where clothing is bequeathed, it may also consist of furs;

24. *Paulus, On Sabinus, Book XI.*

As some persons have tunics and robes made of furs.

25. *Ulpianus, On Sabinus, Book XLIV.*

This is proved by the fact that certain nations, for instance the Sarmatians, clothe themselves in skins.

(1) Aristo says that receptacles for clothing, and the coverings of seats, are also included in a legacy of this kind.

(2) Fillets set with pearls, as well as buckles, should rather be classed as ornaments than clothing.

(3) Tapestry which is either used to recline upon, or as a covering, is also embraced in a bequest of clothing. I do not think that the cloths and housings used for horses should be considered as clothing.

(4) Cloths with which to wrap the thighs or legs and felt caps are included under the term clothing, because by means of them a portion of the body is clad. Felt socks are also included, because they are used to protect the feet.

(5) Pillows are also included in the term clothing.

(6) Where anyone makes use of the expression "His clothing" it is evident that he means that which he himself has for his own use.

(7) Mattresses are also clothing.

(8) The skins of goats and lambs are clothing.

(9) Pomponius, in the Twenty-second Book on Sabinus, very properly says that where the wardrobe of a woman is bequeathed the garments of female infants and young girls are also included, for the term "woman" means all persons of the feminine sex.

(10) Ornaments peculiar to woman are those with which she decorates herself, as, for instance, earrings, bracelets, necklaces, rings (with the exception of those used for seals), and all articles which are designed for no other purpose but the adornment of the body, to which class also belong trinkets of gold, jewels, and precious stones, for the reason that they themselves have no other use.

Toilet-articles consist of those things by the use of which a woman becomes more neat and clean. Among them are included mirrors, urinals, ointments, vessels to contain the latter, and other articles of the same kind, bathing utensils, and chests. The following are classed as ornaments, namely, fillets, coifs, small hoods, head dresses, pins set with pearls which women are accustomed to have, and small nets for the hair.

A woman can be clean and still not be adorned, as is the case with those who have washed themselves clean in the bath, and have not yet put on their ornaments; and, on the other hand, a woman may arise from her sleep decorated with her ornaments, but still she will not be clean.

(11) Pearls, where they are not unstrung, or any other precious stones where they can be readily detached from their settings, may be said to be included among ornaments. Where, however, precious stones, pearls, or jewels are still rough, they will not be considered as ornaments, unless the intention of the testator was otherwise, when he desired articles of this kind intended for adornment to be included in the class and under the name of ornaments.

(12) Ointments, such as are used in illness, do not come under the head of toilet-articles.

26. *Paulus, On Sabinus, Book XI.*

Although there are certain articles of dress which are intended for embellishment rather than to cover the body, still, because they are designated by the name of clothing, they should be considered to belong to the category of garments, and not to that of ornaments.

In like manner, it is well established that those articles should be classed as ornaments which women make use of to increase their beauty, and adorn themselves; and it makes no difference if some of these things are used for other purposes (as hoods and other headdresses) , for although they protect the body, they are still considered to be ornaments rather than clothing.

27. *Ulpianus, On Sabinus, Book XLIV.*

Quintus Mucius, in the Second Book on the Civil Law, says that silver plate should be classed as manufactured silver.

(1) The question arises where a bequest of all the silver of a testator is made whether his silver coin should also be held to be included in the legacy. I think that this should not be done, for

no one ordinarily classes his money as silver-ware. Likewise, where manufactured silver is bequeathed, I do not think that coins are included, unless it plainly appears that the intention of the testator was otherwise.

(2) Where all the silver of the testator was bequeathed, there is no doubt that any which may have been placed with him for safe-keeping will not be due to the legatee, for the reason that what he cannot claim as his own is not considered to belong to him.

(3) Where a legacy of manufactured gold or silver is bequeathed to anyone, and it has been broken or damaged, it will not be included in the legacy; for Servius is of the opinion that manufactured gold or silver should be held to be such as we can conveniently use, but that silver vessels which are broken or damaged, do not come under this head, and should be classed as manufactured silver.

(4) Where a bequest is made to anyone of all the gold which may belong to the testator at his death, he can claim all the gold which the latter had at that time. Where, however, a distribution of his articles of gold was made by the testator, it then becomes a matter of importance to ascertain in what terms the legacy was expressed. If manufactured gold is bequeathed, where anything has been made out of the gold it will all belong to him to whom the legacy was left, whether it was intended for the use of the testator, or for that of someone else; as, for instance, gold vases, ornaments, seals, jewels for women, and all other articles of this description. When, however, unmanufactured gold is bequeathed, which is of such a character that it cannot be made use of without being worked up, and which the testator regarded as unmanufactured gold, it will be considered to have been bequeathed.

But if engraved gold or silver is bequeathed, the testator will be held to have left by his will that on which any design is traced, as, for instance, articles made at Philippi, and also medals, and other things of this kind.

(5) Where silver is bequeathed, I do not think that vessels used as receptacles for discharges from the bowels are included, because they are not classed as silver ware.

(6) Anyone may properly define manufactured silver to be such as is not in bulk or in sheets, or which does not consist of inlaid pieces, or of furniture, toilet articles, or personal ornaments.

28. *Alfenus Verus, Digest, Book VII.*

Where silver destined for the use of the testator is left by will to anyone, together with his wardrobe and his furniture, the question arises for what use these articles would seem to be intended; whether the silver designed for daily table service of the head of the household was meant, or whether the silver tables and other things of the same kind which the testator did not use continually, but was accustomed to lend for games, and on other important occasions were referred to. The better opinion is that the silver only is included in such a bequest which was designed for the ordinary table service of the testator.

29. *Florentinus, Institutes, Book XI.*

Where material of another description is inserted in gold or silver, and the legacy consists of manufactured gold or silver, whatever is inserted in them will be due to the legatee.

(1) In order to determine which of the two materials is accessory, the intention and custom of the testator, as well as the use which he made of the article in question, must be ascertained.

30. *Paulus, On the Allotment of Freedmen.*

Where anyone bequeaths a legacy as follows, "I give and bequeath to my wife her toilet articles, her ornaments, or everything which I have acquired for her use," it is well established that everything is due. Likewise, when a bequest is made as follows, "I give and bequeath to Titius the wine which I have in the city, or in the harbor," he will be entitled to all of them; for

the word "or" is introduced for the purpose of extending the scope of the legacy.

31. *Labeo, Epitomes of the Last Works of Javolenus, Book II.*

A certain man left a large dish, one of medium size, and one still smaller, as follows: "I bequeath to So-and-So my smaller dish." It was held that the dish of medium size was bequeathed, if it did not appear which dish the testator intended to designate.

32. *Paulus, On Vitellius, Book II.*

Where manufactured silver is bequeathed, the legacy will include the brazen ornaments added to the feet of silver vessels, and all other articles which can be brought under the same category.

(1) Under the term "manufactured gold" are included jewels set in rings, even though they belong to the rings. Small cups encrusted with gold, and pearls which are set in the jewelry of women in order that the brilliancy of the gold may be enhanced, are also included under the head of manufactured gold. Golden ornaments which are inserted in precious stones and silver plates, and which can be unsoldered, Gaius says are included in the legacy; but Labeo does not adopt his opinion. Tubero, however, says that the legacy includes everything that the testator classed as gold, otherwise articles of silver gilt and vases of any other material enclosed in gold should not be classed as gold.

(2) Where silver vessels used for eating or drinking are bequeathed, and any doubt arises as to which of these classes they belong, the custom of the testator must be taken into consideration; but this is not the case where it is certain that an article does not belong to either class.

(3) A certain officer of the *triarii* left his wife some silver articles to be used while eating, and, as the testator included among his silverware vessels used both for eating and drinking the question arose whether these also were embraced in the legacy. Scævola gave it as his opinion that they were.

(4) Likewise, where a question was raised with reference to the following legacy, "Let my dear daughter, in addition, take from the bulk of my estate, and let her have for her use my entire wardrobe, together with the gold, and everything else destined for the use of women," as the testatrix was engaged in business, it was asked whether not only the silver which was in her house or her wareroom for her own use was left, and also whether that which she had in her place of business could be considered silver for the use of women, and would be included in the legacy. The answer was if the testatrix had silver plate destined for her own use, that which she kept for the purpose of sale would not be held to have been bequeathed, unless the party who claimed it could prove that she also had this in her mind when she made the bequest.

(5) Neratius relates that Proculus was of the opinion that where vases of electrum were bequeathed, it made no difference how much silver or electrum the vases in question contained. But how could it be decided whether the silver was accessory to the silver, or the silver to the electrum? This could be readily determined from the appearance of the vases. If the question should still remain in doubt, it should be ascertained in what class the party who made the will was accustomed to include the said vases.

(6) Labeo, by his will, made a special bequest of her wardrobe to his wife Neratia, as follows: "All her toilet articles, and all her ornaments intended for the use of women, all wool, linen, and purple cloth dyed of various colors, both finished and unfinished, etc." This unnecessary multiplication of terms does not change the nature of the property, because Labeo mentioned the wool, and afterwards many different colored woolen articles, just as if wool ceased to be such after it was dyed, for even if the expression "of various colors" had been omitted, the wool of different colors would still be due, if it was not clear that the intention of the deceased

was otherwise.

(7) Titia bequeathed her toilet articles intended for the use of women to Septicia. The latter understood that the jewelry and necklaces set with gems and pearls, and the rings, together with the garments of one color as well as those of different colors, were left to her. The question arose whether all these things were included under the head of toilet articles. Scævola answered that, in accordance with the facts stated, only such silver vessels as were employed in the bath would be included in toilet articles for the use of women.

(8) Again, where a testator bequeathed earrings set with two large pearls and two emeralds, and afterwards removed the pearls, the question arose whether the earrings would be due after the pearls had been removed. The answer was that they would still be due if the earrings remained, even though the pearls had been removed from them.

09) He also rendered a similar opinion in another case, where a man made a bequest of a necklace composed of thirty-four cylindrical stones, and an equal number of circular pearls, and afterwards removed four of the cylinders, and six of the pearls.

33. *Pomponius, On Quintus Mucius, Book IV.*

There is no difference between the expressions garments for men, and clothing for men, but the intention of the testator sometimes creates difficulty, if he himself was accustomed to make use of some garment which was also suitable for women. Therefore it should, by all means, be ascertained whether the garment bequeathed was the one which the testator had in his mind, and not that which was actually destined for the use of women, or for men. For Quintus Mucius says that he knew a certain senator who was in the habit of wearing women's clothing at the table, and who, if he should bequeath a garment used by women, would not be considered to have had in his mind one which he himself was accustomed to make use of, as if it was one suitable for his sex.

34. *The Same, On Quintus Mucius, Book IX.*

Quintus Mucius said that if the head of a household should bequeath all his gold to his wife, she would not be entitled to that which he had given to a goldsmith for the purpose of being manufactured, or any which was due to him and had not been returned by the goldsmith. Pomponius: This opinion is partly true and partly false. For with reference to the gold which was due to him, there can be no question; for instance, if he had contracted for a certain number of pounds of gold, the gold to which he was entitled under the contract would not belong to his wife, since it had not yet become the property of her husband ; for he bequeathed to her what belonged to him, and not that which he had a right to collect by an action at law.

So far as the goldsmith is concerned, the opinion is incorrect, if the party gave the metal to him in order that he might make something for him out of it; since, although the gold was in the hands of the goldsmith, this does not change its ownership, as it still remains the property of him who gave it, and he is only obliged to compensate the goldsmith for his labor, on which account we come to the conclusion that the wife will still be entitled to it.

If, however, he gave the metal to the goldsmith, not in order that some article might be manufactured out of it, but out of other gold, then, as the ownership of the metal is transferred to the goldsmith, because an exchange is considered to have taken place, this gold will not pass to the wife.

(1) Quintus Mucius also says that if a husband, having five pounds weight of gold, should make a bequest as follows, "Let my heir deliver to my wife any gold which I may have acquired for her use," even if the husband has sold a pound of gold, and, at the time of his death, not more than four pounds should be found, the heir will be obliged to furnish the entire five pounds, as the terms made use of are indicative of the present time. This opinion,

so far as it is applicable to the legal obligation, is correct; that is to say, the heir is liable by operation of law.

It should, however, be remembered that if the testator alienated the above-mentioned pound of gold, because he desired to diminish the legacy to his wife, then the changed intention of the deceased will permit an exception based on bad faith to be pleaded, so that if the woman should insist in bringing suit to recover the five pounds of gold, she can be barred by an exception on that ground. But where the testator disposed of the gold, having been compelled to do so through necessity, and not because he desired to diminish the legacy, then the five pounds of gold will be due to the woman by operation of law, and an exception on the ground of bad faith will avail the heir nothing against the claimant.

(2) Where a testator makes a bequest to his wife as follows, "I bequeath to my wife any gold which may have been acquired for her use," Quintus Mucius very properly says that this clause contains in itself the designation and the proof of the legacy. Therefore, if the testator has alienated a pound of gold, no more than four pounds weight will remain due by operation of law, and it will not be necessary to consider for what reason the testator disposed of it.

35. *Paulus, Opinions, Book XIV.*

"I desire five pounds weight of gold to be given to Titia, with whom I have always lived without any disagreement." I ask whether the heirs shall be compelled to furnish the gold entirely in kind, or to pay the value of the same; and what amount they must pay. Paulus answers that either the gold in question must be furnished, or the price of the same, whatever it can be purchased for.

(1) I also ask if, issue having been joined in the above-mentioned case, and the Prætor having decided that the gold itself must be furnished, whether the guardians of a minor, who is the heir against whom the decree was rendered, and who applied to the successor of the Prætor for a decree for the complete restitution of their ward, shall be heard with reference to the said decree. Paulus answered that the Prætor had rendered a proper decision who, where gold had been bequeathed, ordered the amount of the same to be delivered.

36. *Scævola, Opinions, Book III.*

"I charge my heirs to deliver to my dearest Seia any golden cup which she may select." As the assets of the estate do not include anything but bowls, goblets, small measures, or drinking vessels, I ask whether Seia can make her collection from these articles. The answer was since the word "cup" is applicable to everything intended for drinking purposes, she can make her selection from them.

37. *Paulus, Opinions, Book XXL*

I gave it as my opinion that woman's clothing is not included in the term "ornaments," and that a mistake of the heir does not change the law.

38. *Scaevola, Opinions, Book V.*

Titia, by her will and a codicil, specially bequeathed under a trust several articles of silver and of clothing. I ask whether any other property than that which may be found among the assets of the estate will be included in the legacy. The answer is that what is found will be included, and that security must be furnished to deliver the balance, in case it should be found.

(1) "I wish my Tabian mantles, and three tunics with their capes, also to be given to Sempronia-Pia, to be selected by herself." I ask whether Sempronia will have the right to make her selection of the different tunics and capes from all the clothing of the deceased, that is to say, from her entire wardrobe. The answer is that if the tunics with the capes were left separately, she could only make her choice from those of the same kind; but if this was not the case, the heir would have a right to furnish them from the entire wardrobe, or to pay her their

appraised value.

(2) Seia made the following provision in her will: "If I, myself, should be prevented from doing so by the uncertainty of human affairs, I desire, and I direct that the bust of such-and-such a god, of a hundred pounds weight, be placed by my heirs in such-and-such a holy temple, with an inscription including my name, and stating that I have caused it to be set up in my native city."

As there were no other gifts in this temple except some of bronze or silver, the question arose whether the heirs of Seia would be compelled to provide a silver, a gold, or a bronze bust. The answer was that, in accordance with the facts stated, one of silver should be placed there.

39. *Javolenus, On the Last Works of Labeo, Book II.*

Where toilet articles intended for women are bequeathed to a wife, Ofilius and Labeo gave it as their opinion that she will only be entitled to such as have been given to her by her husband for her own use. If this should be interpreted otherwise, great harm would result when a goldsmith or a silversmith makes such a bequest to his wife.

(1) Where a legacy was bequeathed as follows, "I leave to So-and-So the silver which may be found in my house at the time of my death," Ofilius holds that silver deposited with the testator or loaned to him, ought not to be included. Cascellius is of the same opinion with reference to silver that was loaned. Labeo thinks that what was deposited with him will be due to the legatee, if it was left with him forever as treasure, and not merely for temporary safe-keeping; because the words, "Which may be found in my house at the time of my death," should be understood to mean that which was ordinarily there. I approve of this opinion.

(2) Attius says Servius held that where a testator left a certain person the silver "which he might have on his Tuscan estate when he died;" that also was included in the legacy, which, before the testator's death, had, by his direction, been taken from the city to the Tuscan estate. The case, however, would be different if it had been removed without his order.

40. *Scaevola, Digest, Book XVII.*

A testator bequeathed to his physician, who resided with him and accompanied him on all his journeys, among other things, the following, "I wish the silver, which is used on my journeys, to be given to him." As the testator was absent at different times on public business the question arose what silver should be considered as included in this legacy. The answer was that that would be included which the testator had in his possession at the time when he made his will.

(1) A bequest was made by a husband to his wife as follows, "I bequeath to my wife, Sempronia, in addition, the silver-ware used in the bath." The question arose whether the silver which the testator was accustomed to use in the bath on feast-days was embraced in the legacy. The answer was that all of it was considered to have been bequeathed.

(2) A woman, at the time of her death, made the following bequest of her ornaments: "I wish all my jewelry to be given to my friend Seia." She also added in the same will: "I desire my funeral to be conducted in compliance with the wishes of my husband, and whatever my burial ceremonies may be, I desire to have buried with me, of my jewelry, two strings of pearls, and my emerald bracelets."

When the body of the deceased was committed to the earth, neither her heirs nor her husband buried her with the jewelry, which she directed to be placed upon her body. The question arose whether the aforesaid articles would belong to the woman to whom she left all her jewelry, or to her heirs. The answer was that they would not belong to the heirs, but to the legatee.

TITLE III.

CONCERNING THE BEQUEST OF A RELEASE FROM LIABILITY.

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

Obligations due from all kinds of debtors can be lawfully bequeathed to them, even though they may be the owners of said obligations.

(1) Julianus stated that if property which is pledged is bequeathed by a creditor to his debtor, the legacy will be valid, and the debtor will be entitled to an action to recover the pledge before he pays the money due. In this instance, Julianus seems to have had in his mind a case where the debtor would not profit by the transaction. Where, however, the intention of the testator was otherwise, he can be released from the obligation just as if he had paid the debt.

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

When an heir was charged not to demand anything of the security, he can collect the debt from the principal debtor; but when he was forbidden to collect it from the latter, and demands it of the security, Celsus thinks that he will be liable to the principal debtor under the terms of the will.

(1) Celsus also says that he has no doubt that where an heir has been forbidden to collect a debt from a debtor, his own heir cannot collect it.

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

It is certain that, at present, a release can be bequeathed to a debtor.

(1) But, even if the testator, at the time of his death, should give a debtor his note, I think that the latter will be entitled to an exception, as the surrender of the note will be valid as a trust.

(2) Julianus, in the Fortieth Book of the Digest, says that if anyone, when about to die, should give a note of Seius to Titius, and direct him to deliver it to Seius after his death; or, if he should recover, return it to him; and then Titius should give the note to Seius after the death of the creditor, and the heir of the latter should attempt to collect the debt, Seius will be entitled to an exception on the ground of fraud.

(3) Let us now see what will be the effect of this legacy. And, indeed if the release of a debt is left to me the only debtor, and an attempt is made to collect it from me, I can avail myself of an exception; or, if such an attempt is not made, I can bring an action to obtain a discharge from liability by means of a receipt. Still, even though I may be a joint-debtor with another party, for instance, where both of us are principal debtors, and the testator desired to favor me alone, I can bring suit, not to be discharged from liability by a receipt, nor that my fellow-debtor may be released against the intention of the testator, but that I may be released by an agreement.

But what if we were partners? Let us see whether I should be released by means of a receipt; otherwise, would I not be subjected to annoyance, if suit were brought against my fellow-debtor? Julianus, in the Thirty-second Book of the Digest, states that if we are not partners, 1 ought to be released by an agreement, but if we are partners, this should be effected by means of a receipt.

(4) Hence the question arises, whether a partner should be considered a legatee whose name is not mentioned in a will, although it is an advantage to both parties if they are partners. It is true that not only he whose name is mentioned in a will should be considered a legatee, but also he who is not mentioned therein, if the testator had him in his mind at the time when the release was bequeathed.

(5) Both parties, however, are considered to be legatees in this instance. For if 1 owe anything to Titius, and, in order to favor me, the bequest is made to him on condition that 1 shall be

released, no one will deny that 1 am a legatee, as Julianus states in the same Book; and Marcellus says in a note that the legacy is bequeathed to both parties, as much as to my creditor, even though 1 may be solvent, for it is always to the interest of the creditor to have two debtors liable for the same obligation.

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

What then must be done, as the creditor can bring an action under the will? The heir should not have judgment rendered against him, unless security is furnished him for defence against the debtor. Likewise, if the debtor should institute proceedings, the heir is required to do nothing more than to protect him against the creditor.

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

Where a testator has a principal and a surety indebted to him, and bequeaths a release to the principal, Julianus states in the same place that the principal ought to be released by means of a receipt; otherwise, if the heir should sue the surety, the principal debtor will be brought into the case in another way. But what if the surety intervenes for the purpose of making a donation, and has no recourse against the principal debtor? Or, what course must be pursued if the money had come into the hands of the surety, and he had given a principal in his stead, to whom he himself furnished a surety? In this instance, the principal debtor should be released by agreement. We are, however, accustomed to hold that the same exception on the ground of contract to which the principal debtor is entitled should be granted the surety. We say that this does not, in any way, apply to this case; as, when a testator leaves a legacy, his intention is one thing, and that of the heir when he makes an agreement is another.

(1) If, however, a release should be bequeathed to a surety, there is no doubt, as Julianus says that the surety should be released by the agreement of the heir. Still, I think that in a case of this kind he should sometimes be released by a receipt, if the party himself was the actual debtor, or if he was a partner with the principal in the transaction.

(2) Julianus, in the same Book, also states that if a son under paternal control should become a debtor, and his release is bequeathed to his father, the latter ought to be discharged from liability by an agreement, to avoid the son from being released. And he adds that it makes little difference whether there is any property in the *peculium* of the son on the day when the legacy vests, or not, for the father will always be secured by means of the legacy; and he holds that this is especially the case when the amount of the *peculium* is considered with reference to the time when the judgment was rendered.

Julianus compares a husband to a father where his wife, after divorce, bequeathed him a release from liability for her dowry; for he, also, although he may not have been solvent at the time when the legacy vested, will be a legatee, and he says that both the parties cannot recover what has already been paid. The better opinion, however, as Marcellus observes, is that the father can bring an action, for he was not yet a debtor when he made payment, as the husband cannot do this, if he has paid the debt. For even if anyone should think that the father was a debtor, still, he only occupies the place of a conditional debtor, and there is no doubt that he can recover what he paid.

(3) Where, however, an heir is charged to release the son, Julianus does not add that the former should be released, either by a receipt or by an agreement, but he seems to think that the son should be discharged from liability, as it were, by a receipt; which transaction would also be a benefit to the father. This rule should prevail, unless it can be clearly proved that the testator intended otherwise, that is to say, that neither the son nor the father should be annoyed; for in this instance he ought to be released, not by means of a receipt, but by an agreement.

(4) Julianus also says that where a father becomes surety for his son, and his release is

bequeathed to him, he should be discharged from liability by an agreement, as a surety, and not as a father; and therefore suit can be brought against him with reference to the *peculium.* Finally, he thinks that this rule only applies where the testator intended that he should be released as a surety, but if he intended that he should also be released as a father, he should also be discharged from liability for the *peculium.*

6. *Javolenus, Epistles, Book VI.*

But, after the emancipation of the son, the father will only be entitled to an action to the extent of whatever forms part of the *peculium* of his son, or when the latter may have paid out anything for the benefit of his father; since the property which it is to the interest of the father to have, will belong to him by virtue of the legacy.

(1) The inquiry may be made, whether the father can bring suit under the will for this purpose, with the result that the son will also be released from liability to an action. It has been held by certain authorities that the proceeding has this effect, because it is considered that it is to the interest of the father that his rights should remain unimpaired, where he gives his son his *peculium* after his emancipation.

I, however, hold the contrary opinion, and I think that nothing more should be granted to the father under the terms of the will, than that he should be required to pay only what could be collected by the heir.

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

Moreover, not only what is due can be remitted, but also a portion of the same, that is to say, a part of the obligation, as is stated by Julianus in the Thirty-third Book of the Digest.

(1) Where he who has stipulated for the delivery of Stichus, or ten *aurei,* charges his heir not to demand Stichus, it is established that the legacy is valid; but let us consider what it includes. Julianus says that it appears that an action can be brought under the will to compel the discharge of the debtor by a receipt, which will also release him so far as the ten *aurei* are concerned, because a receipt is equivalent to payment; and just as the debtor should be released if he had delivered Stichus, so he will be discharged from liability by the receipt for Stichus.

(2) If, however, the heir should be charged to release the debtor from the payment of twenty *aurei,* Julianus also states, in the Thirty-third Book, that the debtor should, nevertheless, be released from liability for ten, as if he obtains a receipt for twenty, he will be discharged from liability for the former amount.

(3) Where two heirs have been appointed by a debtor, and he charges one of them to pay his creditor, the legacy will be valid so far as his co-heir is concerned, and the latter will have a right to bring suit to compel payment to the creditor.

(4) A release bequeathed to a debtor only becomes effective where payment has not been required from him, during the lifetime of the testator; if, however, it has been required, the legacy is extinguished.

(5) Therefore Julianus asks, if a release is bequeathed, and the substitute of a minor child is charged with the same, and the minor afterwards exacts payment of what is due, whether the legacy will be extinguished. And, as it is established that a minor, so far as a legacy with which his substitute is charged is concerned, occupies the same position as an heir charged with a conditional bequest, the result is that the substitute will be liable to an action under the will, if the minor should demand payment of the claim by the debtor.

(6) The same rule applies where the minor does not exact payment, but only institutes proceedings in court, for the substitute will be compelled to have the action dismissed.

(7) For if the release had been bequeathed to the debtor conditionally, and either issue had

been joined, or payment had been exacted before the condition was fulfilled, the debtor will still be entitled to his action under the will to obtain the release which was bequeathed to him.

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

We can not only make a bequest releasing our debtor, but also one releasing our heir and anyone else whomsoever.

(1) An heir can be charged not to demand payment of a debtor within a certain time, but there is no doubt that he should not release him during the intermediate time; and if the debtor should die, the debt cannot be collected from his heir within the said period.

(2) It should be considered whether the heir can collect interest on penalties for the time during which he is forbidden to demand the debt. Priscus Neratius held that to make such a demand would be contrary to the will, which is correct.

(3) A bequest like the following, "My heir must not collect the debt from Lucius Titius alone," does not pass to the heir of Lucius Titius, if, during the lifetime of the latter, nothing was done in opposition to the will by the heir attempting to collect the debt from him; for whenever property which is bequeathed attaches to the person of the legatee, it is in the nature of a personal servitude, and does not pass to his heir; but if it does not attach to his person, it will be transmitted to his heir.

(4) If the words granting the release refer to matters *in rem,* the effect is the same as if the heir had been specifically forbidden to collect the claim from either the debtor, or his heir, as the addition of the heir is of no force or effect; just as would be the case if the person of the debtor himself had not been included.

(5) He who is directed to render accounts is not considered to have complied with the wishes of the testator, if he does not produce his accounts, but merely pays the balance remaining in his hands.

(6) Where an heir is forbidden to bring suit against the agent who attended to the affairs of the deceased, it is not considered to be for the benefit of the legatee, if the obligation was contracted by the bad faith or the fraud of him who transacted the business, and the testator will be held to have entertained this opinion. Therefore, if the heir should institute proceedings against the agent on the ground of business transacted, and the latter brings suit under the will for an indeterminate amount, he can be barred by an exception on the ground of fraud.

(7) A release may also legally be bequeathed to anyone with whom I leave a deposit, or to whom I make a loan for use, or give property in pledge, or to one who is obliged to make good to me the proceeds of a theft.

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

When an heir is forbidden to require the rendition of accounts, it has been very frequently stated in rescripts that he will not be prevented from demanding balances which are due, where the parties have them in their possession, or where the agent who transacted the business has been guilty of any fraudulent act. If anyone should desire to release another from liability on this account also, he should make his bequest as follows: "Let my heir be charged to return to So-and-So anything which he has collected from him by such-and-such and such-and-such a suit, or release him from liability under said actions."

10. *Julianus, Digest, Book XXXIII.*

Where an heir is charged not to collect anything from a surety, and to pay to Titius what the principal owes; he ought to agree not to make a demand of the surety, and to assign to the legatee his rights of action against the principal debtor; just as when an heir is charged not to collect anything from the principal debtor, and to pay to a third party the amount that the

surety owes, he must give a receipt to the principal, and will be compelled to pay to the legatee the amount fixed by the court as due from the surety.

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

If a debtor should order his surety to be released by his heir, ought he to be released? The answer is that he should be. As the heirs are liable to an action on mandate, the inquiry was also made whether the legacy was not void, as the debtor made a bequest to his creditor. The answer was that, whenever a debtor makes a bequest to his creditor, the legacy will be void if it should not rather be to the interest of the creditor to bring an action under the will, than one founded on the original obligation; for if Titius should have directed Mævius to promise the payment of a certain sum of money, and afterwards should direct him to be released by the stipulation, it is clear that it is more to the interest of the party making the promise to be released than to pay the amount in accordance with the stipulation, and then to bring an action on mandate.

12. *The Same, Digest, Book XXXIX.*

Lucius Titius, who employed Eros as his agent, made the following provision in his codicil, "I desire Eros to be free, and I wish him to render an account of all that he has done, during the time subsequent to my last signature." He, afterwards, while still living, manumitted Eros, and, at the same time, the slave rendered his accounts, and the testator signed them up to that date, which was only a few days before he died. The heirs of Lucius Titius alleged that Eros had received certain sums of money, both while he was still a slave and after he became free, and did not include these in the accounts which were signed by Lucius Titius. I ask whether the heirs can collect anything from Eros for the time preceding the last signature of Lucius Titius. I answered that, according to the facts stated, Eros cannot demand his freedom, unless the sums referred to had been specifically remitted to him.

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

If a creditor should make a bequest to a debtor of what he owes him, and the former can protect himself by a perpetual exception, the legacy will be of no force or effect. If, however, the same debtor should make a bequest to his creditor of what he owes him, he will be understood to have intended that his creditor shall be released from the operation of the aforesaid exception.

14. *Ulpianus, Trusts, Book I.*

The same rule will apply where the debtor was required to make payment within a certain time, or under some condition.

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

Where anyone is charged in a will not to collect a debt from Titius, he cannot sue either him or his heir; nor can the heir of the heir bring an action; nor can the payment of the obligation be demanded of the heir of the debtor's heir. The heir of the heir of the testator can also be charged not to collect the claim from the debtor.

16. *Paulus, On Plautius, Book IX.*

If I should rent a tract of land to anyone for five years, and then bequeath whatever the tenant was obliged to do for me or pay to me, or would be obliged to pay or give to me in the future, and the heir is charged to allow the tenant to have this himself; both Nerva and Atilicinus say that if the heir should prevent him from enjoying the legacy, he would be liable to an action on the lease, and if he should retain anything arising out of the contract of hiring, he would be liable to an action under the will; for the reason that it makes no difference whether he demands something from the tenant, or retains possession of it, as the entire lease is held to have been bequeathed.

17. *Javolenus, On the Last Works of Labeo, Book II.* Any balance due on the lease is also included in the legacy.

18. *Paulus, On Plautius, Book IX.*

Cassius: Even if a lodging has been bequeathed in this way, the heir will be obliged to furnish it gratuitously; and moreover, it has been decided that the tenant can bring an action based on the will against the heir, in order to be relieved of liability under his lease; which opinion is perfectly correct.

19. *Modestinus, Rules, Book IX.*

If we make a bequest as follows, "Let my heir be charged to release from liability So-and-So, who has transacted my business, and not to exact anything from him which he may be obliged to pay to, or do for me," the heir will be charged not to collect any money from the legatee which has been lent to him. It is, however, hardly credible that, by a legacy of this kind, the testator intended there should also be bequeathed to the legatee whatever was due from him to his slaves as their *peculium.*

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

"To my brother Aurelius Sempronius. I do not desire that any of my debtors shall be annoyed on account of their obligations, nor that anything, either principal or interest, shall be collected from them as long as they live; and I return, free from liability and released from pledge, the house and the Carpathian land to the party interested in the same." Modestinus gives it as his opinion that if the debtor himself should be sued, he will be protected by an exception, but that this will not be the case so far as his heir is concerned.

(1) When Gaius Seius was growing up, he received Publius Mævius and Lucius Sempronius as his guardians. While still under lawful age, the said Gaius Seius, being about to die, made the following provision in his will with reference to his curators: "Let no one raise any question concerning my curators, for I myself have transacted my business." I ask whether the heirs of the minor can demand an accounting for the curatorship from the curators, since the deceased, as is apparent from the terms of his will, acknowledged that he had attended to all of his business himself. Modestinus was of the opinion that if the curators had committed any fraudulent act, or if any of the property of the testator was in their hands, suit could be brought against them on this ground.

21. *Terentius Clemens, On the Lex Julia et Papia, Book XL*

If I should bequeath anything which you owe me, either to yourself or to a third party, and you should pay it to me, or be released by me for any other reason, the legacy will be extinguished.

(1) Hence, it was held by Julianus that, even if a creditor should become the heir of his debtor and should afterwards die, the legacy will be extinguished; and this is correct, because an obligation is, as it were, extinguished by confusion, just as it is by payment.

(2) Where, however, a legacy is bequeathed under some condition, and the heir comes in beforehand and collects the debt, another opinion must be rendered; because, while the condition is still pending, the prevention of the payment of the legacy to the legatee, if he is still living and entitled to receive it, does not depend upon the inclination of the heir, nor, if the legatee should not be legally capable of taking it, can the heir prevent the party entitled to the benefit of the legacy from obtaining the same.

22. *Papinianus, Questions, Book XIX.*

"I do not wish anything that Sempronius owes me to be collected." It was decided that the debtor, in order to compel his release, was not only entitled to an exception, but also to an action under the will.

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

An agent from whom the heir was forbidden to require an accounting, and whom he was also charged to release from all liability for any act performed in that capacity, can still be required, by an action on mandate, to pay to the heirs all the money that may be due to him from a banker under a contract which he entered into as an agent, or to assign his rights of action against the said banker.

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

Where an heir is requested to release his debtor, it is held that this only applies to what remains due on the obligation. Therefore, where any of the debt was paid before the will was opened, it will not be included in the trust. But if, after the will has been opened, and before the estate has been entered upon by the heir, who was aware of the intention of the deceased, payment of what is owing should be required, this will closely resemble fraud, and hence the amount can be recovered by the legatee.

25. *Paulus, Questions, Book X.*

Where I bequeathed to Titius what he owed me, either stating or not stating the amount, or, on the other hand, where I make a bequest with a difference, as for instance: "I leave to Titius what I owe him," or "I leave to Titius a hundred *aurei,* which I owe him;" I ask if you think that it should, by all means, be ascertained whether anything is really due; and I furthermore request you to inform me in what way you interpret these matters, which are of every day occurrence. I answered that if the party to whom Titius is indebted wishes to release the debt, it makes no difference whether he directs his heir to discharge him from liability, or forbids him to collect the debt; for, in either instance, the debtor should be released, and in both cases an action will lie in favor of the debtor against the heir, for the purpose of procuring his release.

If the testator mentioned the sum of a hundred *aurei,* or a certain tract of land as being due, and it can be proved that the legatee was the debtor, he should be released. If, however, he does not owe anything,

as a false statement has been made, it may be said that he can also bring an action to recover what is embraced in the legacy. This principle also applies where the bequest was as follows: "Let my heir be charged not to collect the hundred *aurei* which he owes me," or "Stichus whom he owes me."

If, however, he had said, "Let my heir be charged to give to Titius the hundred *aurei* which he owes me," it may be maintained that he can claim them, although the statement is untrue. However, I by no means agree to this, as the testator must have thought that the word "give" had reference to the debt. On the other hand, if the debtor makes a bequest to his creditor, I do not see that the legacy has any validity, if the amount is not stated. But if he should mention the sum which he acknowledges that he owes, the legacy will not be valid except in those instances where its payment will be more advantageous than that of the debt. For if the debtor should bequeath a hundred *aurei,* which he says that he owes, and he does owe them, the legacy is void. If, however, he should not owe them, it has been held that the legacy is valid; for, where a certain sum of money is mentioned, the case is similar to that where Stichus was bequeathed under a false statement. This rule the Divine Pius stated in a Rescript, where a certain sum of money was bequeathed as having been received by way of dowry.

26. *Scævola, Opinions, Book IV.*

A guardian having appointed certain heirs at the time of his death, desired to give to his ward, whose guardianship he had administered, the third part of his estate, provided he did not raise any controversy with his heirs on account of the guardianship, but released them all from liability with reference to the same. The ward obtained the legacy, and, nevertheless,

afterwards demanded of the heirs everything which had come into the hands of his guardian from the sale of property, or from any other source connected with the guardianship. I ask whether, by the terms of the will, he should be excluded from bringing actions of this kind. The answer was that, if he received the benefit of the trust before complying with the condition imposed, and then proceeded to make the claim contrary to the terms of the legacy, an exception on the ground of bad faith could be interposed against him by the heirs, unless he was ready to return what he had received from the trust, which had been granted him as a favor on account of his age.

27. *Tryphoninus, Disputations, Book VIII.*

Let us see whether a person to whom a release has been granted by a will, and against whom an action on the *peculium* is pending, shall be considered to occupy the position of a legatee, if, at the time when a legacy usually vests, nothing should be found in the *peculium.* Even if he is not yet a debtor, it does not follow that he would derive any advantage from the legacy, unless through the hope of some future addition to his *peculium.* Therefore, will his condition as legatee be in suspense, just as ii would be if, for any reason, he should render the expectation of the legacy doubtful? This is the better opinion.

28. *Scævola, Digest, Book XVI.*

Aurelius Symphorus became surety for a certain guardian, and at his death made a bequest to the wards of the latter as follows: "I bequeath five *aurei* to Arellius Latinus and Arellius Felix, individually, when they shall have attained the age of fourteen years, at which time I desire to be paid to each one of them six *denarii* every month for their support, and twenty-five *denarii* every year for their clothing, with which legacy they must be content, since their guardianship has caused me no small amount of annoyance. I also charge my heirs to collect nothing from them on account of the guardianship, nor to retain anything by reason of this legacy."

The question arose, if the said heirs had paid out anything on account of the suretyship, whether they could recover it from the heir of the children, or the party for whom the testator had become surety. The answer was that, in accordance with the facts stated, the heirs of the latter appeared to have been solely charged not to claim anything on account of the guardianship which Symphorus had administered, and which might be due from the wards named Arellius.

(1) A man, having made a will, bequeathed a release to his debtors, and then having unsealed the will and reread it, he executed another in which he repeated the legacy as follows: "I confirm every bequest made in a will which I unsealed, and everything that is written therein."

After the estate had been entered upon under the second will, the question arose whether the debtors who had been released by the first will could demand to be discharged from liability for the sums of money for which they had become indebted after the making of the first will; and if the heirs brought an action against them, whether they could be barred by an exception on the ground of bad faith. The answer was that they would not be released.

(2) Titius made the following bequest to his debtor Seius: "I give and bequeath ten *denarii* to Seius. I also give five to him, in addition to this, all that he owes me both principal and interest." He also, in a general clause, charged his heirs to give and deliver to each one of the legatees what he had left him. Seius afterwards borrowed more money from Titius. I ask whether this money, which was borrowed after the will was made, should also be understood to have been bequeathed to Seius. The answer was that, as the words used by the testator had reference to past time, it should not be held that the last sum borrowed was bequeathed.

(3) Titius, having made a will and appointed his sons his heirs, expressed himself as follows

with reference to his father, who also had formerly been his guardian: "I desire my father Seius to be released from liability to any action on guardianship." I ask in what way these words should be understood, that is to say, whether they mean that the money which had been obtained from the sale of property or the collection of claims, and which the father had converted to his own use, or lent at interest in his own name, should be paid to the children and heirs of the testator, or to his grandchildren. The answer was that this must be determined by the court having jurisdiction of the case, for the presumption of law is that on account of the natural affection entertained by a son, the father should be released from all liability, unless it can be proved by the heirs of the testator that his intention was otherwise.

(4) Mævius, in her will, desired one of her heirs to be released from liability to an action on guardianship, in the following words: "I do not wish an account of the guardianship which Julianus Paulus administered with Antistius Cicero, be required of him, and I wish him to be released from all liability on account of the same."

I ask, if any money derived from the guardianship should remain in his hands, whether it can be collected from him. The answer was that there was nothing in the case stated why money which belonged to the ward and remained in the hands of the guardian should be considered to have been bequeathed.

(5) A testator made the following provision in his will, "I wish my relative Titius to be released from every debt whatsoever that he owes me, and in addition I give him ten *aurei*;" and he inserted the following in a codicil: "I desire, in addition, my heir to release my relative and debtor, Titius, from the payment of interest on any money which he owed me during his lifetime. If my heir should attempt to collect the said interest from him contrary to my wishes, then I desire the said interest be paid to Titius by my heirs as long as he lives."

As the testator evidently had the intention rather to increase than to diminish the legacy, the question arose whether his heirs would, under the terms of the trust, be liable to Titius to compel them to release him from all indebtedness. The answer was that, in accordance with the facts stated, the legacy which the testator had bequeathed in the first place appeared to have been diminished.

(6) Where a testamentary bequest was made as follows, "I wish everything that Seius owes me, or for which I have pledged my faith for him, to be given to him," I ask whether only that which was due at the time when the will was executed was bequeathed, or whether the amount which accrued afterwards by way of interest, was included in the legacy. The answer was that the testator intended that every obligation of the debtor should be cancelled by the trust.

(7) Stichus, having been manumitted by will, the testator left him a tract of land with all its equipment, together with other property, and added the following: "I forbid any account to be rendered by him, because he has the records in his possession." The question arose whether Stichus would be obliged to pay over any sum of money remaining in his hands from the administration of his stewardship. I answered that Stichus was not liable on that ground.

Claudius: No one, after his manumission, is liable for any act committed by him during servitude, and advice has been taken with reference to ascertaining the law as to what is due. Hence the heirs can retain the balance remaining in their hands, along with the *peculium,* or it can be deducted from the *peculium* if the latter is bequeathed.

(8) "I desire the hundred *aurei* which I deposited with Apronianus to remain in his hands until my son reaches the age of twenty years, and I forbid any interest on said money to be collected from him." The question arose whether Apronianus could, under the terms of the trust, maintain that the aforesaid sum was not collected from him before the time prescribed by the testator. The answer was that, according to the facts stated, he could assert such a claim.

(9) A testator appointed his daughters his heirs, and charged them with a trust as follows: "My daughters, do not require Gaius Seius to render any account for the administration of my property, which he has managed in his bank, or out of it, up to the time of my death, and release him from all liability with reference thereto." As the said Gaius Seius had charge of all the property of the testator at the time of his death, and had invested the same in his bank, and out of it, the question arose whether he would be compelled to render an account thereof to the heirs of the testator. The answer was that, in accordance with the facts stated, a release had been bequeathed, but the court must decide what was to be done under the circumstances.

(10) A testator appointed, as his heir, his former guardian, together with his own brother and certain other persons, and bequeathed to his said guardian ten *aurei,* which the latter had expended on his account and on that of his brother. The question arose whether the trust was valid, so far as the guardian was concerned. The answer was that, if the testator had left the amount which was due under a trust, the execution of the trust could not be demanded.

(11) The inquiry was also made if the bequest should prove to be void, so far as the guardian was concerned, whether it would be valid with reference to the brother of the testator; since it was for his benefit, as well as for that of the party who had administered his guardianship, also. The answer was that the legacy was valid so far as the brother was concerned, as he was released from his debt.

(12) The question also was asked whether the guardian should be heard if he agreed to accept the trust, provided that certain clauses of the will were allowed to stand, and others were rejected, alleging, as a reason, that the amount specified in the trust was less than he had advanced for expenses. The answer was that he was not prevented by the terms of the will from claiming everything which he could prove was due to him.

(13) A testator made the following bequest: "I direct the sum of fifty *aurei,* which I have borrowed from my wife on a note to be used in my business, to be paid to her by my heirs." The question arose whether the trust would stand if the husband should prove to be actually the debtor of his wife. The answer was that if the indebtedness existed the trust would be void.

(14) The question also was asked whether the execution of the trust could be demanded, if the wife, having brought suit to collect the money due, should lose the case. The answer was that, according to the facts stated, she could demand the execution of the trust, because it was apparent that the debt was not due on any other ground.

29. *Paulus, On the Lex Julia et Papia, Book VI.*

Where a testator has two principal debtors, and charges his heir to release both of them, and one of them is not capable of receiving a legacy, and they are not partners; the heir should transfer his right of action from the debtor who cannot take the legacy to the one upon whom the law does confer this benefit, and by this proceeding two things will happen, that is, the one who cannot receive the legacy will participate in the benefit, and the one who can receive it, will be released.

If, however, the debtors are partners, the one who is incapacitated will necessarily profit through the other who can receive the legacy, and he will be released by means of a receipt; for the same thing will happen even if the testator had directed that the only one entitled to take under the will should be released.

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

The plaintiff or the defendant, having charged his heir not to take judgment in the Court of the Centumvirs, the question arose as to the effect of this on the legacy. It was decided that the latter was only valid where the adversary of the testator had a bad case, so that he would be beaten in a contest with the heir; for then the heir would not only be obliged to surrender the property which was the subject of the suit, but also to pay all the expenses of litigation to the

legatee. But if he had a good case, there does not seem to be anything in the legacy, not even the expenses, as some authorities have held.

31. *Scævola, Opinions, Book III.*

A creditor made the following bequest to his debtor: "I desire everything due to me from Gaius Seius, and which he has secured by pledging his gardens, to be given to him by my heirs." If the testator, during his lifetime, had received any payment from Seius, I ask whether this could be claimed as due under the legacy. The answer was that, in accordance with the facts stated, it could not be claimed.

The same party again applied for advice, alleging that the testator, before making the codicil by which he left the bequest, had received almost all the principal and interest of the debt, so that but a very small portion of the debt remained, and asked whether he would have a right of action for recovery on account of the clause, "everything due to me which is related to the past." The answer was that, with reference to the facts stated in the first place, my opinion was correct; but so far as those stated subsequently were concerned, something had been added, and the point must be decided by the court, who should ascertain whether the testator, having forgotten that the money had been paid, had made this provision; or because payment was without his knowledge; or whether he had acted designedly, as he wished that the amount due, rather than the right to demand a release, should be bequeathed.

(1) A testator, among others, made the following bequest to his freedman: "If he has transacted any business for me during my lifetime, I forbid any accounting to be required of him therefor." The question arose whether he would be compelled to surrender to the heirs the books in which the accounts were kept, as well as any sums remaining in his hands as shown by the entries of receipts and expenditures. The answer, with reference to the matter in question, was that the heir was also entitled to claim what the steward had lent to his fellow slaves who formed part of the estate, which sums, expended for the benefit of his master, should be deducted from the balance in his hands.

(2) Titia, who had had two guardians, made the following provision in her will: "I do not wish an account of my guardianship which Publius Mævius and Lucius Titius administered, to be required of the former." The question arose whether any money remaining in his hands from the administration of the guardianship could be collected from him. The answer was that there was nothing in the case stated to lead to the belief that the money which belonged to the ward, and remained in the hands of the guardian, was bequeathed.

(3) The question was also asked whether the fellow guardian should also be considered to have been released. The answer was that the fellow guardian was not released.

(4) "With reference to Gaius Seius, who has been especially deserving, I do not wish that anything he owes me in notes, or on account, or whatever he has borrowed from me, or any obligations I may have contracted for his benefit be required either of him or of his heirs." I ask whether only the amount of money due at the time when the will was made was bequeathed, or whether any of the interest which had accrued on the said sum afterwards, was included in the legacy. The answer was that, in accordance with the facts stated, it appeared that the testator intended all the obligations of Seius due to himself to be discharged by virtue of the trust.

(5) It was also asked, after an obligation had been renewed and the amount of the debt increased, whether what was due under the old contract would still be included in the legacy; or where a renewal had been made, and the party having become, as it were, a new debtor, he could be sued for the increased amount. The answer was that only that was considered to have been bequeathed which the party owed at the time, but if the testator still adhered to his original intention, the legacy would include all the indebtedness existing at the time of his death.

TITLE IV.

CONCERNING THE CANCELLATION OR TRANSFER OF LEGACIES AND TRUSTS.

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

Where a testator, having bequeathed the right to drive cattle through his land, does not grant the right of way, he omits nothing from the legacy, for the reason that the right to drive cattle cannot exist without the right of way.

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

Where a tract of land is devised, a reservation may be made as follows, "I do not give or bequeath to So-and-So any other right attaching to the said land except the usufruct of the same," in order that the usufruct may constitute the legacy.

(1) The usufruct, however, can be reserved, so that only the mere ownership will be left.

(2) In like manner, a part of the land bequeathed may be reserved.

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

If anyone should make a testamentary disposition as follows, "I give and devise such-and-such a tract of land to Titius, and if Titius should die, let my heir be charged to give it to Seius," the devise is held to be legally transferred. Even if the party to whom it was left in the first place should be dead at the time of the transfer of the property, Seius will be entitled to it.

(1) If anyone should make a bequest to Titius as follows, "Let my heir give such-and-such an article to Titius, or if Titius should die before receiving it, let him give it to Sempronius," according to the strict construction of the law, the heir will appear to be bound to both parties, that is to say to Sempronius and to the heir of Titius. If, however, the testator's heir should be in default in delivering the property to Titius, the right to demand the legacy will be transmitted to his heirs, and Sempronius will have no claim to it; but if there should have been no default, Sempronius, and not the heirs of Titius, will then be entitled to receive the legacy. But if Titius should die before the time when the legacy vests, Sempronius alone will be entitled to it.

(2) The same thing must be said where an estate is left in trust for the benefit of a boy, and his mother becomes the legatee if he should die before obtaining the estate, so that if he dies before the time when the legacy vests the mother will be entitled to it; but if he dies afterwards, the benefit of the trust will pass to the heirs of the child, just as if there had been default in the execution of the trust itself.

(3) Where, however, anyone makes a bequest as follows, "Let my heir deliver such-and-such property to Titius, and if he does not do so, let him deliver it to Sempronius," Sempronius will only be entitled to the legacy, if at the time it vests, Titius should be incapable of acquiring it.

(4) If anyone should make a bequest as follows, "Let my heir give such-and-such a tract of land to Titius, and if Titius should alienate the same, let my heir give it to Seius," the heir will be charged with both trusts; for Titius is not charged with the trust if he should alienate the land, but the heir is charged with the devise to him. Therefore the heir, by filing an exception on the ground of bad faith, should provide for himself and exact security from Titius not to alienate the land.

(5) If anyone reserves more than he leaves, his reservation will be valid; as, for instance, if he should bequeath twenty *aurei,* and reserve forty.

(6) If a testator should bequeath the usufruct of certain land, and reserve the right of way, his reservation is void, but the legacy will not be invalidated, just as where a person leaves the ownership of land, reserving the right of way, the legacy will not be diminished.

(7) If a testator should bequeath a legacy separately to two persons of the name of Titius, and afterwards deprives one of them of the bequest, but it is not clear which one is meant, both of them will be entitled to the legacy; just as where, in making a bequest, it is not apparent to which of two parties it is given, we say that it is bequeathed to neither of them.

(8) Where a tract of land was devised to Titius absolutely, and then was left to him under a condition, and finally he was deprived of it, as follows, "My heir shall not give to Titius the tract of land which I left to him conditionally," he will not be entitled to it under either provision, unless the testator expressly stated that he desired him to receive the legacy absolutely.

(9) Let us see whether the condition on which a legacy, an estate, or the freedom of a slave is dependent, can be revoked. Julianus says that, in the case of the freedom of a slave, the removal of the condition does not immediately confer freedom upon him. Papinianus, also, in the Seventeenth Book of Questions, says that, generally speaking, the condition cannot be revoked, for he holds that a condition is not given but is imposed, and what is imposed cannot be taken away, as this applies only to what is given. It is, however, better that the signification of the words, rather than the words themselves, should be considered; and, as conditions can be imposed, so also they can be rescinded.

(10) Where a testator, by his will, left a hundred *aurei* to Titius and made the following bequest to him in a codicil, "Let my heir give to Titius fifty *aurei,* and no more," the legatee cannot claim more than fifty *aurei.*

(11) Not only legacies, but also trusts can be revoked, even by a mere wish. Hence, it is asked whether a trust will be due in case enmity has arisen between the parties. If, indeed, the enmity relates to a capital offence or is of an extremely serious character, what has been bequeathed will be held to have been revoked; if, however, the offence is a light one, the trust will continue to exist. In accordance with this we can include legacies, and an exception on the ground of bad faith may be filed.

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

If the parties should renew their friendship, and the testator should repent of his former resolution, the legacy or trust which was left will be restored in its entirety, for the will of the deceased was alterable until the last moment of his life.

5. *Gaius, On the Urban Edict, Book II.*

Just as a legacy can be taken away from one person, so also it can be transferred to another, for instance, as follows: "I give and bequeath to Seius what I have bequeathed to Titius." This clause contains a tacit deprivation of the legacy, so far as Titius personally is concerned.

6. *Paulus, On the Lex Julia et Papia, Book V.*

The transfer of a legacy is made in four ways. It can either be transferred by substituting one person for another; or this may be done by the party who directed it to be bestowed, so that another may give it; or where one kind of property is left instead of another, as ten *aurei* instead of a tract of land; or where the legacy was absolute, and it is transferred under a condition.

(1) If, however, I should give to Mævius what I have already given to Titius, although it is customary to hold that they are both charged with the delivery of the same property, still, the better opinion is that, in this case, the first legatee is deprived of the bequest, for where I say, "Let Seius be charged with giving what I have charged Titius to give," I shall be considered to have said that Titius shall not deliver the property.

(2) Likewise, where ten *aurei* are bequeathed instead of a tract of land, certain authorities think that the first bequest is not revoked; but, as a matter of fact it is, for the last will is the

one to be carried into effect.

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

Where the bequest of an article is made to anyone under a condition, and the same article has already been absolutely left to another, the first bequest is not held to have been absolutely revoked, but only in ,case the condition of the second one should be complied with. If, however, it was the intention of the testator that the first legacy should, under all circumstances, be cancelled, this must be held to have been done.

8. *Julianus, Digest, Book XXXII.*

Therefore, if he to whom the legacy was transferred should die during the lifetime of the testator, it will, nevertheless, not belong to the person who was previously deprived of it.

9. *Julianus, Disputations, Book V.*

If anyone, after having left a hundred *aurei* to a person absolutely, then bequeathed the same sum to him conditionally, and intended to leave him this second sum in addition, what he left him absolutely will be due at once, and what was bequeathed to him under the condition will be payable if the condition should be fulfilled. Where, however, through having changed his mind, he left him the same sum under a condition, the absolute bequest may be considered to have become conditional. Hence, if in the same will by which he bequeathed a hundred *aurei* he afterwards left fifty, and he intended these fifty to constitute a new bequest, a hundred and fifty *aurei* will be due. But if he intended the bequest to consist of but fifty *aurei,* only fifty will be payable.

The same rule will apply where this was done by means of a codicil.

10. *Julianus, Digest, Book XXXVII.*

Where a legacy is absolutely bequeathed to Titius, and he is deprived of it under a certain condition, and dies while the condition is pending, even though the condition should fail, the legacy will not belong to the heir of Titius; for where a legacy once given is taken away under a condition, the effect is the same as if in the first place it had been left under the opposite condition.

(1) Where a bequest is made as follows, "Let my heir pay ten *aurei* to Titius, and if he should not pay them to Titius, let him pay the said ten *aurei* to Sempronius," if Titius should die before the day when the legacy vests, Sempronius can legally claim the legacy, for it should be understood to have been transferred to him.

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

Where a testator bequeaths a slave, in general terms, and reserves Stichus, he does not annul the legacy, but he weakens it;

12. *Ulpianus, On Sabinus, Book L.* As the legatee cannot select Stichus.

13. *Marcianus, Institutes, Book VI.*

The Divine Severus and Antoninus stated in a Rescript that where a testator, induced by some motive or other, in his last will mentioned one of his freedmen as being of extremely bad character, he was considered to have deprived him of all that had been left to him previously.

14. *Florentinus, Institutes, Book XI.*

Legacies which are void when granted, are not rendered valid by being suppressed; as, for instance, after having appointed the master of a slave his heir, the testator conditionally deprives the said slave of an absolute bequest which he had made to him of the same. For where an absolute bequest is taken away by imposing a condition, it is held to have been bequeathed under the contrary condition, and therefore is confirmed. This, however, does not

apply where the legacy which was suppressed was not valid in the first place.

(1) The same reasons for which a legacy becomes void when bequeathed, cause its suppression also to become of no force or effect; as, for example, if you deprive a legatee of a part of his right of way, or direct a slave to be only partly free.

15. *Paulus, On the Allotment of Freedmen.*

Where a slave bequeathed by a testator is alienated, and then repurchased by him, he will not be due to the legatee, against whom an exception on the ground of bad faith may be interposed. It is evident, however, that he will not be barred by it if the legatee can prove that the testator had renewed his intention to give him the slave.

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

It makes no difference whether the legacy contained in the will is erased, or taken away.

17. *Celsus, Digest, Book XXII.*

There is nothing to prevent a testator from correcting, changing, or revoking a former will by a succeeding one.

18. *Modestinus, Differences, Book VIII.*

If a testator, during his lifetime, should give away to another the property which he had bequeathed, the legacy will be absolutely extinguished, nor do we make any distinction as to whether he disposed of his property through necessity, or merely through inclination; so that if he gave it away through necessity, the legacy will still be payable, but if he disposed of it merely through inclination, it will not be payable. This distinction, however, will not apply to a party who makes a donation through liberality, for no one is liberal when impelled by necessity.

19. *The Same, Opinions, Book XI.*

Modestinus gave it as his opinion that if the deceased, by depriving Mævius of a legacy which was bequeathed to him, did not intend to revoke the trust with which he was charged, the heirs can be sued by virtue of the trust; and this opinion shall be approved.

20. *Pomponius, On Quintus Mucius, Book I.*

Although I may transfer a legacy to a person who has not the right to receive it under my will, or bequeath the legacy without the grant of freedom to my own slave, even if they are not entitled to receive it, it will still not be payable to the person who was deprived of the same.

21. *Licinius Rufinus, Rules, Book IV.*

Only he can be deprived of a legacy to whom it was bequeathed, and therefore if a bequest should be made to the son or the slave of another, the father or the master cannot be deprived of it.

22. *Papinianus, Opinions, Book VI.*

An heir appointed to a share of an estate also received a legacy by the will. The testator afterwards regarded him with intense hatred, and intended to make another will which he began, but could not finish, and passed the party over without mentioning him. His rights of action as heir could, indeed, not be denied him, but if he should claim the legacy, he could be barred by an exception on the ground of bad faith.

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

A father, having divided his property among his children, desired that his daughter should receive the sum of three hundred *aurei,* derived from the profit which he obtained from the advantages he enjoyed as the chief Centurion of the Triarii; and he afterwards used this

money in acquiring a tract of land. Notwithstanding this fact, the brothers and co-heirs of the sister will be still obliged to execute the trust, for what was used for the benefit of the testator could not be held to have been consumed. But, as he had apportioned his property among his children, he intended that anything which had not been divided should belong to them in common; and hence it was decided that the land which had been acquired by means of funds derived from the office in the army should also be divided, so that the daughter might receive her share of the estate out of the amount paid for said land.

This also would be the case, if money had been included in the assets of the estate.

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

Where a legacy bequeathed under a condition is transferred to another party, it is held to have been transferred subject to the same condition, unless it was one not attaching to the person of the first legatee. For if anyone should bequeath property to his wife, provided she should have children, and the legacy should be transferred, the condition which was necessarily attached to the person of the first woman will not be considered to have been repeated.

(1) A father devised his gardens with all their appurtenances to his daughter, and afterwards presented some of the slaves belonging to the said gardens to his wife. Whether he confirmed the donation or not, his last wishes will take precedence of the bequest to his daughter. But even if the donation should not be valid, still the father will be understood to have diminished the legacy of his daughter.

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

A testator left to one of his heirs a tract of land as a preferred legacy, and afterwards directed that certain rights of action, to the amount of the purchase of said tract of land, should be assigned to another. Afterwards, having sold the land without causing any injury to the party entitled to it as a preferred legacy, he placed the price received for the same among the property of his estate. I gave it as my opinion that the rights of action should not be assigned to his co-heir.

26. *Paulus, Questions, Book IX.*

Where a legacy was bequeathed to a slave with his freedom, and he was afterwards sold, and the bequest of his freedom was revoked, although such a revocation is void with reference to a slave belonging to another, still, the purchaser will not be entitled to the legacy. There is reason in this, for the revocation will stand, as the slave can be repurchased, just as the bequest of the legacy is valid when it is made to one who, at the time the will was made, belonged to the testator, but who, after having been sold, obtained his freedom by means of a codicil.

(1) What would be the case if the testator, during his lifetime, should manumit a slave whom he had directed to be free by his will, and should then revoke his grant of freedom by a codicil? Let us see whether the mere revocation of his freedom would annul the legacy. Some authorities think that it would, but a superfluous provision does not affect a legacy.

27. *The Same, Questions, Book XXV.*

When a slave is bequeathed, and something is left to him, and he afterwards should be sold, and deprived of what was bequeathed to him, the revocation will be valid, because the legacy will take effect if the slave should be repurchased.

(1) Where a slave is bequeathed, and is manumitted during the lifetime of the parties, and he is deprived of his legacy, the deprivation will be of no force or effect; therefore he can take the legacy bequeathed to him, for, even if he should again be reduced to slavery, his legacy will still not be revived, for he is considered to be a new man.

28. *Valens, Trusts, Book V.*

If I should bequeath certain property to you, and ask you to deliver it to Titius, and then should leave you the same property under a trust, but should not request you to deliver it to anyone, the question arises whether it is in your power to select the property under the terms of the second trust in order to avoid the execution of the first one. It has been established that it is better to take into consideration the last provision of the will.

29. *Paulus, Sentences, Book III.*

A freedman who received a legacy by the first part of the will afterwards was stigmatized by the testator as ungrateful in the same instrument, and the testator having changed his mind, the freedman will not be entitled to an action based on the will.

30. *Scævola, Digest, Book XXX.*

A testatrix left several articles to her foster-child, and afterwards revoked the bequest of some of them, and charged her heir to substitute others in their stead, among which she desired twenty pounds of gold to be bestowed, as follows: "In addition to this, I give and bequeath, and I wish twenty pounds of gold to be given to her." She also added: "And I charge you, Attius, above all, to care for and protect your sister Sempronia, with due affection, and if you think that she has returned to a good mode of life, leave her when you die the abovementioned twenty pounds of gold; and, in the meantime, pay her the income of said sum, that is to say, interest on the same at the rate of six per cent."

She afterwards transferred the same twenty pounds of gold to her legatee, Mævius, by a codicil, and charged him with a trust as follows: "I desire the twenty pounds of gold which I have left to my foster-child, Sempronia, by my will, to be given to Mævius, after taking security from him to pay five *denarii* every month out of said sum to the said Sempronia, as long as she may live, in addition to a hundred and twenty-five *denarii* for her clothing; and this I beg you to do. I am certain that you, Mævius, on account of your affection, will charge your heir at your death to carry out my wishes with reference to my foster-child." The question arose whether Mævius, as legatee, would, at the time of his death, be compelled to pay the twenty pounds of gold to Sempronia, as the heir Attius had been charged to do. The answer was that, according to the facts stated, he could not be compelled to pay her the twenty pounds of gold; but that the other things with which he had been charged for the benefit of the foster-child must be furnished by Mævius and his heir, as long as the said foster-child lived.

(1) Titia, by her will, appointed her freedwoman Seia, who was also her foster-sister, heir to a twelfth part of her estate. She left certain lands to her freedman Pamphilus under a trust, among which were certain fields of large extent, designated as being near Colon; and she afterwards, by a letter, also gave other property to the same freedman, in which letter she referred to Seia and Pamphilus as follows: "To my heirs, Greeting. I wish that everything stated below be carried out, as well as any provisions which I have already made with reference to Pamphilus. If my foster-sister, Seia, should not become my heir to the share of my estate to which I have appointed her, I wish all the lands near Colon to be given to her."

As the freedwoman Seia rejected the share of the estate left her by will, and selected what had been given to her by the codicil the question arose, if Pamphilus should claim the same land under the terms of the trust, whether he could be barred by an exception on the ground of bad faith. The answer was that the trusts having reference to the lands, that is to say to those which were situated near Colon, were considered to have been transferred to the freedwoman Seia.

(2) A testator requested his heirs that, if he should die in a province, sixty *aurei* should be given to Lucius Titius, in order that he might take charge of his body, and bring it back to his country. He also added the following: "If anything remains of said sum of money, I wish it to be given to him." On the same day he addressed a codicil to his heirs, in the following terms: "If I should happen to die either in the province or on my journey, I ask you to have my body

taken to Campania, and placed in the tomb of my children." The question arose whether the testator, by this provision, tacitly deprived Lucius Titius of anything remaining out of the above mentioned sum of sixty *aurei.* The answer was that he should be considered to have been deprived of it.

(3) A father appointed his daughters by his will heirs to unequal portions of his estate, and by the same will made a division of almost all his property, and then he added the following: "All my remaining property, as well as any liabilities attaching to my estate, shall belong only to my two daughters namely, Prima and Secunda, or whichever of them survives." He afterwards, by a codicil, made a very different division of his property among them than he had done by his will, and some of it he did not leave specifically to anyone. The question arose whether the daughters, Prima and Secunda, could, under the terms of the will, claim that they alone were entitled to the property which was not specifically bequeathed to anyone by the last disposition which their father made of his estate. The answer was that he did not appear to have revoked his entire will, but had only made changes with reference to certain property which he had disposed of in a different manner.

(4) A mother made the following provision in a letter concerning a legacy and a share of her estate bequeathed to her son: "As I know that my son Priscillianus is at the point of death, I consider it only just and proper to bequeath to my brother Marianus, and my husband Januarius, equal shares of that portion of my estate which I have given to my son; and, in case he should die I do give and bequeath, and I desire to be delivered to them anything else, in addition, which I may leave to him." Priscillianus lived until after the will was opened, and then died of the same disease. The question arose whether the legacy left to him would, under the terms of the trust, belong to Januarius and Marianus. The answer was that it could be held that, if the son should die of the same disease from which he was suffering at the time that the legacy would be absolutely transferred to those with respect to whom the inquiry was made.

31. *The Same, Digest, Book XIV.*

A testator who had appointed his son heir to a part of his estate left him also two tracts of land with the slaves and all the implements belonging to the same. He also left several things to his wife, as well as the slaves Stichus and Damas. But, having ascertained that there was no steward in charge of one of the estates devised to his son, he sent Stichus, and appointed him superintendent of the cultivation of the said land, and gave him charge of the accounts relating to the same. The question arose whether Stichus would belong to his wife or his son. The answer was that, as the testator was mindful of the matters for which he was provided in his will, Stichus, as steward, would belong to the land to which he was transferred, and that the wife could not claim him under the terms of the trust.

(1) A certain individual bequeathed four fields to his mother, whom he had appointed heir to a portion of his estate, and charged her to deliver two of said fields to his father-in-law; and afterwards, by a codicil, he suppressed the trust which he had created for the benefit of his father-in-law. The question arose whether the said two fields would belong to the mother as a preferred legacy. I answered that there was nothing in the case stated why they should not belong to her.

(2) Seia, by her will, made a bequest of five pounds of gold. Titius accused her of having ordered the death of her father. After the accusation was made, Seia executed a codicil, but did not deprive her stepson Titius of the legacy previously mentioned, and she died before the accusation was heard. The case having proceeded to trial, it was decided that the father of Titius did not lose his life on account of any criminal act of Seia. As she did not by the codicil deprive Titius of the legacy which she had given him by will, I ask whether it should be paid to Titius by the heirs of Seia. The answer was that, according to the facts stated, it was not due to them.

(3) A certain individual, among other things, bequeathed his *peculium* to his daughter, who was under his control. After he had made his will, he collected money belonging to his daughter from a debtor of the latter, and used it on his own account. I ask whether the daughter can, on this ground, bring an action against her father's heirs. The answer was that if she can prove that he did this without the intention of depriving her of the legacy, she can bring the action.

32. *Venuleius, Actions, Book X.*

It is easy to take anything from, or add anything to a legacy, where only a sum of money was bequeathed, but where certain corporeal property is concerned, it is more difficult to express this in writing, and the division is likely to be unintelligible.

(1) Where the freedom bequeathed to slaves is taken away from them, nothing is gained by specifically depriving them of their legacies.

TITLE V.

CONCERNING DOUBTFUL MATTERS.

1. *Papinianus, Opinions, Book VII.*

A testator left the Mævian, or the Seian Estate to Titius. As several tracts of land were mentioned in the records under the name of the Mævian Estate, I answered that it did not appear that the deceased intended all of said tracts to be included in the devise, provided the value of the Seian Estate did not greatly differ from that of the Mævian Estate.

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

Where a legacy is bequeathed to or a trust is created for the benefit of the citizens of a town, it is considered to have been left to the town.

3. *Paulus, Questions, Book XIV.*

Where a sentence is ambiguous, we cannot interpret it both ways, but only according to the intention of the testator. Therefore, where anyone said something that he did not intend to say, he did not say what the words mean, because this was not his intention; nor did he say what he intended, because he did not make use of language suitable for that purpose.

4. *The Same, Opinions, Book XIX.*

Paulus was of the opinion that, where a legacy is bequeathed dependent upon compliance with a condition, it must undoubtedly be paid to certain or uncertain persons in such a way that an action to compel the execution of the trust will lie.

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

Paulus also gave it as his opinion that, where the name of the beneficiary of a trust is not inserted in the will, there is no doubt whatever that no person, either certain or uncertain, is entitled to the benefit of the trust.

6. *Gaius, Trusts, Book I.*

A certain individual, having been sent into exile, made a will, and after appointing an heir and making bequests to several persons added the following: "If any one of my heirs or other friends whom I have mentioned in this my will, or anyone else, should obtain my recall from the Emperor, and I should die before I can manifest my gratitude to him, I wish such-and-such a sum of money to be given by my other heirs to him who does this."

One of the heirs whom he had appointed obtained his recall, but before the testator knew it he died. The question arose as to the execution of the trust. Julianus, having been consulted, gave it as his opinion that the trust should be executed; and even if the party who obtained the

recall of the testator was neither his heir nor legatee, but one of his friends, that the latter was entitled to the benefit of the trust.

(1) If anyone should charge you to deliver his estate to his posthumous heir, or a stranger;

7. *Marcianus, Trusts, Book III.*

Or if he should appoint you his heir along with his posthumous child, or should bequeath legacies to both of you, or make you the beneficiaries of a trust;

8. *Gaius, Trusts, Book I.*

It is asked if the posthumous child, whether he was born or not, could prevent you from profiting by your share of the estate. I think it is more proper to hold that if the posthumous child should not be born, he will not enable you to share in the estate, but the whole of it will belong to you, just as if it had been entirely left to you in the first place; but if he should be born, both of you will be entitled to what was left to each, and if one child is born, you will be entitled to half the estate; if two are born, you will be entitled to a third; and if three children are brought forth at once (for triplets are also born), you will be entitled to a fourth of the estate. And, even in our time, Serapias, an Alexandrian woman, was presented to the Divine Hadrian with her five children, whom she had had at a single birth. Where, however, more than three children come into the world at the same time, the event is considered a prodigy.

(1) Where a certain man, after having appointed several heirs, charged one of them under a trust to deliver the share of the estate which might come into his hands to any one of his co-heirs whom he might select at the time of his death, it is absolutely certain that this trust is a valid one; as it is not left to the discretion of the heir of whom the request was made, whether he should deliver the property at all, but to whom he prefers to deliver it. For it makes a great deal of difference whether the testator places it in the power of the trustee whom he desires to deliver, or not to deliver certain property, or whether, after having imposed upon him the necessity of delivering it, he grants him alone the unrestricted choice of distribution.

(2) Where co-heirs are appointed to unequal shares of an estate, the question arose whether the heir should be required to give each one equal shares, or only shares in proportion to those to which they are appointed heirs. It was decided that if the testator directed one of his heirs to give up his share to his co-heirs, if they paid him a certain sum of money, to which they were directed to contribute equally; it would seem to be just that equal portions of the property should be given to them by virtue of the trust. If, however, in the distribution of said money, the testator intended that they should contribute unequal shares, in order that they might correspond with the shares of the estate to which they were entitled, it would appear to be reasonable that, under the terms of the trust, the property should be delivered to them in proportion to their respective shares of the estate.

9. *Paulus, Sentences, Book II.*

Where a donation is made between husband and wife, and the one to whom it was made dies before the other, the property reverts to the one who gave it. If both parties should die at the same time, in order to decide the question, it was held that the donation was valid, and that this was especially the case, because the donor who could claim the property did not survive.

10. *Tryphoninus, Disputations, Book XXI.*

A testator, who had two minor children, substituted Titius for the one who might die first. Both of them perished at the same time in a shipwreck. The question arose whether the estate would pass to the substitute, and to which one of the two minors he was to be considered the heir. I said that if the brothers had died in the ordinary course of nature, the brother of the one that died first would become his heir *ab intestato,* and the substitute would succeed to the second one; nevertheless, he would be entitled to the estate of the one that died first, as it was included in that of the other. In the question proposed, however, where both of them perished

at once, and as neither brother survived the other, should it be held that both of them died last, or that neither of them died last, because the decision as to which died last was dependent upon the fact that one of them died first? The former opinion, however, namely, that the substitute is the heir of both the minors, should prevail. For where a testator, who has only one son, appoints a substitute for the one that dies last, he is not considered to have made an invalid substitution; just as the next of kin is understood where there is but one who does not precede anyone else, and in this instance, as neither one of the brothers survived the other, both of them are considered to have died first and last.

(1) Where a son and his father lost their lives in war, and the mother claimed the estate of her son on the ground of his having died last, and the relatives of her father declared that the son died first, the Divine Hadrian decided that the father died first.

(2) If a freedman should die at the same time as his son, the estate passes by operation of law to the patron of the intestate freedman, unless it is proved that the son survived his father. We hold that this is the case on account of the respect attaching to the right of patronage.

(3) Where a husband and a wife die at the same time, and a stipulation with reference to the dowry was entered into providing that it should belong to the husband, if the woman died during marriage, this will take effect, if it is not proved that she survived her husband.

(4) If Lucius Titius should lose his life at the same time as his son who had reached the age of puberty, and whom he had appointed his sole heir by his will, the son is understood to have survived the father, and will be his heir under the will, and the estate of the son will pass to the successors of the latter, unless the contrary can be proved by the heirs of the father. If, however, the son, who perished with the father, had not reached the age of puberty, it is held that his father survived him, unless the contrary can be proved.

11. *Ulpianus, Disputations, Book VI.*

Where a legacy was left to the one of my relatives who may first ascend to the Capitol, and two of them are said to have done so at the same time, and it is not apparent which one arrived first, will the legacy be prevented from taking effect? Or, it may be asked, what is the rule if the testator made a bequest "to the one who should erect a monument to him," and several of them erect one; or if a bequest is made to one who is the older of two persons, and both of them are of the same age; or where a legacy is bequeathed by the testator to his friend Sempronius, and there are two persons of the same name held in equal esteem? But if a legacy is bequeathed to two men of the same name, for instance, to two called Sempronius, and one of them is afterwards deprived of the legacy, and it does not appear which one was meant; will the legacy be extinguished, so far as both parties are concerned, or will its revocation be void?

This question may also arise where freedom is left to several slaves of the same name, or to certain ones among them.

The better opinion is that, in all these cases, the legacies and the grants of freedom should take effect, but where a revocation takes place it affects all the parties.

(1) It is clear that if a female slave should receive her freedom under the following provision, "Let her be free, if the first child she bears is a male," and she brings forth a male and a female child at a single birth, and it is certain which one was born first, there should be no doubt with reference to her condition; that is to say, whether she will be free or not; nor should there be any doubt so far as that of the girl is concerned, for if she was born after the boy, she will be freeborn.

If, however, there is any uncertainty in this respect, and it cannot be removed by judicial investigation, where matters are doubtful it is better to adopt the more equitable opinion, and to presume that the male child was born first, so that the slave may obtain her freedom and her

daughter be freeborn.

12. *Julianus, Digest, Book XXXVI.*

Whenever an usufruct is bequeathed to freedmen, and the ownership of the property to the last survivor, the bequest is valid, for I think that, in this instance, the property is left under the following condition: "If he should be the last survivor."

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

Whenever there is any ambiguous clause in the phraseology of an action or an exception, it is most convenient to understand it in such a way that the property to which it relates shall rather be preserved than be lost.

14. *The Same, On Ambiguities.*

Where a man who had deposited two hundred *aurei* made the following bequest, "I leave to Seius three hundred *aurei,* in addition to the two hundred which I have deposited with him," these two sums, taken separately, have a certain designation, but where they are taken together, they give rise to ambiguity. It must, however, be held that not three hundred, but five hundred *aurei* are due, because the two sums are united.

(1) Where anyone makes a bequest as follows, "Let my heir give to Attius, together with Dion, the slave of Mævius, the Seian estate," there is some doubt as to whether the land was also left to Dion, or whether Dion was bequeathed along with the land. It is better to hold that not only the land, but also the slave Dion was left, and especially if the testator had no good reason to bequeath a legacy to Dion.

(2) Where we frame a stipulation as follows: "If you do not furnish such-and-such a slave, or such-and-such a tract of land, do you promise to pay a hundred *aurei?"* The penalty will be due, whether the stipulation is carried out or not; that is to say, the stipulation will be binding, whether neither one nor the other act is performed.

It is evident that the same rule will apply where several things which we desire to be done are specifically mentioned, and we stipulate as follows, "If either of these things is not done," or, for example, "Do you agree to appear for Stichus, Damus, and Eros in court? If one of them is not represented, do you promise to pay ten *aurei*?" It is necessary for the party to appear for all of them, in order that the terms of the stipulation may be complied with. Or that the case may be more clearly stated, let us suppose the stipulation to be worded as follows: "Do you promise to pay ten *aurei* if you do not appear for Stichus, Damus, and Eros?" For we can have no doubt in this instance that all of them must be represented.

(3) There is a difference between the two following stipulations: "You will pay So-and-So so much if such-and-such a thing, or such-and-such a thing is not done," or, "If either of the things which it has been agreed should be done, is not done, you will pay such-and-such a sum," for while it is true that one or the other other is to be done, it is not, for this reason, true that one or the other of the two things is not to be done, for both of these propositions may be true, although they are opposed to one another; because when the meaning is not general, but has reference to some specific matter, if any of it is true it renders the whole clause true. Just as, on the other hand, two clauses containing statements which are opposite are both false at the same time; for instance, where some children of a testator die after reaching puberty, and others die before reaching that age, since on the one hand it is incorrect to say that all of them died under the age of puberty, and, on the other, it is also incorrect to say that they all died after that age. This results because the meaning is taken in a general sense, and in this case, if anything is false, it renders the entire clause untrue.

Therefore it should be ascertained what the subject of the inquiry is, for if I should say such-and-such a thing, or such-and-such a thing should not be done, it ought to be asked if anything has not been done ? The effect of the former proposition is that neither of the things should be

done; that of the latter that they both should be done. In the former instance, it will be of no advantage to the person not to have done one of the two things, if he did the other; and in the latter, it will not benefit him if he proves that he has done one of the two things, if he did not do the other.

(4) Hence, if anyone should put the following interrogatory: "Did you do any of those things with which you are charged?" and the party says he did not, he means to say, "I did not do any of those things with which I am charged," that is, "I did none of them."

(5) Where anyone inserts several things in a stipulation, one of which he desires to be done, he should frame the stipulation as follows: "Do you promise that such-and-such a thing, or such-and-such a thing shall be done, and if neither of them is done, will you pay such-and-such a sum?"

(6) Moreover, if the head of a household should insert the following in his will, "If a son or a daughter is born to me, let him or her be my heir; but if neither a son nor a daughter should become my heir, let Seius be my heir," he does not declare his purpose clearly enough if he intended to appoint a foreign heir, only in case neither his son nor his daughter should become his heir; for this should be expressed as follows: "If neither my son nor my daughter should become my heir." Sometimes, however, the former clause becomes necessary; as, for example, where anyone who has a son and a daughter desires to make both of them his heirs, and if only one of them should become his heir, to appoint a stranger with him or her, or if neither should become his heir, to substitute a stranger. That opinion, however, should be adopted which seems rather to correspond with the intention of the testator, so that if either a son or a daughter should be born to him, a stranger shall not be admitted to the succession, unless the testator expressly stated that this must be done.

15. *Marcianus, Institutes, Book VI.*

If anyone should make the following provision in his will, "Let my heir pays ten *solidi* to the witnesses who sealed my will," Trebatius holds that the legacy is valid. Pomponius also considers this to be true, because the will itself is confirmed by the production of the witnesses. This opinion I think to be correct.

16. *The Same, Rules, Book II.*

There are certain matters in which at first it is difficult to arrive at a conclusion, but in the end what has been done appears to be clear; as, for instance, where a bequest has been made, and, while the legatee is deliberating as to whether he will accept it or not, the heir transfers the property in question to a third party. In this instance the transfer will be void if the legatee should decide to accept the legacy; but if he should reject it, the transfer will be valid.

The case would be the same if the heir should loan money belonging to the estate which was bequeathed; for if the legatee did not reject it, it would be held that the heir had loaned money belonging to someone else, but if the legatee rejected the estate he would be held to have lent his own money. But what if the money was expended? The same rule would apply, in accordance with the circumstances of the case.

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

When we consider the case of persons dying at the same time, as well as the discussion of other matters; for example, where a mother stipulated that the dowry of her daughter should be returned to her by the husband, if her daughter should die during marriage, and the mother died at the same time as her daughter, the question arises whether an action based on the stipulation would lie in favor of the heir of the mother. The Divine Pius stated in a Rescript that the stipulation would not allow such an action to be brought, because the mother did not survive the daughter.

The question was also asked if a stranger who stipulated for the return of a dowry should die

at the same time as the husband, or at the same time as the wife on whose account he entered into the stipulation, could he transfer the right of action to his heir?

18. *Paulus, On Plautius, Book XII.*

The same rule applies where a dowry is left as a preferred legacy to a wife, and she dies at the same time as her husband.

19. *Marcianus, Rules, Book III.*

In the following instance, where a minor and his brother, who was his necessary heir, and was substituted for him, died at the same time, the question arises whether the brother would be the heir to his brother or not.

Moreover, where two necessary heirs have been substituted for one another, and they perished together, will both be considered as the heirs of the testator, or will one of them be the heir of the other, that is to say, if they had been asked to deliver the estate to one another at the time of their death? In cases of this kind, if they should die at the same time, and it does not appear which of them was the first to lose his life, one of them will not be considered to have survived the other.

(1) However, with reference to the Falcidian Law, if a master dies at the same time as his slaves, the latter will not be reckoned as forming part of his estate at the time of his death.

20. *Ulpianus, On Sabinus, Book XXV.*

Where a legacy is bequeathed to relatives, and the said relatives have forfeited their rights as such, but still remain citizens, it must be said that they are entitled to the legacy, for they were members of the family at the time when the will was executed. It is certain that if anyone was not a member of the family when the will was made, but became one through arrogation, at the time of the death of the testator, he will, still more, be entitled to the legacy.

(1) If anyone should make a bequest to his kindred, it is the same as if he had made it to his relatives.

21. *Paulus, On Plautius, Book XII.*

As the Senate, in the time of the Divine Marcus, permitted bequests to be made to corporations, there is no doubt that if a bequest is made to a body which has a legal right to assemble, the latter will be entitled to it. However, a legacy left to one which has no right to assemble will not be valid, unless it is specially left to the members composing the same, for the latter will then be permittted to receive the legacy, not as an association, but as separate individuals.

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

Where any ambiguity of language exists, the validity of a transaction will depend upon the intention of the parties; for instance, if I should stipulate for Stichus, and there are several slaves of that name; or for a slave in general; or for something to be delivered at Carthage, and there are two cities so called; and in every instance where doubt arises, it must be considered that the contract was made in good faith to be carried out in the place where it was most convenient, unless it is clear that it has been drawn up contrary to law.

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

A mother lost her life in a shipwreck at the same time as her son who had reached the age of puberty. If it cannot be ascertained which of them died first, it is more natural to suppose that the son lived the longer.

24. *Gaius, On the Lex Julia et Papia, Book V.*

Where a woman perishes in a shipwreck, at the same time with her son who is under the age

of puberty, the son is understood to have lost his life first.

25. *Marcellus, Digest, Book XI.*

It has been decided that where any statement, which is ambiguous, or even incorrect, is made in a will, it should be interpreted favorably, and in accordance with what is supposed to have been the intention of the testator.

26. *Celsus, Digest, Book XXII.*

"Let him be liberated whom I may tell my heir I desire shall be given his freedom, and let my heir be charged to give such-and-such a sum to him whom I shall designate." The wishes of the testator should be carried out, if the identity of the slave whom he had in his mind can be established in any way.

27. *The Same, Digest, Book XXVI.*

Where any question arises as to the intention of the parties in a stipulation, the ambiguity should be interpreted against the stipulator.

28. *Modestinus, Rules, Book I.*

Where a man desired one of his slaves to be manumitted, and it does not appear which one the testator intended to be liberated, none of them will be entitled to freedom under the terms of the trust.

29. *Javolenus, On the Last Works of Labeo, Book III.*

A certain individual that owned the slave Flaccus, who was a fuller, and Philonicus, who was a baker, left to his wife the baker Flaccus; and the question arose which of the slaves was due, and whether both of them were not included in the legacy. It was held, in the first place, that that slave was bequeathed whom the testator intended should form part of the legacy. If this could not be ascertained, an investigation should then be made to learn whether the master knew the names of his slaves. If this was the case, the slave would then be due whom he mentioned by name, even if he had made a mistake with reference to his trade. Where, however, the names of the slaves were unknown to him, the baker should be considered to be the subject of the legacy, just as if his name had not been mentioned.

30. *Scævola, Digest, Book XVIII.*

A testator manumitted several slaves by his will, and among them Sabina and Cyprogenia, when each of them had reached the age of thirty years, and as soon as they became free, he desired a certain sum of money to be given to them; and he made the following provision, in which both slaves were included: "I wish ten *aurei* to be given to Sabina and Cyprogenia, each, when they arrive at the age above mentioned, and, in addition to this, I desire ten *aurei* to be paid to each of them every year, for their support, as long as they live." The question arose whether support should be furnished to all the slaves manumitted, or only to Sabina and Cyprogenia. The answer was that, according to the facts stated, support seemed to have been bequeathed to all of them.

TITLE VI.

CONCERNING BEQUESTS MADE BY WAY OF PENALTY.

1. *Africanus, Questions.*

Where a son under paternal control or a slave is appointed an heir, and the testator also illegally or insultingly bequeaths a legacy which will operate as a penalty against the father or the master, it has been held that the legacy is of no force or effect; for every bequest included in a will which is prompted by a desire for revenge, whether it is left to an heir or to anyone else who derives benefit from the last will of the testator, must be considered void.

2. *Marcianus, Institutes, Book VI.*

The will of the testator distinguishes a penalty from a condition, and whether it is a penalty, a condition, or a transfer that is referred to in the legacy, must be ascertained from the intention of the deceased. This the Divine Severus and Antoninus stated in a Rescript.

TITLE VII.

CONCERNING THE RULE OF CATO.

1. *Celsus, Digest, Book XXXV.*

The Rule of Cato is stated as follows, "Any legacy that would be void if the testator died immediately after making his will will not be valid no matter how long afterwards he may die." This rule does not hold good in certain cases.

(1) But what if anyone should make a bequest as follows: "Let such-and-such a sum be paid to Titius, if I should die after the *Kalends."* Shall we quibble with reference to this? For, in this instance, if the testator should die immediately, it is better to hold that the legacy was not bequeathed at all, than that it was bequeathed illegally.

(2) In like manner, if a tract of land left to you was yours at the time the will was executed, and you alienated it during the lifetime of the testator, you will be entitled to the bequest, but you will not be entitled to it if the testator died immediately after having made his will.

2. *Paulus, On Plautius, Book IV.*

If, however, a bequest should be made as follows, "If my daughter should marry Titius," it is held to be valid if she should be married at the time of the death of the testator, even though at the time the will was made she was not marriageable.

3. *Papinianus, Questions, Book XV.*

The Rule of Cato is not applicable to either inheritances or legacies, the time of the vesting of which is not to be referred to the date of the death of the testator, but to that of the acceptance of the estate.

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

It is well established that the Rule of Cato is not applicable to the conditional appointments of heirs.

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

The Rule of Cato does not apply to new laws.

TITLE VIII.

CONSIDERING TESTAMENTARY PROVISIONS WHICH ARE CONSIDERED AS NOT HAVING BEEN WRITTEN.

1. *Juliamus, Digest, Book LXXVIII.*

Where anyone has been asked to write the bequest of an estate or a legacy in a will to himself, the question arises whether the said bequest of the estate or the legacy shall be considered as not having been written; and also whether under an appointment made in this way, an heir can have a substitute. The answer was that the portion of the estate concerning which you have asked advice belongs to the substitute, for when the Senate fixed the penalties of the Cornelian Law against a person who, in a will, appointed himself heir or legatee of an estate, he is also held to have, in the same way, rendered appointments of an inveigling character void, as for instance, the following, "Let Titius be my heir to the same portion of the estate for which he himself has appointed me by his will," as provisions of this kind are considered just as if they had not been inserted in the will.

2. *Alfenus Varus, Digest, Book V.*

Where the meaning of any testamentary provision cannot be ascertained, it is just as if it had not been written, but the other provisions will still be valid.

3. *Marcianus, Institutes, Book XI.*

Anything over and above a bequest for maintenance which is left to a criminal sentenced to the mines is considered as not having been written, but it is not forfeited to the Treasury, because the legatee is the slave of a penalty, and not the slave of the Emperor. The Divine Pius stated this in a Rescript.

(1) If an heir or legatee, who was appointed, should be condemned to the mines after the will has been executed, the estate or the legacy will not be forfeited to the Treasury.

(2) Likewise, if anything is left to the slave of another, and he is afterwards purchased by the testator, the legacy will be extinguished; for any bequests which are transferred to a place from which they cannot originate are considered as not having been written.

4. *Ulpianus, On the Lex Julia et Papia, Book XIII.*

Where a bequest is made to anyone at a time when he is already dead, it is considered as not having been written.

(1) Moreover, where a legatee is in the power of the enemy at the time that the will is made, and does not return from captivity, the legacy is held not to have been written. This was also stated by Julianus.

5. *Paulus, Questions, Book XII.*

When anyone appoints himself the heir in a will by which he is directed to deliver the estate to someone else, the trust with its burden will still remain imposed upon him, even though what he has done will be considered as not having been written. The same rule also applies to the will of a soldier.

TITLE IX.

CONCERNING THOSE WHO ARE DEPRIVED OF THEIR LEGACIES AS BEING UNWORTHY OF THEM.

1. *Marcianus, Institutes, Book VI.*

The Divine Severus and Antoninus stated in a Rescript that a freedman to whom property had been bequeathed by the will of his patron should be deprived of his legacy or trust as being unworthy of it, if, after the death of his patron, he accused him of having been engaged in some illegal transaction, even though he may have deserved a reward for doing so.

2. *The Same, Institutes, Book XI.*

If an emancipated son, having been passed over, demands the possession of the estate of his father, in opposition to his will, and enters upon the estate as the substitute of a child under the age of puberty, he will be entirely deprived of the estate, which will be forfeited to the Treasury.

(1) Again, if anyone should, contrary to law, marry a wife in a province in which he exercises any public employment, the Divine Severus and Antoninus stated in a Rescript that he could not retain anything which he might have acquired by the will of his father; just as in the case of a guardian who marries his female ward in violation of the Decree of the Senate. Therefore, in both instances, if the person is appointed an heir to the entire estate, and enters upon the same, there will be ground for confiscation by the Treasury, for he will be deprived of the estate as being unworthy of it.

(2) On the other hand, however, this rule will not apply where a woman has married a man who is administering a public office in a province, nor to a female ward who has married her guardian unlawfully ; but it is better to hold that she can take under the will, and should not be rejected as unworthy of doing so.

(3) The same rule will apply where anyone gives away the entire estate, or a portion of the same, of some relative whom he has a right to succeed, but who he does not know is still living, for he will be deprived of the property as being unworthy.

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

The Divine Pius decided that a person was unworthy (as Marcellus states in the Twelfth Book of the Digest) who was clearly proved to have permitted the woman by whom he was appointed heir to die through his own negligence and fault.

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

Papinianus, in the Fifth Book of Questions, says that where anyone accuses an heir of forging an appointment in a will, he will not be deprived of a legacy with which his co-heir, whom he did not disturb, has been charged.

5. *Paulus, On the Rights of the Treasury.*

After a legacy has once been accepted, it will still be lawful to prove that the will was forged, and it will also be proper to claim that it is void; but no allegation as to its being inofficious will be permitted.

(1) He who contends that a will is void and loses his case is not excluded from any provision made in his favor. Therefore, anyone who, having obtained a legacy, afterwards alleges that the will was forged, must lose what he received under it. However, with reference to him who received the legacy, and denies that the will is valid, the Divine Pius made the following statement in a Rescript: "Although the relatives of Sophro have received their legacies from the duly appointed heir, still, if they have good reason to suppose that the heir is not entitled to the estate, and that it belongs to them by the law of intestacy, they can claim it under said law. It shall be determined by the court, after proper examination, whether they should be excluded from the estate or not, after due consideration of their persons, their rank, and their ages."

(2) It has been well established that where a guardian has been appointed, and excuses himself from administering his trust, he will lose whatever he was entitled to under the terms of the will. If, however, he has already obtained it, he will not be allowed to excuse himself.

I think that this rule will not apply to one who has only received a legacy, and having been requested by the mother of the minor to become his guardian, prefers to excuse himself; for, in this instance, he did nothing contrary to the will of the deceased. But the legacy which was refused to the guardian will not pass to the Treasury, but will be left to the son whose interests have been abandoned by the legatee.

(3) If a father or a master should attack a will, an action will be denied him, where the legacy is left either to his son or his slave, if they would obtain any advantage from the same.

A different opinion must be given where the said legatee has received the sole benefit of the bequest.

(4) Where anyone entitled to a legacy is requested to manumit his slave, and anything is given to the slave by the will, it must be said that the act of the master will not prejudice the slave; and he should be purchased by the Treasury in order to be manumitted, provided the master is willing to sell him; but one who has refused to take under the will cannot be compelled to do this.

(5) If a son under paternal control alleges that the will is forged, let us consider whether an action should be refused his father. I think that if he made the accusation against the will of his father, an action should not be denied the latter.

(6) If anyone to whom I am charged to pay a legacy under a trust should say that the will is forged, I will be obliged to pay the legacy to the Treasury.

(7) Where anyone who alleges that a will is forged becomes the heir of the legatee, or of the heir who is appointed, it must be held that his statements will not prejudice him.

(8) The case is similar where a person alleges that a will is inofficious.

(9) Indulgence must be shown to the person who makes the accusation on account of his age, and especially if his guardian or curator desires to prove that the will is either forged, or inofficious. This the Emperors Severus and Antoninus stated in a Rescript.

(10) An action should be refused to those who have given testimony in favor of a party who alleged that the will was forged. This was decreed by the Divine Severus.

(11) Some authorities think, and very properly, that those should be refused an action who aided the accuser, or became sureties for him.

(12) Some authorities think that a governor who declared a will to be forged is unworthy, if the heir who was appointed under it gains the case on appeal.

(13) In every instance, the requirements of his office will be sufficient excuse for the Advocate of the Treasury who has given assistance to the designs of the accuser.

(14) Where anyone attacks the principal will, he ought to be excluded from the benefits of the second, as well as from those granted by a codicil subsequently executed, even though they may not be confirmed by it.

The same rule should not be followed where the party attacks the second will or the codicil, because, in this instance, he is not considered to have impugned the validity of both instruments.

(15) Let us consider whether a slave who attempted to break the will by his testimony should be deprived of the freedom granted him by the said will. He is not worthy to obtain the benefit of the trust, and so far as his liberty is concerned, the Divine Pius decided that he should be deprived of it.

(16) Where a party is appointed a guardian, he cannot, by alleging that the will was forged, be excused from serving in that capacity, but he can be excluded from the benefit of the legacy.

(17) Anyone who received from a testator a donation *mortis causa* does not, in this respect, resemble a legatee.

(18) The case is different with him who, under the terms of a will, is directed to receive something from a legatee, or a slave who is to be liberated conditionally, for he can be excluded as being unworthy.

(19) The Divine Pius and Marcus decided that under such circumstances the appointed heir should be excluded from the benefit of the Falcidian Law.

(20) All those who are rejected as being unworthy shall be excluded from participating in the reward which, according to the Edict of the Divine Trajan, should be given to those who accuse themselves.

6. *Marcellus, Digest, Book XXII.*

It was stated by the Emperor in a Rescript that an heir shall not retain the fourth part of an estate if he has appropriated any of the assets of the same; and therefore if the deceased left an

estate of four hundred *aurei,* and the heir should abstract a hundred of them, and retain a quarter of the three hundred, that is to say, seventy-five, and give to the legatees two hundred and fifty, he must also give them seventy-five out of the hundred which he stole, and the remainder, that is to say, twenty-five, will be forfeited to the Treasury.

7. *Modestinus, Differences, Book VI.*

Where anyone alleges that the will of Titius is forged, and does not prove his allegation, he will not be prevented from becoming the heir of the heir of Titius, because he does not succeed directly to the estate of Titius.

8. *The Same, Rides, Book IX.*

Where an heir has been declared unworthy, and deprived of an estate, any rights of action which may have been merged cannot be restored to their original condition.

9. *Ulpianus, On the Lex Julia et Papia, Book XIV.*

If mortal hatred should have arisen between a legatee and the testator, and it should be probable that the latter was unwilling that he to whom a legacy, or the benefit of a trust was bequeathed, should enjoy the benefit of the same, the better opinion is that the legacy cannot be claimed by him.

(1) Again, where he has openly and publicly abused the testator, and made malicious speeches against him, the same rule will apply.

(2) Where, however, the civil condition of the testator is the cause of the controversy, raised by the legatee, the latter will not be entitled to what has been left him, which will, in this instance, immediately be forfeited to the Treasury.

10. *Gaius, On the Lex Julia et Papia, Book XV.*

He is guilty of a fraud against the law who tacitly agrees to deliver what is left to him, or anything else, to a person who is legally prohibited from taking under the will, whether he gives a written instrument to this effect, or undertakes to do so by a mere promise.

(1) Where anyone was charged to deliver certain property to someone who can take under a will, and who, at the time of death, has been forbidden to do so, I have no doubt that although the trust is extinguished, it should still remain with him who was asked to deliver the property, because no fraud is held to have been committed by him, unless he bound himself with reference to what he knew would occur; that is to say, that he would deliver the property to the beneficiary even though he might be legally incapacitated from receiving it.

(2) It has very properly been held that if the father of a son who is under his control makes a tacit agreement, this should not prejudice the son, because he is obliged to obey his father.

11. *Papinianus, Questions, Book XV.*

Where an heir has entered into an illegal tacit agreement, he cannot avail himself of the Falcidian Law with reference to the portion which was the subject of the fraudulent contract. This rule was established by the Senate.

Where, however, the share of the estate to which he was appointed heir is larger than that which he fraudulently agreed to deliver, he can retain the Falcidian fourth from the excess of his share under the will.

12. *The Same, Questions, Book XVI.*

Where a certain man appointed heirs whom he had no right to select, although designation of this kind is not valid, and the first will is not broken in consequence, still, the Senate long since decreed that the heirs who were entitled to the estate under the last will of the deceased should be deprived of the same as unworthy. This the Divine Marcus decided with reference

to a person whose name the testator had erased from his will, after it had been executed, for he sent the case to the Prefects of the Public Treasury. The legacies left by the will, however, remained unimpaired. With reference to the preferred legacies bequeathed to the heir, a question as to the intention of the testator may arise, and these legacies will not be refused to him, unless it clearly appears that the intention of the testator was otherwise.

13. *The Same, Questions, Book XXXII.*

Claudius Seleucus to his friend, Papinianus, Greeting. Mævius, having been condemned for adultery with Sempronia, married the said Sempronia, who had not been convicted of the offence, and he, at his death, appointed her his heir. I ask whether the marriage was legal, and whether the woman could be admittted to the succession. I answered that a marriage of this kind could not stand, and that the woman was not entitled to the benefit of the estate, but what was left by the will would be forfeited to the Treasury.

Even though in a case of this kind the woman should appoint her husband her heir, we hold that he should be deprived of the estate as being unworthy of the same.

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

Where a woman has been living with a soldier as his concubine, even if the said soldier should die within a year after his discharge, after having made a will in favor of the woman, I have recently given you as my opinion that she cannot enjoy the benefit of such a will executed in accordance with military law, and whatever is left her will belong to the Treasury.

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

An heir who alleges that a codicil is false, and does not prove his case, shall not be deprived of the estate. If, however, his co-heir was charged by the same codicil with a trust for his benefit, an action to compel the execution of the trust will be refused him. Therefore, if the deceased made a distribution of his property among his heirs by means of the codicil, the party who asserts that it is forged will retain his hereditary share, except where a legacy has been left to him in trust; but he cannot enjoy the benefit of the Falcidian Law, if, in that part of the estate which he forfeited there should be enough property to make up for the Falcidian portion which he lost under the just principle of set-off.

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

Where, by a second will, a father made a pupillary substitution of his nephews for his son, who was under the age of puberty, and who had already been appointed the co-heirs of the latter, and the said nephews, substituted after the death of the minor, accused his mother of having produced a spurious child, in order to obtain the estate on the ground of intestacy, I answered that if they lost their case they should be deprived of the share of the estate to which they were entitled by the substitution, because a decree with reference to the will had not been rendered in their favor.

(1) As it is not considered a disgrace for a woman to become the concubine of a man who is not her patron, an action to recover what was left him by her will will not be denied to him who kept a woman as a concubine.

Our most illustrious Emperors took this view in the case of Cocceius Cassianus, a man of the highest rank, who had greatly favored Rufina, a freeborn woman, to whom he was much attached, and whose daughter he had referred to in his will as his foster-child, and had appointed co-heir with his granddaughter, although it was afterwards ascertained that she was illegitimate.

(2) It was decided by the Divine Marcus that where a testator, having unsealed his will, erased the name of an heir through having changed his mind, and, in consequence of this, his share was adjudged to be forfeited to the Treasury, this fact would not prejudice the legatees with

reference to whom the intention of the testator remained unaltered, and therefore that the share of the aforesaid heir would go to the Treasury with all its burdens.

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

I held that an heir who, being aware of the murder of the deceased, failed to avenge his death should be compelled to surrender all the profits of the estate, without being able to legally demand that the rights of action which had been merged when he obtained the estate should be restored to their former condition.

Where, however, the heir has been misled by his ignorance of the crime, he will be entitled to the same defence, as a *bona fide* possessor, so far as the profits collected before the controversy arose are concerned; and in this case his demand that the rights of action which have been merged shall be restored to their former condition will not be improperly made.

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

I gave it as my opinion that a person who fraudulently undertook the execution of a trust could be compelled to also surrender those profits which he had collected before legal proceedings were instituted; for he is not considered to have been a *bona fide* possessor; just as is the case with those who hold property which is claimed by the Treasury. I held that, after the controversy arose with reference to the execution of a trust of this description the value of the profits previously collected, together with the interest on the same, should be surrendered; and this applies to all the profits for which a price has been paid, but if the party had used the profits himself, only their value without interest should be refunded.

The Divine Severus in a case of this kind graciously decreed that only the profits of the property, and not the interest on the same, would be due without any distinction of the time when they had been collected. This is the practice at the present time.

(1) Where all the property of an estate has been forfeited to the Treasury on account of the execution of a trust fraudulently undertaken, it is not proper that the heir should remain subject to the burden of the debts of the estate. The same rule applies where the death of the testator is not avenged. If, however, the heir has sustained any loss by entering upon the estate through the merger of rights of action or of servitudes, he will not be considered worthy of the relief of restitution.

(2) An heir, having been appointed to a share of an estate, received the devise of a tract of land, and agreed to deliver what he had received to a person who was legally incapable of receiving the same. Although the devise was not legal, so far as his share was concerned, that is to say, the portion to which he was entitled as heir, still, I gave it as my opinion that his right to the land was unimpaired, for neither the rule of law nor the difference of possession could accomplish the division of -the will of the testator.

19. *Paulus, Opinions, Book XVI.*

If the appointed heirs are deprived of the estate because the testator, having changed his mind, desired to make another will and was prevented by them from doing so, he will be considered to have entirely revoked his former will.

20. *Hermogenianus, Epitomes of Law, Book III.*

A husband who does not avenge the death of his wife shall be deprived of her dowry as being unworthy.

21. *Paulus, Sentences, Book III.*

The shares of the estates of freedmen that have lost their lives under suspicious circumstances, which are due to patrons who neglect to avenge their death, shall be forfeited to the Treasury. For all heirs, as well as those who occupy the position of heirs, are required, as a matter of

duty, to avenge the death of the deceased.

22. *Tryphoninus, Disputations, Book V.*

For the best of reasons, it can be maintained that a guardian who alleges in the name of his ward that a will is forged or inofficious, but is unable to prove his contention, does not lose his legacy. And even if he charges a freedman of the father of his ward with a capital crime, in the name of the latter, he shall not be excluded from possession of the estate in opposition to the terms of the will, because the requirements of his duty, and his responsibility as guardian should excuse him; nor can anyone convict a guardian of malicious prosecution who brings an accusation in the name of his ward, and not through any enmity entertained by himself, but, perhaps, induced by the representations of the mother of the ward, or at the instigation of the freedmen of the father.

If a guardian accuses anyone of a crime in the name of his ward, and does not prosecute the case, because, in the meantime, the ward has arrived at the age of puberty, it must not be said that he has become liable to the Turpillian Decree of the Senate, as the rights are distinct, even though several are united in the same person, for the rights of a guardian are one thing, and those of a legatee another; and where a guardian brings an accusation, not in his own name, but in that of his ward, he does not deserve punishment.

Finally, property left to a ward by a will under such circumstances is lost, unless it is preserved by order of the Emperor; to such an extent is he the defender, and, as it were, the patron of him who makes the accusation.

Sabinus says the same thing in his works on Vitellius.

23. *Gaius, On Implied Trusts.*

Where any heir whosoever, having been tacitly requested by the will of a testator to deliver to some person not entitled to receive it a fourth part of the estate to which he is entitled under the Falcidian Law, there will also be ground for the application of the Decree of the Senate; for there is not much difference between a trust of this kind and one where an heir is charged to give property which he has received from an estate to a party who is incapable of receiving it.

24. *Papinianus, Questions, Book XVIII.*

Where a son denies that his father's will is valid, as the controversy relates to the legality of the instrument, and he does not attack the testamentary provisions made by his father, or accuse him of any offence, he will retain what was left him by the deceased.

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

Where a son-in-law appoints his father-in-law his heir, the sole incentive of paternal affection will not permit any suspicion to attach to the implied execution of the trust.

(1) Claudius, in the Thirtieth Book of the Digest on Scævola, remarks that if the party to whom an unlawful bequest was made should die during the lifetime of the testator, the bequest will not be forfeited to the Treasury, but will remain in the hands of him who was charged with the execution of the trust.

THE DIGEST OR PANDECTS.

BOOK XXXV.

TITLE I.

CONCERNING TESTAMENTARY CONDITIONS AND DESIGNATIONS, THEIR REASONS AND THEIR MODIFICATIONS.

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

Either uncertain times or conditions are imposed upon legacies which are bequeathed; and if this is not done, they take effect at once, unless, by their very character, they are dependent upon some condition.

(1) Where a certain date is prescribed for the payment of a legacy, even though the time has not yet arrived, the heirs can, nevertheless, pay it, because it is certain that it will be due.

(2) When the time is uncertain, as in the following instance, "Let my heir pay ten *aurei* when he dies," as the date of his death is uncertain, hence, if the legatee should die before him the legacy will not pass to his heir, for the reason that the time did not arrive during his lifetime, although it is certain that the heir will die some time or other.

(3) A condition is inserted in a legacy for example, where we make a bequest as follows, "Let my heir give the child born of Arescusa the slave," or "Let my heir give the crops which may be collected from such-and-such an estate," or "Let my heir give to Seius the slave whom I may have not bequeathed to anyone else."

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

There are certain conditions which can be fulfilled even during the lifetime of the testator, for instance, "If a ship should come from Asia," for the condition will be held to have been fulfilled when the ship arrives. There are others which cannot be complied with until after the death of the testator, as "If he should pay him ten *aurei,* if he should ascend to the Capitol." For before anyone can be held to have complied with the condition, he must know that it has been inserted in the will; for if he should comply with it unintentionally he would not be considered to have carried out the wish of the testator.

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

It has been established that where impossible conditions are prescribed by a will they shall be considered as void.

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

Where legacies are bequeathed to persons to whom a patron is obliged to pay them, the Prætor should regulate the condition so that the amounts received by the patron and the appointed heirs, in compliance with the condition prescribed by the will, shall be in proportion to the respective shares of the legatees.

(1) Where the following provision was included in a will, "If a son should not be born to Titius within the next five years, let my heir then pay ten *aurei* to Seia," and Titius should die before that time, Seia will not be immediately entitled to the ten *aurei,* because the word "then" means the date of the expiration of the five years.

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

A ward can comply with a condition without the authority of his guardian. Let no one be apprehensive for the reason that, when the condition has been fulfilled, he may, in some cases, become the necessary heir, as he will become such by the right of paternal control, and not through the fulfillment of the condition.

(1) Likewise, a slave or a son under paternal control can comply with a condition without the order of his father or his master, because no one is defrauded by his own act.

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

A penalty is not imposed by a will upon an heir or legatee or upon anyone who profits in some manner by the last will of the testator, if he is ordered to erect a monument in accordance with the judgment of someone, and he who is to be consulted is not living, or cannot be present, or is unwilling to give his advice.

(1) Where an heir was directed to manumit certain slaves, and some of them died before the will was executed, Neratius gave it as his opinion that the heir had failed to comply with the condition, but he did not decide whether the latter was able to comply with the condition, or not. Servius, however, held that, where the following was written, "If my mother and my daughter should survive me," and one of them died, the condition had not failed.

The same rule is also stated by Labeo. Sabinus and Cassius think that where conditions considered impossible are inserted into a will they ought to be regarded as not having been written, and this opinion should be adopted.

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

The advantage derived from the Mucian bond is apparent in conditions where something is not to be done; as, for instance, "If he should not ascend to the Capitol," "If he should not manumit Stichus," and in other cases of the same kind. This opinion was held by Aristo, Neratius, and Julianus, and is also confirmed by a Constitution of the Divine Pius. The above-mentioned remedy was held not only to apply to legacies but also to inheritances.

(1) Where a wife appoints her husband, to whom she had promised her dowry, heir to a share of her estate, "If he should not demand, or exact the dowry which I have promised him," the husband must notify his co-heir that he is ready to give a receipt for the dowry, or to furnish security that he will not claim it, and he can then enter upon the estate. If, however, the husband should be appointed heir to the entire estate, under the same condition, and there should not be anyone to whom he can furnish such security, he will not be prevented from entering upon the estate on this account. For the condition will be considered to have been fulfilled by operation of law, because after he has once entered upon the estate, there is no one against whom he can bring an action to recover the dowry.

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

Where anyone makes a bequest as follows, "Let my heir pay such-and-such a sum to my wife, as long as she remains with my son," and the wife, desiring to avoid her patron, leaves the neighborhood, but still retains the intention of keeping her children with her, Trebatius and Labeo say that she will be entitled to the legacy, because she should not be required to be every moment with her children; but the only question is whether she has the intention and design of not sending her son away, and whether it is not her duty to keep her son with her while he is being reared.

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

Where a husband bequeathed a legacy to his wife payable when she had children, we are accustomed to say that he did not have in his mind those children whom his wife already had at the time when he made his will.

10. *The Same, On Sabinus, Book XXIII.*

The following condition, "I bequeath to my daughter, when she is married," signifies that the person who executed the will intended that the condition should only be fulfilled, and that it made no difference when this was done. Therefore, if the daughter should marry after the will was made, and during the lifetime of the testator, the condition will be held to have been

complied with, and especially where it is of such a character that it should be complied with but once.

All material unions, however, do not bring about the fulfillment of a condition; for instance, where a girl who is not yet nubile is married, she does not comply with the condition. We say that the same rule will apply if she should marry anyone with whom she cannot be united according to law. But can any doubt arise whether she can comply with the condition by marrying afterwards, just as if she had not married the first time? If the testator had had in his mind the first marriage of his daughter, I think that the condition has failed; still the indulgent interpretation should be given that as the condition has not yet been fulfilled, it has not failed.

(1) Where a legacy was bequeathed under the following condition: "If a ship should arrive from Asia," and the ship should arrive at the time that the will was made, but the testator was ignorant of the fact; it must be said that the condition has been fulfilled. This must also be said where a bequest is left to anyone, "When he arrives at puberty."

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

Where those things have already been done which were imposed by way of condition, and the testator was aware that they can be done a second time, the parties must wait until they are done the second time. If, however, the testator did not know this, the legacies will be due immediately.

(1) It also should be remembered that ordinary conditions must be fulfilled after the death of the testator, if this is necessary in order to comply with the provisions of the will, as, for example, "If he should ascend to the Capitol," and others of this kind. Unusual conditions can also be fulfilled during the lifetime of the testator, for instance, "If Titius should become Consul."

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

When a bequest is made as follows, "As my eldest son has taken ten *aurei* out of my chest, let my younger son take the same amount from the bulk of my estate," the legacy will be due, because it has been left in order that the condition of the children might be rendered equal. And it is clear that this is the case, for where anything is bequeathed for some reason, it refers to the past, but one which is left by way of penalty has reference to the future.

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

Where an estate is left to anyone under the condition, "If he pays a certain sum to a minor, or an insane person," the legatee will be held to have complied with the condition if he pays the money to the curator or the guardian of the party interested.

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

"Let Titius be my heir, if he erects statues in the city." If he is ready to erect the statues, but the municipal authorities will not furnish him with a place for that purpose, Sabinus and Proculus hold that he will become the heir, and that the same rule of law applies to a legacy.

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

Where a legacy is bequeathed under the following condition, "If she should marry in my family," the condition is held to have been complied with as soon as the marriage ceremony has been performed, although the woman has not yet entered the bed-chamber of her husband, for consent and not cohabitation constitutes marriage.

16. *Gaius, On the Edict of the Prætor Relating to Wills.*

Where questions arise with reference to matters foreign to the will, they must receive a just and liberal interpretation; but those which arise concerning the will itself must be determined in strict accordance with the rules of the written law.

17. *The Same, On the Edict of the Prætor Relating to Legacies.*

A designation is incorrect where it is made as follows, "I bequeath the slave Stichus, whom I have bought of Titius, the Tusculan estate which was presented to me by Seius," for if it is known to what slave or to what estate the testator referred, it will not be material if he whom he said that he had bought was really given to him, or if what he indicated had been donated to him he in fact had purchased.

(1) Therefore, where a slave is bequeathed as follows, "I bequeath to Titius my cook Stichus, my shoemaker Stichus," although the slave may be neither a cook nor a shoemaker, he will belong to the legatee, if it should positively be ascertained that the testator had him in mind when he made the bequest. For even if the mistake is made in designating the person of the legatee, but it is clear to whom the testator intended to make the bequest, it will be as valid as if no error had been committed.

(2) This rule with reference to a false designation is still more applicable where the reason is incorrectly stated, as, for instance, as follows, "I give such-and-such an estate to Titius, because he has had charge of my business." Likewise, "Let my son Titius receive, as a preferred legacy, such-and-such a tract of land, because his brother took such-and-such a sum of *aurei* from my chest," for even if the brother did not take the said sum of money from the chest, the legacy will be valid.

(3) But if the legacy is mentioned in terms which impose a condition, for instance, as follows, "I give such-and-such a tract of land to Titius, if he has transacted my business," "Let my son Titius receive such-and-such a tract of land, as a preferred legacy, if his brother took a hundred *aurei* from my chest," the legacy will be valid if the legatee transacted the business, or his brother took a hundred *aurei* out of the chest.

(4) Where a legacy is bequeathed to anyone dependent upon his performing some act, as, for example, erecting a monument to the testator, or constructing some public work, or giving a banquet to the people of the city, or paying part of the legacy to another, the legacy will be considered to have been bequeathed under a certain modification.

18. *The Same, On the Provincial Edict, Book XVIII.*

Where property is left to anyone under the condition of his not doing something, he must give security by means of the Mucian Bond to him to whom the legacy or the estate will belong under the Civil Law if the condition should fail to be complied with.

19. *Ulpianus, Disputations, Book V.*

The intention of the deceased occupies the first place in the conditions prescribed by him, and it controls the conditions. Hence, with reference to the following, "If my daughter should marry Titius," it was held that the date of the death of the testator ought not always to be considered, but that the time for the fulfillment of the condition could be extended beyond that event, where this was the wish of the testator.

(1) The following clause, "If the first should be my heir, let him be charged to pay," is not to be considered as implying a condition; for the testator seems rather to have intended to indicate when the legacy should be payable than to insert a provision, unless he meant to impose a condition; hence the following should not be held to prescribe a condition, "I give and bequeath whatever is due to me at Ephesus."

If, however, a bequest is made as follows, "If the first should not be my heir, let the second be charged to pay," and the first becomes the heir, the legacy will not be due. If the first should enter upon the estate, along with the second, there can be no doubt whatever that the condition has not been fulfilled.

(2) Where a patron, having obtained possession of an estate contrary to the provisions of the

will, receives the share which is due to him by law, his co-heir will not be obliged to pay to him any legacies which have been bequeathed under the following condition, "If my patron should not be my heir."

(3) Where the first heir has been charged with a legacy as follows, "If the second should not be my heir, let him pay Titius twenty *aurei,"* and, in like manner if the second heir is charged with a bequest to Titius as follows, "If the first should not be my heir," and both parties become the heirs, the condition of the legacy will not be fulfilled. If one of the heirs should obtain the estate, and the other should not, the legacy will be due.

20. *Marcellus remarks as follows on Julianus, Digest, Book XXVII.*

We have no doubt that dishonorable conditions should be referred back to those who imposed them. Among these are, generally speaking, such as require an oath.

21. *Julianus, Digest, Book XXXI.*

It makes a great deal of difference whether the condition is one of fact or one of law. For conditions like the following, "If a ship should arrive from Asia," "If Titius should become Consul," although they may not be fulfilled, they prevent the heir from entering upon the estate, so long as he is ignorant that they remain unfulfilled. Those, however, which refer to matters of law, only require to be unfulfilled whether the heir is aware of the fact or not. For instance, where anyone thinks he is under paternal control, when he is, in reality, the head of a household, he can acquire an estate. Wherefore, when anyone is appointed heir to a portion of an estate, although he may be ignorant whether the will has been opened or not, he can still enter upon the estate.

22. *The Same, Digest, Book XXXV.*

Whenever a bequest is made to a wife under the condition that she will not marry, and she is charged to deliver the property bequeathed to Titius if she should marry, it has been well established that if she marries she can claim the legacy, and will not be compelled to execute the trust.

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

Where a testator directed his legatee to pay ten *aurei* to his two heirs, and to take for himself a certain tract of land, the better opinion is that the heir cannot divide the condition, unless the legacy is also divided. Therefore, although he may have paid five *aurei* to one of the heirs, he can claim no part of the land unless he pays the remaining five to the heir who enters upon the estate; or if he should reject it, he pays the entire ten to the one who alone accepts it.

24. *The Same, Digest, Book XXXV.*

It has been established by the Civil Law that a condition is always considered to have been fulfilled where the party who is interested in not having this done opposes its fulfillment. Many authorities have extended the application of this rule to legacies and the appointment of heirs. Certain jurists have also very properly held that in cases of this kind, stipulations become operative when attempts are made by the promisor to prevent the stipulator from complying with the condition.

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

Where a husband bequeaths his estate to his wife, and they have children, and the woman, after a divorce has been obtained, has children by another man, and then, the second marriage having been dissolved, she returns to her first husband, the condition is not understood to have been complied with, for it is probable that the testator did not have in his mind the children who, during his lifetime, had been begotten by another man.

26. *The Same, Digest, Book LXXXII.*

The following clause, "If he should pay twenty *aurei* or swear that he will perform a certain act," includes a condition which has two parts. Hence, if anyone should be appointed an heir under the condition that he will swear that he will pay ten *aurei,* or erect a monument, although he will be permitted, under the terms of the Edict, to receive the estate or the legacy, he will still be compelled to do what he was ordered to swear that he would do, as only the oath can be remitted.

(1) Where the same property is bequeathed to one person absolutely, and to another conditionally, or where one heir is appointed absolutely, and another under a condition, and the condition fails, half of the legacy or the estate will accrue to the heir or the legatee to whom the legacy or the estate was absolutely bequeathed, provided the party accepted his share of the same.

27. *Alfenus Varus, Digest, Book V.*

A certain individual provided in his will that a monument, like that of Publius Septimius Demetrius which stands on the Salarian Way, should be erected to him, and if this was not done, that his heirs should be liable to a considerable fine. As no monument to Publius Septimius Demetrius could be found, but there was one erected to Publius Septimius Damas, and it was supposed that the party who made the will intended that a monument should be erected to him like the one aforesaid, the heirs asked advice as to what kind of a monument they would be obliged to erect, and whether they would be liable to the penalty if they did not erect any, because they could not find one to use as a pattern. The answer was that if it could be ascertained what kind of a monument the party who made the will intended to designate, even though he may not have described it in his will, it should still be erected in accordance with what he wished to indicate.

If, however, his intention was not known, the penalty would have no force or effect, as there was no monument found which could serve as a pattern for the one which he ordered to be erected; but the heirs must, nevertheless, erect a monument corresponding in every respect with the wealth and rank of the deceased.

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

A testator made the following bequest to his daughter, "If my daughter, Attia, should marry with the consent of Lucius Titius, let my heir give her such-and-such a sum." Titius having died before the testator Attia married, the question arose whether she would be entitled to the legacy. The answer was that she would.

(1) "Let my wife Attia take the boy Philargyrus and the girl Agathea from the slaves who will belong to me at the time of my death." The testator sold Agathea, whom he owned at the time he made the will, and afterwards bought other female slaves, to one of whom he gave the name of Agathea.

The question arose whether she should be considered as having been bequeathed. The answer was that she should be.

29. *Julianus, On Urseius Ferox, Book I.*

The following condition, "If he should ascend to the Capitol," should be understood to mean if he should ascend to the Capitol as soon as he could.

30. *The Same, On Minicius, Book I.*

If an entire estate should be bequeathed to me separately and absolutely, and to you conditionally, and you should die before the condition was complied with, I will not be required to comply with it, as even if the condition should fail, the share which you could have claimed will accrue to me.

31. *Africanus, Questions, Book II.*

The following provision was inserted into a will, "Let Stichus and Pamphila be free, and if they should be united in marriage, let my heir be charged to pay them a hundred *aurei."* Stichus died before the will was opened. The answer was that" the right to the share of Stichus was extinguished, and that, as it appeared that Pamphila had failed to comply with the condition, her share would therefore remain in the possession of the heir.

If, however, both of them had lived, and Stichus had refused to marry her while the woman was ready to marry him, she would be entitled to her share of the legacy, but the right of Stichus to his share would be extinguished. For where a legacy is bequeathed to anyone as follows, "Let my heir pay a hundred *aurei* to Titius, if he marries Seia," and Seia should die, Titius is understood to have failed to comply with the condition. But if he himself should die, he will not transmit the legacy to his heir, because by his death the condition is understood not to have been fulfilled. Where, however, both of them are living, and he refuses to marry her, for the reason that the condition fails through his act, he cannot obtain the legacy; but if the woman is unwilling to marry him, and he is ready to marry her, he will be entitled to it.

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

Although the words, "Render his accounts," have no other signification than to pay the balance which was due, still, if less than is due is paid by a slave who is to be free under a certain condition, through the fault of the heir, and not on account of any fraud committed by the slave, and he is considered to have rendered his accounts in good faith, he will become free; and, unless this rule is observed, no slave who is manumitted under a condition would ever obtain his freedom, if, through want of knowledge, he should pay less than he ought to have paid.

This must be understood to refer to cases where a slave is ordered to render his accounts, and, through some mistake but without fraudulent intent, he does so in such a way that his master may also be mistaken with -reference to his calculation.

33. *Marcianus, Institutes, Book VI.*

A false designation does not benefit the legatee, the beneficiary of the trust, or an heir who has been appointed; for instance, where" the testator incorrectly refers to his brother, his sister, his grandson, or anything else.

This was provided for by the Civil Law, as well as by the Constitutions of the Divine Severus and Antoninus.

(1) Where, however, a controversy arises with reference to several persons having the same name, that one will be admitted to the succession who can prove that the deceased had reference to him.

(2) Where a bequest is made to anyone as to a freedman, that is to say, by mentioning him among other freedmen, he should not lose the legacy for the reason that afterwards he may have received a gold ring from the Emperor, for his dignity is increased, and his condition is not altered, as was stated by the Divine Severus and Antoninus in a Rescript.

(3) If anyone should bequeath property as follows, "If it should belong to me at the time of my death," and it is not found at that time, the appraised value of said property will not be considered to have been bequeathed.

(4) But what if anyone should provide by his will as follows, "I give and bequeath Stichus and Pamphilus to Titius, if they should belong to me at the time of my death," and he should alienate one of them, could the other be claimed by the legatee? It was decided that he could be claimed, for this clause, although it is in the plural number, must be understood just as if the testator had said separately, "I give and bequeath Stichus if he should be mine at the time of my death."

34. *Florentine, Institutes, Book XL*

Where a bequest is made to anyone specifically, as, for example, to Lucius Titius; it would make no difference whether he designated him in this way, or by mentioning his physical characteristics, his trade, employment, relationship, or affinity; for a designation of this kind generally takes the place of the name, nor is it of any consequence whether it be false or true, provided it is positively known whom the testator meant.

(1) There is this difference between designation and a condition: a designation generally refers to something which has already been done, a condition to something which is to take place.

35. *Pomponius, Rules.*

The easiest of several conditions upon which freedom is dependent is considered to be the one which leads most directly to freedom, although it may be, by nature, harder and more difficult of accomplishment than the others.

36. *Marcellus, Opinions.*

Publius Mævius provided by his will as follows: "I give and bequeath, and charge whoever shall be my heirs to pay to my sister's son Gaius Seius, forty *aurei* for his expenses during his Consulate." Seius was appointed Consul during the lifetime of Mævius, and gave the ordinary present, and afterwards, upon the *Kalends* of January, assumed the duties of the Consulate, and then Mævius died.

I ask whether Seius would be entitled to the forty *aurei.* Marcellus answered that he would.

(1) Titia made the following provision with reference to certain lands which she had left to Septitia by her will, "I charge you, Septitia, to give to my son the same lands when he shall have reached the age of sixteen years. If, however, my said son should not reach the age of sixteen years, I charge you to deliver the said lands to Publius Mævius and Gaius Cornelius."

As Septitia died, and the son also died during his fifteenth year, I ask whether the trust should be executed, and the heirs of Septitia be compelled to deliver the land to Publius Mævius and Gaius Cornelius, the son not having completed his fifteenth year. Marcellus answered that Septitia had transmitted to her heirs the same right which she herself had in the land; for it would be contrary to the intention of the testatrix for the execution of the trust to be demanded immediately, as in that case more benefit would be derived by the substitutes than by the boy, either through Septitia or her heirs.

The words used by the testatrix would, indeed, seem to indicate that the trust should be executed as soon as her son died, but it is not probable that she intended the benefit to be enjoyed by the substitutes sooner than it could have been by her son. The aspect of the case is not at all changed because Septitia died first, for even if the boy had lived, the heirs of Septitia could not have been sued by him any sooner than Septitia herself could.

37. *Paulus, On the Lex Fusia Caninia.*

If anyone should make a bequest to a slave, whom he himself could not manumit, under the condition that "his legatee should manumit him," the legatee will not be excluded from receiving the legacy, but he cannot be compelled to manumit the slave, as one is only obliged to execute the will of the testator, when, by its terms, nothing is to be done contrary to law; and this opinion was stated by Neratius.

The legatee will not be deprived of the legacy, as the testator preferred that he should obtain the benefit of the slave rather than that his own heir should have him.

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

If I should say in my will, "I bequeath to So-and-So as much as I shall bequeath to Titius by

my codicil," although the legacy is only explicitly mentioned by the codicil, still it is valid under the terms of the will, and only the amount inserted in the codicil will be due. For legacies like the following were sustained by the ancients, namely, "Let my heir give to So-and-So an amount equal to that I shall state to him in a letter, or which I shall obtain from such-and-such an action."

39. *Javolenus, On the Last Works of Labeo, Book I.* Where a condition has reference to a certain class of persons, and not to individuals who are well known, we think that it relates to the entire will, and to all the heirs who have been appointed; but where the condition only has reference to certain individuals, we should consider it as relating only to that degree in which the said parties have been appointed heirs.

(1) Where a clause was inserted in a will providing that a "building may be erected in the Forum," and it is not stated in what Forum, Labeo says that if it does not appear what the intention of the deceased was, the building should be erected in the Forum of the town in which the party who made the will resided. I also approve this opinion.

40. *The Same, On the Last Works of Labeo, Book II.*

If your neighbor should, upon certain days, hinder you from using a highway when you wish to travel upon it in order to comply with a condition, and you are not to blame for not bringing an action against him to prevent him from doing this, these days shall not be included in the time imposed by the condition.

(1) A certain man made a bequest as follows, "If Publius Cornelius should pay my heir for the expense which I have incurred with reference to the Seian Estate, then let my heir deliver the Seian Estate to Publius Cornelius." Cascellius said that the legatee ought also to pay to the heir the price of the land. Ofilius denies that the price is included in the term "expenses," but that only -those expenses are meant which the party paid out of the land after it had been purchased. Cinna holds the same opinion, and adds that an account of the expenses must be taken without deducting the profits. I think that this is the better opinion.

(2) A testator bequeathed a hundred *aurei* to Titius, and afterwards made the following provision in his will, "Let my heir give the sums of money which I have bequeathed, if my mother should die." Titius survived the testator, and died during the life of the mother. Ofilius gave it as his opinion that, after the death of the mother, the heirs of Titius were entitled to the legacy, as it had not been left under a condition, but had been bequeathed absolutely in the first place, and the time of its payment had been added afterwards. Labeo says, "Let us see if this opinion is not false," because it makes no difference whether a bequest is made as follows, "Let my heir pay to my legatee the money which I have bequeathed to him, if my mother should die," or, in these terms, "Let him not pay the money, unless my mother should die," for, in either instance, the legacy is given or taken away under a condition.

I approve the opinion of Labeo.

(3) A master bequeathed five *aurei* to his slave, as follows: "Let my heir pay to my slave Stichus, whom I have ordered to be free by my will, the five *aurei* which I owe him on account." Namusa says that Servius gave it as his opinion that the bequest of the slave was void, because a master cannot be indebted to his slave. I think that, according to the intention of the testator, the debt should rather be considered a natural than a civil one, and this is the present practice.

(4) A husband, who had received no dotal land, made the following testamentary disposition, "Let my heir give to my wife the Cornelian Estate, which she gave to me as her dowry," Labeo, Ofilius, and Trebatius held that the devise of the land was, nevertheless, binding, because as the Cornelian Estate actually existed, the false designation did not affect the devise.

(5) Thermus Junior mentioned in his will the names of certain persons by whose advice he desired a monument to be erected to himself, and then made the following bequest, "Let my heir pay to Lucius, Publius, and Cornelius a thousand *aurei* for the purpose of erecting my monument." Trebatius gave it as his opinion that this is just the same as if the bequest had been made on condition that the party should give security for the erection of the monument with the said money. Labeo concurs in the opinion of Trebatius, because it was the intention of the testator that the sum should be used for the erection of a monument. Both Proculus and myself approve this opinion.

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

When a legacy is bequeathed under a condition, it does not become payable at once, but only after the condition has been complied with, and hence it cannot, in the meantime, be transferred by the heir.

42. *Africanus, Questions, Book II.*

A legacy was bequeathed to a son under paternal control, subject to the condition that he remained in the power of his father. It was held that the legacy seemed to have been bequeathed to the father, and that the latter could claim it in his own name.

The same rule of law applies where a bequest is made in this way to a slave. The proof of this contention is, that even though provisions should be bequeathed to the slaves of Titius, there is no doubt that the legacy belongs to the master and not to the slaves.

43. *Paulus, On Plautius, Book VIII.*

Plautius: An heir was charged by the testator, who was a freedman, to sell the entire estate and reserve ten *aurei* for himself. The patron of the deceased subsequently claimed possession of the estate in opposition to the will, and took that portion of the same to which he was entitled by law. Proculus and Cassius say that the beneficiary can recover from the heir a sum in proportion to what he himself has paid.

Paulus: This is the present practice, for as an heir, through the payment of trusts and legacies, is discharged from liability by the Prætor, so also he should receive his share of the same.

(1) The case is different where the Falcidian Law applies, and reduces the amount of the legacies, since in instances of this kind nothing can be recovered, because the condition has been entirely complied with.

(2) Likewise, the right of payment is restricted where the party to whom the bequest was made cannot take the entire share of the estate which may be left to him, for the better opinion is that he should pay a part, and that those also should pay a part whose shares have been increased by the amount taken from him to whom more had been left than is allowed by law.

(3) Neratius, in the First Book of Opinions, states that where two heirs have been appointed, and one of them is requested to deliver the estate to you, and you are asked to pay a certain sum to Titius, and the heir avails himself of the benefit of the Falcidian Law in delivering the property, it is not inequitable that you should pay as much less to Titius as the heir ought to pay to you.

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

Where anyone is directed to pay a certain sum to an heir, and the latter is a slave belonging to another, he should not pay the sum to the master, for even if some other heir had been appointed, and directed to pay the sum to the heirs of Titius, it should be paid to the slave himself, because things which have already been done do not pass to the master; just as where I stipulate for myself or for the slave of Titius, payment should be made, not to Titius, but to his slave. These opinions are correct.

(1) Where, however, a party is ordered to pay the heir, let us see whether the payment should be made to his master. It follows in this instance that payment should be made to the slave.

(2) It is certain that a slave who is to be free under some condition must pay the master.

(3) On the other hand, a legatee who is charged with payment to the master does not comply with the condition by giving the amount to the slave, unless the master consents. For no one can comply with the condition in a case of this kind, if I am either ignorant or unwilling.

(4) Where an estate is returned in compliance with the Trebellian Decree of the Senate, it should be given to the heir in order that the condition may be complied with, and it should not be returned by the latter under the trust.

(5) When an heir enters upon an estate which he suspects of being insolvent, and gives it back to the trustee, a doubt may arise whether he shall be deprived of it, and the more equitable opinion is that, in this instance, he will not be deprived of anything.

(6) Where, however, I am appointed heir, and a controversy arises as to my right to the estate, if the legatee should furnish security to return the legacy in case the estate should be evicted, security should also be given to him to return what he paid.

(7) But if you should be ordered to pay me the sum of ten *aurei,* and receive the estate, under the Decree of the Senate, I shall not be compelled to return you the said ten *aurei,* by virtue of the trust.

(8) Where a legacy is bequeathed to a slave belonging to two masters, under the condition of his paying something to the heir, certain authorities hold that the condition cannot be partially complied with, but that the money should be paid at once. I, however, hold the contrary opinion.

(9) Where a part of the property bequeathed has been acquired by a third party through usucaption, I doubt whether the condition should be complied with in full. I think it can be said that it may be partially complied with, in accordance with the intention of the testator.

(10) Plautius: I bequeath a tract of land to one of several heirs under the condition that he will pay a hundred *aurei* to my heirs. He must deduct his share of the estate, and give the remainder to the heirs in proportion to their respective shares. Where, however, he had been appointed heir to a share of the estate, "if he should pay ten *aurei* to the heirs," he could only become the heir by paying the entire ten *aurei* to his co-heirs; because he could not be admitted to the succession before he paid the entire sum. For, in the case where a slave is granted his freedom by will, and made an heir to a share of the estate on condition that he pays ten *aurei* to the heirs, it was decided that he would not be free and become an heir until he had paid the entire sum of ten *aurei* to his co-heirs.

Paulus: This is our practice at present.

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

Julianus says that where a legacy has been left to a person under the condition that he pays his heir ten *aurei* and the heir gives him a receipt for what he owes him, he is not considered as having complied with the condition, as he would if he had actually made payment; but, as it was the heir's fault that the condition was not complied with, the legacy can be claimed just as if this had been done.

46. *The Same, On Vitellius, Book III.*

If, for example, a slave who is to be free under the condition of paying a certain sum of money in a hundred days, and the beginning of the term is not mentioned, it will begin to run from the day that the estate is entered upon, because it is absurd to hold that it would begin before the time arrived when he who was entitled to the legacy would be able to receive it.

This rule will apply to all legatees who are directed to pay the heir under such circumstances. Therefore the time for complying with the condition by the legatee will be computed from the day when the estate was entered upon.

47. *Marcellus, Digest, Book XIV.*

A master bequeathed freedom to his slave as follows, "Let him be free if he belongs to me at the time of my death." He gave the legacy or the estate to him unconditionally, and then sold him. The legacy or the estate will be due to his new master, and the slave can accept it by his order; for the testator in granting him his liberty expressly stated, "If he belongs to me," with the result that, even if this condition had not been explicitly mentioned, his freedom would be prevented. Still, the disposition of property is very frequently changed, even where the testator specifically indicated something which, if it was not done, would still be understood.

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

I do not think that the time for the execution of a trust has arrived when the beneficiary of the same has entered his sixteenth year, and the condition was when he should have reached the age of sixteen years. The Emperor, Aurelius Antoninus, rendered this decision in the case of an appeal from Germany.

49. *Celsus, Digest, Book XXII.*

Where an heir is charged to make a payment of a sum of money, or a slave is ordered to be free in ten years, the legacy will be payable, or the grant of freedom will become operative on the last day of the term.

50. *Ulpianus, On the Duties of Consul, Book I.*

Where freedom was bequeathed directly to a slave under condition of his rendering his accounts, the Divine Pius permitted the Consuls to appoint an arbiter to decide the matter in the following words, "The Consuls, having been applied to by you, shall appoint an arbiter to examine the accounts, and to decide not only what balance is due from Epaphroditus, as well as what accounts and what documents he must deliver or show to his masters, and when the judgment of the arbiter has been complied with, the freedom of Epaphroditus will no longer be interfered with."

51. *Modestinus, Differences, Book V.*

Where a slave is ordered to be free under different conditions separately imposed, he can select the condition which seems to him to be the easiest complied with. Where, however, a legacy is bequeathed in this manner, the legatee must comply with the last condition imposed.

(1) A slave was directed to pay ten *aurei* to the heir and become free, and, by paying the amount to the heir of the heir, he can obtain his freedom. Publicius says that, under similar circumstances, this rule must not be observed with reference to a legatee.

52. *The Same, Differences, Book VII.*

It sometimes happens that certain provisions in a will, when explicitly stated, are disadvantageous, although if they could be tacitly understood this would not be the case. This occurs where a legacy is bequeathed to someone as follows, "I give and bequeath ten *aurei* to Titius, if Mævius should ascend to the Capitol." For although the choice is left to Mævius as to whether he will ascend to the Capitol or not, and therefore cause the legacy to be payable to Titius, still, a legacy cannot be legally bequeathed in these terms, namely, "I give ten *aurei* to Titius if Mævius should consent," as a legacy cannot be made dependent upon the will of another; hence it has been said that testamentary provisions specifically stated cause injury, but those expressed in general terms do not.

53. *The Same, On Inventions.*

Where anyone directs a slave to be free if he renders accounts to the heir, and he should afterwards forbid him to do so; he grants him his freedom as it were, absolutely, and he will be entitled to it by virtue of the will.

54. *Javolenus, On Cassius, Book II.*

Where anyone orders legacies, for the payment of which he does not fix any time, to be paid in one, two and three years, and bequeaths a sum of money to a minor when he shall arrive at the age of puberty, it is stated in the Commentaries of Gaius that the last legacy mentioned should be paid in one, two or three years after the boy arrives at puberty; because a more important condition than the term of payment is attached to the legacy.

I think that the opposite opinion is correct, because where a time is prescribed, it has reference to the postponement of the payment of legacies which are due at present, but does not apply to those which are payable in the future, and the age of puberty establishes a certain date for the payment of the legacy.

(1) The same property was bequeathed to two persons, if they should pay a hundred *aurei* to the heir. If one of them should pay him fifty, he will be entitled to his share of the legacy, and the share of the one who did not pay will accrue to the other, dependent upon compliance with the condition.

55. *The Same, Epistles, Book XIII.*

An estate was left to Mævius if he paid two hundred *aurei* to Callimacus, who could not take anything under a will, and the legatee was, nevertheless, obliged to comply with the condition and to pay the two hundred *aurei,* in order to become entitled to the land which was devised to him, even though he did not transfer the ownership of the said sum to the person who received it. For what difference does it make whether anyone is directed to pay the money to such a person, or to deposit it in some place, or to throw it into the sea? Money cannot come into the hands of an individual of this kind under the terms of a will, but he can acquire it as a donation *mortis causa.*

56. *The Same, Epistles, Book XIV.*

Where an estate is left to anyone on condition of his paying ten *aurei,* the devisee cannot obtain any portion of the land without paying the entire amount. The case, however, is different where the identical property is left to two persons under the same condition, for in this instance, under the terms of the will, the condition imposed upon the different parties may appear to have been divided among them separately, and therefore they can, as individuals, comply with it in proportion to their respective shares, and receive the legacy.

For although the entire sum, on the payment of which the legacy is dependent, seems to be divided by the enumeration of the different persons, the condition cannot be divided where some accidental occurrence takes place, in the case where the legacy is left to one person conditionally, and the entire number of those who are substituted for the legatee should be considered as constituting but one individual.

57. *Pomponius, On Quintus Mucius, Book IX.*

Where a slave was directed "to perform five acts for a stranger and become free," the question arose whether the condition should be understood to mean the same as where the payment of a sum of money had been directed, so that, instead of its delivery we can specify the performance of labor. This is our present practice, just as when it is provided that if a slave should pay a stranger a certain sum of money out of his *peculium* he shall be liberated, so, if he furnishes the labor, he must also be granted his freedom. Therefore, in the case stated, the heir will act wisely if he prevents his slave from performing the labor, lor, by doing so, the slave will obtain his freedom, but the stranger will not get the benefit of his services.

58. *The Same, On Various Passages, Book X.*

Where a legacy is left to a female slave belonging to another, "provided she should marry," Proculus says that the legacy is valid, because she can marry after having been manumitted.

59. *Ulpianus, On the Lex Julia et Papia, Book XIII.*

A legacy becomes of no effect, if the person to whom it was bequeathed conditionally should die before the condition is fulfilled.

(1) But what if he should not die, but should lose his civil rights? For instance, where a bequest was made to a certain man, "if he should become Consul," and he is deported to an island, will the.legacy not be extinguished in the meantime, because he can be restored to his civil rights ? I think that this is extremely probable.

(2) The same rule cannot be said to apply where a penalty involving servitude is imposed upon him, because servitude resembles death.

60. *Paulus, On the Lex Julia et Papia, Book VII.*

Conditions relating to acts are of different kinds, and are susceptible, as it were, of a threefold division, that is to say where something must be given, or something must be done, or something must occur; or, on the other hand, where something must not be given, or not be done, or not occur. The conditions of giving something or of performing some act have reference either to those to whom a bequest was made, or to others; the third class depends upon some event taking place.

(1) The Treasury is obliged to comply witli the same conditions by which the person from whom the Treasury obtained possession of the property was bound; just as it can also claim the property which is the subject of the legacy, with any burdens attaching to the same.

61. *Ulpianus, On the Lex Julia et Papia, Book VIII.*

Where a man leaves a legacy to his wife payable at the time that she has children, some doubt may arise whether the testator only had reference to such children as might be born after his death, or whether he had in his mind those also who were born to him after his will was made, if he died while the marriage continued to exist.

I think it is but proper that this should apply not only to children born during the lifetime of the husband, but also to those born after his death.

62. *Terentius Clemens, On the Lex Julia et Papia, Book IV.*

Children born to a woman by another person after the decease of her husband will still be allowed to receive a legacy, if the testator expressly stated that this should be the case.

(1) Where a bequest was made of more than the law allowed to a certain person who could not receive the entire amount, "if he should pay something to the heir," the question arose whether what he gave for the purpose of complying with the condition could be acquired by virtue of the legacy, for the reason that he did not receive what he paid to the heir; or whether what he paid should be considered in excess of the legacy, and therefore that he will not be entitled to any more of the estate of the testator than he would have been if the legacy had been bequeathed unconditionally.

Julianus very properly thinks that he will be entitled to as much more of the legacy as he may have paid for the purpose of complying with the condition, nor does it make any difference whether he was directed to make payment to the heir, or to a stranger; because after the calculation, which he is always obliged to make, is completed, no more will remain for him than the share authorized by the law.

(2) Where a man bequeaths an annual legacy to his wife under the condition that she shall not

marry as long as she has children; what is the rule of law? Julianus answers that the woman can marry and take the legacy. If, however, the testator provided that she should not marry as long as her children were under the age of puberty, the rule would not apply; because the duty of caring for the children, rather than remaining in the state of widowhood, was enjoined by the testator.

63. *Gaius, On the Lex Julia et Papia, Book II.*

Where a legacy was bequeathed as follows, "If she should not marry Titius," or, "If she should marry neither Titius, Seius, nor Mævius," and finally a large number of persons were included in the prohibition, it was held to be the better opinion that the woman would lose her legacy if she married any one of them; for it does not appear that widowhood was imposed by such a condition, because she could very easily marry someone else.

(1) Let us see what would be the case if a legacy was bequeathed to a woman under the condition that she married Titius. And, indeed, if she could marry Titius honorably, there can be no doubt that she would be excluded from the legacy, unless she complied with the condition. If, however, the said Titius was unworthy of contracting marriage with her, it must be said that she can marry anyone that she pleases, by the beneficent provision of the law. For when she was ordered to marry Titius, she was forbidden to marry anyone else, and therefore, if Titius is unworthy of her, the provision is the same as if it had been stated in general terms, "If she should not marry." And, moreover, if she entertains a genuine affection, this condition is harder than the one, "If she should not marry," for she is forbidden to marry anyone else but Titius, with whom her marriage would be dishonorable.

64. *Terentius Clemens, On the Lex Julia et Papist, Book V.*

Where a legacy is bequeathed under the following condition, "If she should not marry Lucius Titius," Julianus says that the law will not apply.

(1) If, however, the testator had said, "If he should not marry Aricia," it should be ascertained whether a fraud on the law has not been perpetrated; for if the said Aricia was a woman who could not easily find another man to marry, it should be held that what the testator had said for the purpose of evasion became void by operation of law, for a law which is beneficial to the State and which has been enacted for the purpose of increasing the population should be aided by a favorable interpretation.

65. *Paulus, On the Edict, Book LXII.*

Where a legacy is bequeathed under a condition, and the heir who is charged with it dies while the condition is pending, he will leave his own heir charged with the legacy.

66. *Modestinus, Opinions, Book X.*

An heir manumitted a slave whom he was ordered to set free on the fulfillment of a condition, and who was also made the beneficiary of a trust. I ask whether the heir was obliged to pay him what was left him under the trust. Herennius Modestinus answered that, although the heir had manumitted the slave absolutely, he must, nevertheless, pay him what he was entitled to by virtue of the trust which had been left to him under the same conditions, provided that the slave could show that the conditions had been complied with, or that it was the fault of the heir that this had not been done.

67. *Javolenus, Epistles, Book VII.*

Where land was devised to a certain person under the following condition, "If he should not manumit his slave," and, if he did manumit him, that the devise of the land should pass to Mævius, the legatee furnished security not to free the slave, received the bequest, and afterwards emancipated him. I ask whether anything is due to Mævius.

The answer was that if the bequest had been as follows, "If he should not manumit his slave,"

and security was furnished, the party could receive the legacy from the heir, and if he afterwards manumitted the slave, the agreement, having become operative, he must either deliver the land to the heir, or pay him its value, and in this instance the heir must give it to him to whom the legacy was due under this condition.

68. *The Same, On Cassius, Book II.*

Where a legacy is bequeathed to take effect when a woman marries, if she was already married and the testator was aware of the fact, the parties must wait for a second marriage, and it will make no difference whether the woman marries again during the lifetime of the testator or after his death.

69. *Gaius, On the Lex Julia et Papia, Book XIII.*

If the testator expressed himself as follows, "I give and bequeath to Titius such-and-such property, if he is willing," Proculus, on Labeo, remarks that the legacy will not belong to the heir of the legatee, unless the legatee himself desired him to have it, because the condition appears to be attached to the person.

70. *Papinianus, Questions, Book XVI.*

A mother appointed her two children heirs to certain shares of her estate under the condition that they should be emancipated, and left them absolutely bequests of certain articles as preferred legacies. They entered upon the estate. Their father should be excluded from the benefit of the legacies, because by emancipating his children in compliance with her wishes, he desired that the last will of his wife should be observed.

71. *The Same, Questions, Book XVII.*

A hundred *aurei* were bequeathed to Titius, in order that he might purchase a tract of land. Sextus Cæcilius thinks that Titius should not be compelled to give security, because, in any event, the entire benefit of the legacy would accrue to him. If, however, the testator intended to benefit the son of his brother, whom he had reared, and who was hardly capable of transacting business, it must be held that the heir was interested, and therefore security should be furnished that the land would be purchased, and would not afterwards be alienated.

(1) A hundred *aurei* were left to Titius, under the condition that "he would marry Mævia who is a widow." In this instance, the legatee cannot be released from compliance with the condition, and hence he will not be excused from giving security. This opinion cannot be successfully opposed, for if anyone should promise to pay the money to Titius if he should not marry Mævia, the Prætor will refuse him an action; for it is one thing for a man to be deprived of the freedom of marriage through fear of a penalty, and another to be induced to contract matrimony under a certain condition.

(2) A hundred *aurei* were bequeathed to Titius, under the condition, "That he will not leave my monument," or "Or that he will always reside in such-and-such a city." It can be said that there is no ground for demanding security by which the right of liberty may be infringed.

We make use of a different rule with reference to the freedman of a deceased person.

(3) "Let my heir give to my son-in-law Titius a hundred *aurei* by way of dowry for my daughter Seia." The benefit of the legacy will belong to Seia because she begins to have a dowry; but as the testator seemed to have had in his mind not only the woman, but also Titius to whom he bequeathed a sum of money, it is proper that he himself should be understood to be the legatee, and therefore be able to claim the legacy. If the heir should pay the money through the son-in-law, after a divorce had taken place, he will also be released, as the payment was converted into the dowry. Payment can legally be made to Titius during the existence of the marriage, even if the woman should forbid this to be done, for it is to her interest that she should begin to be endowed. And if anyone should say that she herself is

entitled to a right of action and can bring suit to recover the money, and does not wish it to constitute her dowry, there is no doubt that she can be barred by an exception on the ground of bad faith. If Titius or the woman should die before contracting marriage, the legacy will belong to the heir.

If Titius should not be willing to marry the woman, the legacy will be valid so far as she is personally concerned, but if Titius should claim it, he can be barred by an exception on the ground of bad faith. Sabinus was of the opinion that if the woman was married to Titius, the legacy would be due without any security, as the money would become her dowry. Security for payment, however, would be necessary before marriage, because the legacy, being absolute, can be demanded. But if the husband should lose his case through his own fault, and should prove to be insolvent, ought the woman to be entitled to relief against the heir for the money which was intended as her dowry, where she was not at all to blame? As both husband and wife have rights of action in this case, the woman will retain hers if the legacy is not paid to her husband.

72. *The Same, Questions, Book XVIII.*

Where a legacy is left as follows, "I bequeath to Titia, if she does not abandon her children," authorities deny that she can be legally required to give security, because the condition can be fulfilled even if the children should die. This opinion was not adopted, however, for an ominous interpretation of this kind should not be opposed to the desire of the mother, and compel her to give security.

(1) Where a patron bequeathed a certain sum of money to his freedman on condition that he would not abandon his children, the Emperor permitted a kind of Mucian bond to be given, because it would be both dangerous and distressing for a freedman who was intimately associated with the children of his patron to anticipate their death.

(2) Titius charged the heir whom he had appointed to deliver to another his estate at the time of his death, if security was not demanded by the beneficiary of the trust. The beneficiary cannot require a Mucian bond to be filed before releasing the heir from giving security, since the condition can be complied with during the lifetime of the party to whom the legacy was bequeathed.

(3) What should be done if the following clause was inserted in the will, "I wish you, after my death, to deliver my estate to So-and-So, in such a way that no bond for the execution of the trust, nor any account will be required of you?" From these words it will undoubtedly appear that the condition of giving bond will not be required, and a certain degree of indulgence may be exercised in demanding an account, that is, so far as negligence is concerned; but the heir will not be excused from presenting one where fraud has been committed.

A rescript on this point was issued with reference to a certain person who had transacted the business of the testator, and by the will of the latter had not been required to render an account.

(4) "If Seia should marry with the approval of Titius, let my heir give her such-and-such a tract of land." If Seia should marry during the lifetime of Titius, and he granted his consent, it should be held that she could receive the legacy; for it is the spirit of the law that nothing shall be done in any way to interfere with marriage. If, however, Titius should die during the lifetime of the testator, relief must be granted to the woman, even though the condition has failed, because, being in suspense, it would be of no force or effect.

(5) "I bequeath to Mævia, at her death, such-and-such a tract of land, if she should not marry." It can be said that even if she should marry, she will immediately be entitled to the legacy. This, however, would not apply, if a certain date, or any other indefinite time, should be fixed for the payment of the legacy.

(6) It is more equitable to hold that a false motive should not interfere with the payment of a legacy, for the reason that the cause of bequeathing it is not included in the legacy. Generally, however, an exception on the ground of bad faith will be available, if it should be proved that the testator would not otherwise have made the bequest.

(7) Cassius and Caslius-Sabinus say that a false condition can be classed as impossible; as, for instance, "Let Pamphilus be free if he pays Titius what I owe him," provided nothing was due to Titius. If, however, after the execution of the will, the testator should pay him what he owed him, the condition will be understood to have failed.

(8) Sabinus gives it as his opinion that the false designation of a legacy does not constitute one, for example, where a testator who had left nothing to Titius inserted the following provision in his will: "Let my heir pay Seius fifty *aurei* out of the hundred which I have bequeathed to Titius." Sabinus came to this conclusion after consideration of the will of the deceased who made this provision, not with the intention of making a bequest, but for the purpose of diminishing one which he thought he had already made. Seius, however, cannot obtain any greater legacy on account of the false designation than if it had actually been true.

73. *The Same, Questions, Book XIX.*

A certain tract of land was left to Titius, "If he should not go into Asia," and, if he should go there it was left to Sempronius. As in the case of all conditions which are terminated by the death of the legatees, it was decided that a Mucian bond must be furnished, and the heir received a bond from Titius, and transferred the land to him. If he should afterwards go to Asia, suit can be brought against the heir to compel him, by a prætorian action, to pay to Sempronius what he could recover under the stipulation secured by the bond which had been given. If the bond, which had been taken with all due caution, should in the meantime become worthless, the heir will not be required to make good the amount out of his own property; but as he can in no way be blamed, it will be sufficient for him to assign his rights of action. If, however, Titius should go into Asia, and Sempronius should die before receiving the legacy, the rights of the deceased will pass to his heir.

74. *The Same, Questions, Book XXXII.*

The usufruct of certain property was bequeathed to the wife of the testator and to Titius, provided the woman did not marry. If she should marry, as long as Titius lived and remained in the same civil condition, she would be entitled to half of the usufruct, for it should be understood that, under the law, she would be entitled to as much by virtue of the legacy as she would have been if she had complied with the condition; and if Titius, with reference to whom the condition actually failed, should reject the legacy, the woman will obtain no advantage.

75. *The Same, Questions, Book XXXIV.*

An uncertain date mentioned in a will imposes a condition.

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

Where a trust has been left to be executed by children, "If any of them should die without issue," it will not be invalidated by the legal fiction of adoption.

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

A grandmother who had appointed her grandson heir to a certain portion of her estate, on condition that he should be emancipated, afterwards inserted the following in a codicil, "I also devise such-and-such lands to my grandson, in addition to what I have already left him as my heir." It was held that the condition of emancipation was repeated, although the grandmother had made no substitution either with reference to the legacies, or the estate. For indeed where a slave was bequeathed his freedom absolutely, but was appointed an heir under a certain

condition, and if he should not be the heir, he was directed to receive a legacy, the Divine Pius stated in a Rescript that his grant of freedom should be considered as repeated in the legacy.

(1) The Mucian bond does not apply, if payment of the legacy is deferred by some other condition.

(2) "Let my heir pay a hundred *aurei* to Titius, if my wife does not marry again." Titius was charged to pay the money to the same woman under the terms of a trust. If the woman should marry, she can demand the execution of the trust on the day when the legacy is payable; and if she is excluded from the benefit of trust, the legatee will not be entitled to security such as the Mucian bond.

(3) A father appointed guardians for his daughter whom he had disinherited, and directed them to begin to transact the business of their ward, if her mother should die before the girl reached the age of puberty; and he charged his wife, at her death, to pay to their common daughter a million *sesterces.* The guardians are not considered to have been appointed under a condition, so that, if, in the meantime, the girl should have acquired any other property, they will not be prevented from administering it. The bond to be executed for the performance of the trust was not required of the mother, and that to be exacted from the heirs to secure the payment of the legacies, or the execution of the trust, can be remitted by any indication whatsoever of the wish of the deceased. Therefore, if the condition not to demand a bond is prescribed in the case of a legacy or a trust, this fact does not render them conditional; for if any of the parties should desire a bond to be furnished, and one is not executed, the condition will not fail, for, at present, under the public law, the heir cannot be compelled to furnish a bond against his will, after it has been decided that he can be excused from giving one.

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

Where a ward or a guardian prevents compliance with a condition which has reference to the person of the former, whether a legacy or a grant of freedom is concerned, the condition is considered by the Common Law to have been fulfilled.

(1) Where two conditions have been prescribed in different ways, it will not affect the legacy if one of them should fail, and the other should afterwards be fulfilled. For it makes no difference whether the conditions imposed could be performed by the party entitled to the legacy, or were dependent upon some event taking place.

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

"Let my heir pay Titius a hundred *aurei* at the time of the latter's death." The legacy is absolute for the reason that it is not dependent upon the condition, but upon delay; for a condition cannot exist under such circumstances.

(1) "Let my heir, when he dies, pay Titius a hundred *aurei."* This legacy is bequeathed under a condition. For although it is certain that the heir will die, it is, nevertheless, uncertain whether the time for the payment of the legacy will arrive during the life of the legatee, and it is not certain that he will receive it.

(2) Where anyone receives a legacy after having furnished a Mucian bond, and does something contrary to the terms of the bond, and the stipulation becomes operative, he must also restore the profits of the property to the heir. In this instance the legatee should be compelled to give security from the beginning.

(3) Although an usufruct to take effect at the time of the death of the legatee, when bequeathed in this way is void, still, the remedy of the Mucian bond will be available where the usufruct of property is bequeathed to anyone under the condition that he will not perform some act.

(4) Anything which is done to evade the law by preventing marriage has no force or effect, as

for example, "Let my heir pay Titius a hundred *aurei* if his daughter, whom he has under his control, does not marry," or "Let my heir pay the said sum to such-and-such a son under paternal control, if his father does not marry."

80. *Scævola, Questions, Book VIII.*

Reasons which immediately exclude the party from taking action must not be considered conditional with reference to trusts, but we can only consider those as such which cause delay with expense, where the legatee can receive his bequest after having furnished a bond. For we cannot say that the following cases are similar, namely, where property is bequeathed, "If the legatee will erect a monument," and where it is bequeathed, "to enable him to erect a monument."

81. *Paulus, Questions, Book XXI.*

Julius Paulus to Numphidius, Greeting. Where the following was provided by a will: "If Stichus should render his accounts, let him be free, along with his wife; and let my heir pay him ten *aurei*;" and Stichus should die before rendering his accounts, whether they balanced, or he owed something, you. ask if the woman would become free, and whether we should have the same understanding with reference to the legacy. Freedom being dependent upon rendering his accounts, this condition is required of the slave in order to show the good faith of his administration, as he seems to have been ordered to account for any balance, in his hands if there was any, and if there was none, both the parties will be held to be absolutely entitled to their freedom; and if the slave should die after the estate was entered upon, both having obtained their freedom, they will also be entitled to the legacy.

If, however, the slave should die with a balance in his hands unaccounted for, his wife will not be considered to have obtained her freedom, which was dependent on the same condition which was not fulfilled. It may not, however, improperly be said, that while Stichus was manumitted under a certain condition, his wife was absolutely manumitted, and that the same condition did not apply to her, but was only mentioned through the necessity of designating their union.

(1) A condition is considered to have been complied with where the party who will be indebted if it is complied with is responsible for this not being done.

82. *Callistratus, Questions, Book II.*

Where a slave is directed to be free as follows, "Let my heir be charged with the delivery of such-and-such a tract of land to my slave, if he renders his accounts," let us see whether the condition has reference to the grant of freedom, or to the legacy. And, indeed, if we decide that it only refers to the grant of freedom, no further consideration is necessary, for the legacy is absolute, and therefore void. If, however, the condition was imposed on the legacy, as some authorities very properly hold, it becomes legally payable at the very moment when the slave obtains his freedom. What then is the meaning of the words, "If he renders his accounts"? Certain jurists say that it signifies if he should give a statement of the balance in his hands, just as if there was no difference between the two conditions, "If he renders an account of the balance remaining in his hands," or, "If he renders his accounts." We, however, do not think that the condition only has reference to payment, or to some act which is to be performed, but that it includes both of these things, since if the slave should tender the balance of the money in a bag, he will not be released from liability, as this was not the intention of the testator, but he wished him to render his accounts in the way in which a slave usually does so; that is to say, that if he should first show the accounts to the heir, and then the calculations, in order that it may be ascertained whether they are correctly or incorrectly made out, and whether the receipts which have been taken correspond with the statement, or not. In this way the investigation begins with an act, and finishes with the payment of money. These words also mean that the heirs can ascertain from the examination of each item what is contained in the

several accounts, for the heir is understood to have ordered the same thing to be done by his heirs which he himself would have done if he had been living. For he was certainly not accustomed to sign accounts, where his slave merely showed him the balance which was due, but he was accustomed to read them, scrutinize them, and take exception to them; therefore, where freedom is left to a slave under the condition, "If he renders his accounts," it has not merely the signification that he will deliver to his heir all the bonds and documents relating to his administration, but that he will also pay him any balance remaining in his hands.

83. *Paulus, Opinions, Book XII.*

Lucius Titius made a will as follows, "Let Aurelius Claudius, the son of such-and-such a woman, be my heir, if he proves in court that he is my son." Paulus gave it as his opinion that the son in question did not appear to have been appointed under any condition which it was in his power to comply with, and therefore that the will was of no force or effect.

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

"I wish ten *denarii* and their clothing to be given to such-and-such freedmen every month, for their support, if they reside with my son." The said freedmen remained in attendance on the son until the latter, having grown up, was appointed to a command in the army, the result of which was he set out on his journey, having left some of his freedmen at Rome, and died in camp. The question arose whether support should be furnished by the heirs of the son. Paulus was of the opinion that the condition should not be considered to have failed, so far as the freedmen who continued to reside with the son of the deceased were concerned, as the son having died, it was not their fault that they did not continue to reside with him; but if the testator had desired support to be furnished to those freedmen who resided with his son for the convenience of the latter, and the freedmen demanded it contrary to the wishes of the deceased, they should not be heard.

85. *Scævola, Opinions, Book III.*

Titia, having appointed her son, who also had children, her heir, charged him to deliver all her property to his children or grandchildren, whenever they should claim it, and to do so without any legal controversy. I ask whether, by these words, "Whenever they shall claim it," a condition appears to have been imposed upon the trust. The answer was that it does not.

86. *Mæcianus, Trusts, Book III.*

Our Julianus says that where a slave is ordered to pay ten *aurei* and be free, and he is manumitted during the lifetime of his owner, he will not be entitled to the legacy which was left him with his freedom, unless he complies with the condition under which it was granted. This also applies to a purchaser of the slave, if he should be sold. It, however, only applies where he could obtain the legacy unconditionally with his freedom, even though no condition was imposed on the payment of the legacy; as, for instance, where the legacy was to vest at the time when he obtained his freedom.

Where, however, his freedom was granted under a condition, and the legacy was payable at once, the question arises whether the legacy is valid. For, in this case there is no ground for the application of the Rule of Cato, since, even if the testator should die immediately after making his will, the legacy will not be absolutely void, as the condition upon which the freedom of the slave is dependent may be complied with before the estate is entered upon, and the manumitted slave be entitled to the legacy, unless he should be appointed a necessary heir; for, in this instance, the legacy will be absolutely void by operation of law because the slave received his freedom under a condition.

87. *Valens, Trusts, Book I.*

The following rule which has been handed down, namely, that where several conditions have been imposed with reference to grants of freedom, the one which is the most easily complied

with, and, in the case of legacies, the last one, shall be considered.

88. *Gaius, Trusts, Book I.*

(That is to say, the one which will be the most convenient for the slave himself to carry out.)

89. *Valens, Trusts, Book I.*

This has reference not only to provisions which are often dependent upon different conditions, but also to dispositions which are at first absolutely made, and have afterwards become conditional. Therefore, where the heir is ordered to pay something absolutely, or where the bequest is absolute, and the same property is subsequently bequeathed under a condition, the last bequest will be valid. If the property is first left under a condition and afterwards absolutely, it will be payable immediately. If, however, the legacy is bequeathed absolutely and the heir is charged or requested to pay it at once under a certain condition, it is the same as if the bequest had been made in two places, so that, if the legatee desires, he can bring suit for its recovery immediately, or it can be claimed by the heir when the condition has been fulfilled, unless the legacy has only been mentioned the second time by way of calling attention to the first, for example, "Let my heir give Stichus to the party to whom I have bequeathed him, if he does such-and-such a thing," for, in this instance, the testator is not considered to have made this provision for the purpose of revoking the bequest, and changing it to a conditional one, and if the legatee should bring suit to recover the property before the condition was complied with, an exception on the ground of bad faith will be a bar to further proceedings.

90. *Gaius, Trusts, Book I.*

Where freedom is bequeathed to a slave several times by a trust, not the condition most easy of fulfillment but the last one should be considered, in order that the final desire of the deceased may have the preference. A Rescript of the Divine Antoninus confirms this opinion.

91. *Mæcianus, Trusts, Book II.*

The nature of conditions which have reference to the future is threefold; some relate to the time during which the testator may live, some relate to that following his decease, and some relate to both, and the date of their fulfillment may be either certain or indefinite. All these things are accustomed to be taken into consideration, not only in the case of trusts, but also with reference to the appointments of heirs, and the bequests of legacies. For instance, there is no doubt that the following condition, "I bequeath to Titia, if she should marry me," must be complied with during the lifetime of the testator; this one, however, "If he should attend my funeral," cannot be complied with until after his death. The following one, namely, "If she should marry my son," can be complied with either during the lifetime, or after the death of the testator. The first and the third of the conditions mentioned refer to an indefinite time, for the condition will be complied with whenever the girl marries; but the second condition has reference to a certain time.

92. *Ulpianus, Trusts, Book V.*

Where a person to whom a legacy was bequeathed is asked to emancipate his children, should he be compelled to emancipate them? I remember that I said on this point that the children were excluded from demanding the execution of the trust; for the Prætor, acting as trustee, does not protect children who desire emancipation as he does slaves. I am aware that Papinianus also in the Ninth Book of Opinions stated that a father should not be compelled to emancipate his children.

I think, however, that an extraordinary rule should be established in such cases, and that a father should be forced to emancipate his children when he has received property which was left to him with the understanding that he would emancipate them, for the intentions of testators should not be evaded. Hence this should be understood in the same way as where a

legacy was bequeathed to him on condition of his emancipating his children, to enable him to emancipate them. The rule stated by the Divine Severus in a Rescript, agrees with this; for when a certain woman appointed her grandchildren her heirs, and appointed her son, their father, their co-heir, and substituted them for one another, requesting her son that he should emancipate her children, but did not ask him to transfer the estate to them, he was compelled by the authority of the Divine Severus to emancipate them, and to deliver the estate to them, and it was added that if he should delay to do this, he would be liable for interest on the amount unpaid while he was in default; for it was held that he who was in default in granting their emancipation was guilty of the same default with reference to the delivery of the property under the terms of the trust.

93. *Papinianus, Opinions, Book VIII.*

A mother having appointed her son her heir, and designated the daughters of the latter as his co-heirs, charged him to emancipate the latter, so that they might receive a curator from the Prætor. It was held that the son was charged with a trust to permit his daughter to become independent of his authority, so that they could obtain the estate of their grandmother, and that it did not make any difference if he should acquire the shares of his daughters by the right of substitution.

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

Where freedom is bequeathed to a slave on condition that he will pay ten *aurei* to Titius, who was not the heir, a certain person is designated, and, on this account, the condition cannot be complied with except with reference to him. It is clear that, when the day for the payment of the legacy arrives, the slave who is to be free under a condition will, according to the law which has been established, be entitled to the money dependent upon said condition, and will gain his freedom without payment to anyone.

The case of a legatee is different, and the condition with reference to him is considered to have failed if Titius should die before the legatee has paid the money.

(1) Where a condition is expressed in the following terms, "Let So-and-So, a slave, be free, if he pays ten *aurei* to the heir," or "Or if he pays ten *aurei* to Titius, the heir," he will obtain his freedom if he pays the money not only to the heir, but to the heir of the latter. But if there should be no successor to the heir he will, according to the established law, obtain his freedom without payment to anyone.

95. *The Same, Epitomes of Law, Book IV.*

Where a legacy bequeathed under a condition is transferred to another, it is considered to have been transferred under the same condition, if it was not personal.

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

The usufruct of a slave was bequeathed to Titius, and freedom was granted to the slave when it should cease to belong to the legatee. Titius died during the lifetime of the testator. The grant of freedom was not valid, because the condition did not have a beginning.

Paulus: Hence, if Titius should live, and should not be able to receive the legacy, it must be said that the same rule will apply; for anything which did not have a beginning cannot be held to have ceased to exist.

(1) The usufruct of a slave was bequeathed to a woman as long as she remained unmarried, and the same slave was directed to be free if she did marry. If the woman should marry the slave would become free, because a grant of freedom has more force than a legacy.

97. *The Same, On Neratius, Book II.*

A legacy was bequeathed to the citizens of a municipality on condition of their taking an oath.

This condition is not an impossible one.

Paulus: How then can it be complied with ? The officials by whom the affairs of the town are conducted can take the oath for the citizens.

98. *The Same, On Neratius, Book III.*

My own property can be bequeathed to me under a condition, because, in bequests of this kind, not the time when the will is executed but the time when the condition is fulfilled must be considered.

99. *Papinianus, Questions, Book XVIII.*

Conditions which are not specifically stated in a will, that is to say, such as seem to have been tacitly included therein, do not render legacies conditional.

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

A testator bequeathed two hundred *aurei* to Titia, if she should not marry, and a hundred to her if she should. The woman married. She can claim the two hundred *aurei,* but not the other hundred; for it would be absurd for her to be considered a widow and a married woman at the same time.

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

A father, by his will, designated Severiana Procula, his daughter, as the wife of Ælius Philippus, one of her relatives. He left a certain estate to his said daughter in trust if she should marry Ælius Philippus, and if she should not marry him, he wished the same estate to be given to Philippus. The girl died before arriving at a marriageable age. I gave it as my opinion that in conditions mentioned in wills the intention, rather than the words of the testator, should be considered; and hence that Ælius Philippus seemed to have been made the beneficiary of a trust if Procula, the daughter of the deceased, should refuse to marry him.

(1) Where a trust is created as follows, "I wish you to surrender my estate, if you should die without children," according to the intention of the testator the condition will fail if only one child should survive the beneficiary of the trust.

(2) The terms of a condition prescribed by a will are considered only for the purpose of ascertaining the intention of the testator, and therefore where testamentary guardians are appointed to administer the affairs of the minor until he grows up, and the condition of a trust is, "If they should administer the guardianship until he reaches his eighteenth year," it will not be considered to have failed to be fulfilled if the guardians should cause themselves to be appointed his curators.

(3) A mother-in-law left a trust for the benefit of her daughter-in-law, under the condition, "That she should remain married to my son." A divorce having been obtained without the fault of the husband after the death of the mother-in-law, I gave it as my opinion that the condition had failed, that the day for the execution of the trust did not begin before the death of either the wife or the husband, and hence that there would be no ground for the Mucian bond because the condition could be fulfilled during the life of the husband.

(4) Where a monthly and annual allowance was left to a freedman by a trust, under the condition, "As long as he may transact the business of the daughter of the patron," the money must be paid, even if the daughter should forbid the freedman to transact her business; still, if she should change her mind, the trusts will be restored to their former condition, for the reason that there are several of them.

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

A grandfather appointed his son and a grandson by another son his heirs, and requested his grandson if he should die before reaching his thirtieth year, to deliver his share of the estate to

his uncle. The grandson died within the period above mentioned, leaving children. I gave it as my opinion that, on account of paternal affection, the condition of the trust failed of fulfillment, because it should be considered that less had been prescribed than had been intended.

103. *Paulus, Questions, Book IV.*

Where a legacy was bequeathed as follows, "Let such-and-such a sum be paid to Titius, after ten years, if he does not require security from my heirs," and Titius should die before the term of ten years has elapsed, he will transmit the legacy to his heir, because the condition was complied with at the time of his death.

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

The beneficiary of a trust who was banished after the will was opened and was afterwards restored to the rights can demand the execution of the trust, where the condition upon which the same was dependent was fulfilled after he had recovered his position as a Roman citizen.

105. *Pomponius, Epistles, Book V.*

Where, while the condition was pending, an heir left to a third party land devised by the testator under a condition, after the condition imposed by the first will has been complied with, the ownership of the property will not be lost by the prior legatee; nor can the heir render any part of the land religious, or impose a servitude upon the same, and if he does impose a servitude, it will be extinguished when the condition is fulfilled.

106. *Julianus, Digest, Book XXV.*

When a legacy is bequeathed under the condition, "If she should not marry Titius," it must be considered just as if it had been bequeathed after the death of Titius; and therefore the legatee will be entitled to it without furnishing the Mucian bond. The woman will have a right to the legacy, even if she should marry someone else.

107. *Gaius, On Events.*

It sometimes happens that a legacy bequeathed conditionally may be understood to be absolute; as where something is left dependent upon the same condition under which another heir was also appointed. The same rule applies where a bequest is left under the condition that the heir enters upon the estate.

On the other hand, where a legacy is bequeathed absolutely, it may be held to have been conditional; as, for example, where the property bequeathed is taken away under a condition, because it is understood to have been left under an opposite condition.

108. *Scævola, Digest, Book XIX.*

A certain man left a house to all his freedmen, and added the following words, "In order that my freedmen may always reside in the said house, and that it may never pass away from persons bearing my name, and may belong to the last survivor; and, in addition to this I wish the Sosian Estate be given to my said freedmen." The question arose whether the condition, "That it may never pass away from persons bearing my name," was also applicable to the second bequest. The answer was that it did apply to it.

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

An heir, having been charged by the testator to accept a hundred *sesterces,* and surrender his share of the estate to Titia, his co-heir, died after entering upon the estate; and Titia also died before paying the hundred *sesterces.* The question arose whether the heir of Titia, by tendering a hundred *sesterces,* could, under the terms of the trust, obtain her share of the estate. The answer was that the heir could not comply with the condition.

Claudius: The opinion of Scævola is stated with a great deal of ability, where the law is clear; but, still, some doubt may arise whether in the present instance a condition was not imposed.

110. *Pomponius, Epistles, Book IX.*

A slave who is to be liberated on condition of paying a certain sum of money to Titius will become free if he pays the money out of his *peculium,* even without the consent of the heirs; but if Titius knowingly accepts the money against the consent of the heirs, he will only be considered to hold it as the possessor, and not the owner, and the heirs, who were unwilling that it should have been paid, can deprive him of it.

111. *The Same, Epistles, Book XL*

A slave who is ordered to be free under the condition of rendering his accounts must show that he has been honest in all the business transacted by him, and that he has not embezzled anything of what he received, and has not included in his accounts any expenses which he did not incur. He must also pay over whatever his accounts show remains in his hands by way of balance, for he cannot become free unless he, in this way, complies with the condition under which freedom was granted to him.

He will not, however, be obliged to prove that the solvency of the debtors with whom he made contracts existed at the time of the death of his master, but that when he lent them money, their credit was such as would have induced the diligent head of a family to trust them.

112. *The Same, Letters, Book XII.*

Conditions like the following, "If they should erect a monument," if imposed upon several persons, cannot be complied with unless by all of them at the same time.

(1) Likewise, "If Titius should pay to Symphorus and Januarius a hundred *aurei,* I leave him such-and-such a tract of land." If Symphorus dies, will the devise be extinguished? I think that it ought to be interpreted in this way, if the legatee should pay the amount during the lifetime of either of the parties. According to the most indulgent interpretation, it must be said that, if Symphorus should die without Titius being in default, he could claim half of the land which was devised, if he tendered half the money to Januarius.

(2) A question arose with reference to the following case: A tract of land was devised to certain persons, if they paid a specified sum of money for funeral expenses, and for transporting the body into another province; for unless both of them made the payment, neither would be entitled to the devise, as the condition could not be complied with unless by both. We, however, are accustomed to make a more liberal interpretation in cases of this kind, just as where a tract of land is devised to two persons if they pay ten *aurei,* and one of them pays his share, he will be entitled to his portion of the devise.

(3) Priscus gives it as his opinion that a slave who is to become free on condition of rendering an account, cannot do this where the testator died, or where he himself may happen to be, or where he may desire to render it; but, in the meantime, he must present himself to the person to whom he is obliged to render the account, and by all means, if the latter should be absent on business for the State.

It is, however, extremely probable that another conclusion might be arrived at in a case of this kind, where the rank of the parties and the distance of the places must be taken into consideration.

113. *Paulus, From the Second Book of the Collection of Imperial Decisions in Matters Brought Before the Emperors; Embraced in Six Books.*

Where a son was charged by his father, "To deliver his estate to Titius, if he should die before he himself could administer his affairs," and the son died after reaching the twentieth year, it

was stated in a Rescript that the trust must be executed.

TITLE II.

CONCERNING THE FALCIDIAN LAW.

1. *Paulus, On the Lex Falcidia.*

The Falcidian Law, by its first Article, conferred the power of disposing of an estate up to and including three-fourths of the same, as follows: "Those Roman citizens who desire to make a will after the enactment of this law shall have the right and the power to give and bequeath their money and their property to anyone whom they may select, in accordance with the following provisions."

In the second Article, the amount of the legacies which can be bequeathed is established in the following words: "Any Roman citizen who may execute a will after the passage of this law shall have the right and the power to bequeath as large a sum of money as he wishes to any other Roman citizen, in accordance with public law; provided the legacy is left in such a way that his heirs will receive not less than a fourth part of his estate under the terms of the will. Those to whom any money is given or bequeathed shall be entitled to receive the same without being liable for fraud; and an heir who is ordered and charged to pay said money must pay it in compliance with the directions prescribed."

(1) On account of the Cornelian Law, the *Lex Falcidia* is also considered to apply to those who die in the hands of the enemy; for the reason that the Cornelian Law confirms their wills just as if they had lost their lives in their own country, by reason of which fiction the *Lex Falcidia* and all others relating to wills which can be considered to have the same application are included in this category.

(2) The *Lex Falcidia* does not have reference to those who reject an estate left by a will, in order to obtain possession of it on the ground of intestacy; but the power of the law can be applied by means of the Edict of the Praetor.

(3) The rule is the same where the condition of taking an oath is remitted.

(4) Where a testator makes a bequest to his slave with the grant of his freedom this law will apply, because payment of the legacy is postponed until the time when the slave will become free; and this is also the case where the person to whom property is left is in the hands of the enemy or has not yet been born.

(5) The Falcidian Law also applies to legacies bequeathed to municipalities, or even for religious purposes.

(6) Again, it not only applies to bequests of property of the testator, but also to those of property belonging to others.

(7) Everything which must be paid or delivered out of the estate of the deceased is subject to the provisions of this law, whether it is certain or uncertain, and whether it is to be weighed, counted, or measured; and the law also applies where the right of property is bequeathed, as, for instance, the usufruct, or any claim which may be due.

(8) Likewise, where a legacy is bequeathed as follows, "Let my heir furnish Seius with provisions, and if he should not do so, let him pay him ten *aurei,"* some authorities hold that the legacy is limited to ten *aurei,* that the provisions can only be acquired as a donation *mortis causa,* and that the heir cannot avail himself of the benefit of the Falcidian Law. When stated that provisions must be furnished without delay, it should be understood to mean after a reasonable time. If, however, the heir should furnish them after having been in default, the legatee will have no right to receive them, and the Falcidian Law will not apply; for the provisions which were bequeathed have now been transformed into a pecuniary legacy, and the ten *aurei* are due.

The rule will be the same if, in the beginning, the bequest had been made as follows, "If he should not furnish the provisions, let him pay ten *aurei,"* for in this instance the provisions are not the object of the bequest, and if they are furnished they will be acquired *mortis causa,* since the condition of the legacy has not been fulfilled.

(9) Where an usufruct is bequeathed, as it can be divided, it is different from other servitudes which are indivisible; and certain ancient authorities were accustomed to hold that the entire usufruct should be appraised, and in that way the amount included in the legacy be determined. Aristo, however, dissents from this opinion of the ancients, for he says that a fourth part of this can be reserved, as in the case of corporeal property. Julianus very properly approves this opinion. But where the services of a slave are bequeathed, as neither use nor usufruct is considered to be included in a legacy of this kind, the decision of the ancients must necessarily be adopted, in order that we may ascertain what is embraced in the legacy; because, necessarily, in all acts which are to be performed, a part must be deducted to comply with the Falcidian Law, and part of the labors of a slave cannot be understood to exist. Even if, in the case of the usufruct, the question should arise to how much the legatee to whom the usufruct was given will be entitled, and what proportion should be allotted to the other legatees, in order that the share of the said legatee may not exceed three-fourths of the estate, recourse must necessarily be had to the rule of the ancient jurists.

(10) Where anyone bequeaths to his creditor the amount that he owes him, the legacy will either be void, if no advantage enures to the creditor; or, if he is benefited by it, for instance, by immediate payment, the Falcidian Law will also apply with reference to the advantage obtained by the creditor.

(11) If the legatee has obtained possession of the property bequeathed, and he cannot be deprived of it because he obtained possession of the same with the consent of the heir, who gave it while laboring under a mistake, an action will be granted to the heir to recover everything over and above three-fourths of the value of said property.

(12) It sometimes becomes absolutely necessary for the entire legacy to be paid to the legatee, if he enters into a stipulation to return anything which he may receive above the amount allowed by the Falcidian Law; for example, where a minor is charged with the payment of legacies which do not exceed the amount authorized by that law, for there is reason to believe that other legacies may come to light after the death of the minor, which, after contribution has been made, will amount to more than three-fourths of the estate.

The same rule may be said to apply where legacies are bequeathed conditionally under the first will, and it is uncertain whether they will be payable or not; and therefore if the heir is ready to pay them without application to court, he can protect his interest by means of the stipulation above mentioned.

(13) The share obtained by an heir through the substitution of his co-heir will benefit the legatee, for, in this instance, the heir resembles one who has been appointed absolutely for one part of the estate, and conditionally for another. Where, however, he refuses to accept the estate, the legacies with which he is charged will not increase by accrual; for instance, where they are bequeathed specifically, and not in general terms, as to "Whomever shall be my heir."

(14) If the share of my co-heir is exhausted, mine remains unimpaired, and if I should claim his, Cassius thinks that the two shares ought to be merged. Proculus, however, holds the contrary. In this case Julianus agrees with Proculus, which opinion I think to be the more correct one. The Divine Antoninus, however, is said to have decided that both shares should be united in computing what is due under the Falcidian Law.

(15) If I should arrogate my co-heir after the estate has been entered upon, there is no doubt that the shares ought to be separated, just as if I became the heir of my co-heir.

(16) If a legacy, payable annually, is bequeathed to Titius for the reason that there are several legacies, and they are conditional, there will be ground for the furnishing of the bond mentioned in the Edict, in order to secure the return of any amount received over and above that allowed by the Falcidian Law.

(17) Certain authorities hold that payment of what is naturally due to the estate and cannot be demanded should not be required, and ought not to be reckoned as part of the assets. Julianus, however, thinks that these claims will, according to circumstances, either increase the amount of the estate or will not increase it, and if paid, this can be acquired by the heir through hereditary right, and hence would be included in the distribution of the estate.

(18) Where a debtor becomes the heir of his creditor, although he may be released from liability by reason of the merger resulting therefrom; still, as he is considered to have received a larger inheritance on this account, the amount of his indebtedness must be computed, although it may have been extinguished by his acquiring the estate.

(19) The question arises whether expenses incurred for the erection of a monument should be deducted. Sabinus thinks that they should be deducted if it becomes necessary to erect the monument.

Marcellus, having been consulted as to whether the expenses for a monument which the testator ordered to be erected should be deducted as part of the debts of the estate, answered that no more ought to be deducted on this account than was expended for the funeral. For the case is different with reference to the expense incurred for the erection of a monument, since it is not necessary, as that of the funeral and the burial are. Therefore, the person to whom money is bequeathed for the erection of a monument must suffer the deduction under the Falcidian Law.

2. *Marcellus, Digest, Book XXII.*

A larger sum should not be allowed than will be sufficient for the erection of an ordinary monument.

3. *Paulus, On the Falcidian Law.*

Where an heir is appointed and sells the estate, which is insolvent, it would be very difficult to persuade anyone that it was not solvent, since it found a purchaser. If this is a fact, however, the legatees will not be entitled to anything, because the heir appears to have profited more from the folly of the purchaser than from the estate of the deceased.

On the other hand, if he should sell the property of the estate for too low a price, this will not prejudice the rights of the legatees, and therefore if the heir has made a good bargain he should enjoy the benefit of it.

(1) If, however, a person who is not solvent should make bequests, and the heir should agree with the creditors not to pay them in full, and, by reason of this agreement, be able to retain something from the estate, still, the legatees will not be entitled to anything, because the heir obtained the money not from the estate, but through the agreement with the creditors.

(2) Likewise, if a legacy payable annually to a municipality is bequeathed, and a question arises with reference to the Falcidian Law, Marcellus thinks that only as much should be considered to have been bequeathed as will amount to a sum which, at four per cent interest, will provide the annual payments of the legacy.

4. *Papinianus, Questions, Book XVI.*

A tract of land having been devised to me under a condition, the heir of the testator appointed me his heir while the condition of the legacy was pending, and the condition was subsequently fulfilled. In considering the application of the Falcidian Law in this case, the land will be understood to be mine, not by hereditary right, but by virtue of the legacy.

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

A bequest left to a city by the terms of a legacy or a trust is not valid where it consists of what must be paid on account of a promise already made. Therefore, if the testator, by the disposition of his will, exceeded the amount of what was due, only the excess will be diminished by the Falcidian Law, hence the creditor cannot be charged with a trust as a legatee. If, Tiowever, the legacy is dependent upon the arrival of a certain date, or compliance with some condition, the estimate of the advantage should not be made, but the entire amount bequeathed can be demanded; and even if the time for payment should arrive, or the condition should be fulfilled during the lifetime of the testator, what in the first place was valid will not become void.

6. *Venuleius, Stipulations, Book XIII.*

If a man should become the heir of his wife, and incur expenses for her funeral, he will not be considered to have expended the entire amount as her heir, but he should contribute in proportion to the extent that he is pecuniarily benefited, after having deducted what was due on account of the dowry.

7. *Papinianus, Questions, Book VII.*

In considering the application of the Falcidian Law with reference to the bequest of a servitude, as a servitude cannot be divided, the legacy of the same need not be entirely delivered, unless an appraised value of a portion of the same is tendered.

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

Where one of several heirs is charged to pay a debt of the estate, and the application of the Falcidian Law is considered, those who have received bequests shall not take any account of the said debt which the heir alone is to pay.

9. *The Same, Questions, Book XIX.*

It was decided with reference to the Falcidian Law that, after the crops which had matured at the date of the death of the testator have been gathered, they increase the value of the estate as forming part of the land, which is held to have been worth more at that time.

(1) No distinction with reference to time is admitted, so far as the unborn child of a female slave is concerned. This is not unreasonable, because as the child has not yet come into the world, it cannot properly be called a slave.

10. *The Same, Questions, Book XX.*

Anything over and above the fourth established by the Falcidian Law which goes into the hands of the heir, does not bind him beyond the other three-fourths, so far as the amount of the legacies is concerned; as, for instance, in the case of the estate of a minor, where he who becomes the heir of the father of the said minor is substituted for the disinherited son.

11. *The Same, Questions, Book XXIX.*

In estimating the amount due under the Falcidian Law, any property which has been retained by the heir at any time is included in the fourth of the estate to which he is entitled.

(1) Where a slave is to become free under a certain condition, and the condition is fulfilled at any time whatsoever, the heir will not be held to have sustained any loss, so far as his fourth interest in said slave is concerned. If, however, the condition should fail to be fulfilled, an opposite opinion must be adopted, and the value of the slave should be estimated at what he was worth at the time of his death.

(2) The Emperor Marcus Antoninus decided that heirs who have been deprived of their shares of an estate shall not be liable for a larger sum for legacies than the remainder amounts to.

(3) Where a certain individual was sentenced to be banished after the confiscation of half his property, and having taken an appeal made a will and died, and, after his death, his appeal was decided to have been improperly taken, the question arose whether the half of his estate which had been forfeited to the Treasury should be considered as a debt, and the remaining half alone should constitute his estate; or whether it would be necessary to come to the relief of the heir. It appears that relief should be granted the heir, as the intention of the testator who took the appeal, and his evident desire warrant this opinion.

(4) Where a slave manumitted by a will dies before the estate is entered upon, it is understood that the heir must sustain the loss. But how can his value be estimated, who, if he had lived, could not be appraised? For those who, at the time of the death of their master, are attacked by a disease which renders it certain that they cannot live, and they afterwards die, it has been decided that the loss must be borne by the estate. Nor is the case different with respect to those who are under the same roof when the master was killed by his slaves.

(5) Let us examine what is the effect of the common rule, namely: "But one Falcidian portion can exist in the will of a father and his minor sons." For, although the substitute may have been charged with the distribution of property left by the minor, when he becomes the heir he will only be liable for it as an ordinary debt; still, on account of other legacies left by the pupillary substitution, there will be ground for contribution. Hence it may happen that the substitute cannot retain anything from the father's estate, or that he may obtain much more than the fourth to which he is entitled by the Falcidian Law.

But what if the estate of the minor should not be sufficient to pay the legacies, while that of the father would have been sufficient to pay those which he bequeathed? The substitute will certainly be required to employ his fourth for their payment, as the father made the bequests out of his own estate, and it makes no difference that payment cannot be required beyond the assets of the estate by any will; for in this instance, the legacies left under the pupillary substitution are understood to have been bequeathed, as it were, conditionally, by the original will.

(6) Where a testator makes a substitution of two persons for his son, and charges each one with the payment of a legacy, the question arises: can the substitute personally claim the Falcidian portion which the minor does not possess, or shall there be but one substitute for the minor? Anyone might (in conformity to what has been already laid down with reference to the established rule governing estates), easily say that the'Falcidian Law will not apply, and that suit can be brought against the other substitute for an amount over and above his share.

The opposite opinion is, however, the better one, as it should be held that he has the right to deduct his fourth, just as if he had become the heir of his father; for as it is from this that the property of the father and the distribution of the legacies derive their form and origin, so where there are several substitutes, and the person of the minor is not to be considered, recourse must be had to the meaning of the appointment.

But what shall we say with reference to the other substitute who was not charged, so that, if the minor should die before paying the legacies with which he was burdened, and they amount to more than three-fourths of the estate, will he be authorized to deduct the Falcidian portion from all of them?

But he still has the fourth, and the same conclusion cannot be arrived at as in the case of the other appointment. Again, if we deny that this should be done, it must be held that such a course is contrary to the general rule. Therefore, a difference exists, as he who was charged in his own name can retain the fourth just as if he had been appointed an heir, and the other substitute, who was not charged, although his share may be increased, cannot be sued for the entire amount, on account of confusion in the estimate.

The result of this is that if security with reference to the Falcidian portion was furnished to the

minor, it will enure to the advantage of both parties; that is to say, so far as the amount which each one will be able to retain for himself is concerned.

(7) Where a testator appointed a co-heir with his minor son, the question arose: in what way should the portion authorized by the Falcidian Law be ascertained, and what was the meaning of the ordinary rule that it should apply separately to different legacies? I said that, with reference to any legacies with which a father charged his son, as well as those with which he charged a substitute, no separation can be made, as they should be subjected to a common estimate and both must contribute in turn; but where legacies with the payment of which a foreign heir is charged are bequeathed, they cannot be mingled with the others, and therefore the substitute will be entitled to a fourth of the share which was given to the minor, although he may be entitled to his own share as the appointed heir.

Another rule, however, is applicable where an heir is appointed to different portions of an estate; for in this instance the legacies will be merged not less than if he had been appointed but once to one share which is composed of several; and it does not make any difference whether he was appointed heir to the several shares absolutely, or under different conditions.

(8) Where anyone substitutes an heir who has been appointed instead of his disinherited son, and charges him with the payment of a legacy by the second will, the legacies are necessarily merged; and therefore Julianus says that those with the payment of which the substitute was charged are valid, because he is the heir of the father.

12. *The Same, Questions, Book XXX.*

Where a debtor, who has appointed his creditor his heir, requests that, in estimating the sum reserved by the Falcidian Law, his obligation should not be included with the bequests to the legatees, there is no doubt that the will of the deceased can be sustained in court by filing an exception on the ground of fraud, when the amount due under the Falcidian Law is to be determined.

13. *The Same, Questions, Book XXXVII.*

Where a slave undertakes the execution of an implied trust under the direction of his master, it has been decided that, because he was obliged to obey his master, he will be entitled to the benefit of the Falcidian Law.

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

A father appointed his daughter, who was separated from her husband, heir to a portion of his estate, and charged her to deliver to her brother and co-heir the share of it which she had received, after having deducted the sixth part of the same. In determining the amount to be reserved under the Falcidian Law, would the dowry be liable to contribution? If the father, with the consent of his daughter, did not claim her dowry, I gave it as my opinion that she would be entitled to the Falcidian portion by hereditary right, but she would be entitled to the dowry in her own right, because it should not be included in her father's estate.

(1) A grandmother, having appointed her grandchildren her heirs, charged some of them, without having deducted the amount to which they were entitled to by the Falcidian Law under another will, to pay the entire legacy to their brothers and co-heirs.

I gave it as my opinion that the trust was legally created, but that the amount with which it was charged would also be liable to contribution.

(2) It is not proper, where a substitute was appointed for two minors under the age of puberty, and became the heir to both, that the Falcidian Law should apply to the estate of only one of them; if, out of the property of the other minor, he should retain the fourth part of the estate of the father which passed to his children.

(3) If, however, one brother, who is legitimate, should become the heir to the other, and be

substituted for the survivor, the share of the father's estate which the surviving son receives on the ground of intestacy will not be subject to contribution to the Falcidian portion, but the substitute can only retain the fourth part of what the minor who had a substitute acquired.

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

Where a debt has been remitted by an agreement *mortis causa,* the debtor must contribute to the amount due under the Falcidian Law, and this can be retained by the heir by filing a replication *in factum.*

(1) Where a brother appointed his sister his heir, and charged her with a donation which he wished to give to another, who stipulated with her that she would not take advantage of the Falcidian Law, and if she did so, that she would pay him a certain sum of money, as it has been well established that the laws cannot be violated by any agreement entered into by private individuals, the sister will be entitled by public law to retain the Falcidian portion, and an action based on the stipulation will be refused to the other party.

(2) Where annual legacies have been bequeathed, it has been decided that an heir will, none the less, be permitted to retain the Falcidian portion, because during the first and second years he paid the legatee without making any deduction.

(3) Where a grandfather was indebted to his grandson on account of his administration of his guardianship, and the latter afterwards became the sole heir of his grandfather, if the Falcidian Law should be applicable, it was held that the amount, along with the other debts, must be deducted from the assets of the estate. It makes no difference whether the grandfather, who was also the guardian, charged his heir, if he should die before reaching a certain age without having any children, to deliver the estate, as well as his own property to a third party; for it was not held that the estate should be set off against this debt, and it was practically admitted that such a set-off ought not to be made, as the deceased indicated that his heir should have his own property.

It is clear that if the condition of the trust was complied with, and the profits of the estate collected after the death of the grandfather, they should be set off against an equal sum of the money due to the guardianship; but the heir would only be entitled to retain the fourth part of the property of the grandson, which the grandfather left him at his death.

(4) Where a father was charged with a trust for the benefit of his son, by the will of the mother of the latter, which trust he had not executed, he wished a set-off against it to be made of the estate which he left to his son. If a calculation was made to determine the amount due under the Falcidian Law, what the son was entitled to should be set off against the fourth which he had actually obtained from his father's estate, and he could only deduct the excess of the three-fourths of what was owing to the heirs.

(5) Whatever the heir is compelled to deliver to a husband out of donations made by him to his wife shall not be counted as part of her estate; as the woman, so far from becoming more wealthy, is considered to have become poorer to that extent. Again, when any diminution of the donations for which the heir is responsible takes place, the loss will not be borne by the husband.

(6) In fixing the amount due under the Falcidian Law, the heir cannot be compelled to give a receipt for the crops of land left conditionally under the terms of a trust; and where he has not been charged to deliver the crops to the beneficiary of the trust, he will be entitled to a fourth, and the profits of the fourth of the property of the deceased which belonged to him at the time of his death. Nor does it make any difference when the Falcidian Law begins to be operative, for although it will commence to apply to the trust immediately after the conditions have been fulfilled; still, the profits of the fourth must be left in possession of the heir from the time of the death of the testator.

(7) Where a son appointed his mother his heir, and bequeathed her, under a trust, a sum to make up the deficiency of what he should have left her, but did not do so; what was left to her can be diminished by the amount of the Falcidian portion, and the mother can receive the money left her in excess of the quarter of the share.

(8) In calculating the fourth to be reserved under the Falcidian Law, the amount cannot be diminished by the estimate made by the testator, any more than the heir can be entirely deprived of it.

16. *Scaevola, Questions, Book III.*

If an heir should deliver only certain articles out of several which have been bequeathed, he can retain the entire Falcidian portion out of the remainder, and can interpose an exception on the ground of bad faith against the legatee, even with reference to the property which he has already delivered.

(1) If only one article has been bequeathed, and a part of the same has been delivered, the heir can reserve the entire Falcidian portion out of the remainder.

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

If a soldier should make a codicil, and die within a year after his discharge, the legacies bequeathed by his military will, in accordance with military law, must be fully paid, but it is held that those left by his codicil must be paid after the Falcidian portion has been deducted. This matter should be explained as follows: If the testator has four hundred *aurei* and bequeaths four hundred by his will, and a hundred by his codicil, out of the fifth part (that is to say eighty, which the legatee would be entitled to by the codicil if it was not subject to the Falcidian Law), the heir will be entitled to retain a fourth, that is to say twenty *aurei.*

18. *Paulus, Questions, Book XL*

A son under paternal control who had served in the army, at his death, charged his father to give Titius his *peculium castrense.*

The question arose whether the heir could deduct a fourth of it. I said that the Falcidian Law, as interpreted by the Divine Pius, also included the successions of intestates where there had been trusts created; but in the case stated the *peculium* was not a part of the estate although I would hold that where a foreign heir was appointed it would become a portion of the estate by his entering upon the same. For when the *peculium* remains in the hands of the father, his ancient right continues to exist, and the property is still *peculium.* Nor is this contrary by the fact that the Falcidian Law applies to the wills of those who die in the hands of the enemy, since the fiction of the Cornelian Law creates both the estate and the heir.

However, I do not doubt that the father ought also to enjoy the benefit of the law; for if, indeed, he is required to surrender the property as having belonged to the head of the family, the appointed heir, having failed to enter upon the estate under the will, can be sued by the legatees in conformity with the terms of the Edict.

(1) The consequence of this is that if the father should, in the meantime, obtain the fourth and the profits of the same, we can apply the Trebellian Decree of the Senate, and equitable actions can be brought in order that the property may become a part of the estate after restitution has been made.

19. *Scsevola, Questions, Book Vill.*

Where an heir is charged to sell a tract of land for five *aurei,* which is worth ten, there is no doubt that the five *aurei* will be subject to the operation of the Falcidian Law.

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

If my slave, after having been appointed my heir, is charged with a legacy for my benefit, and

acquires an estate for me, Msecianus denies that the legacy should be subject to the Falcidian Law because it is not valid.

21. *Paulus, Questions, Book XII.*

Where a ward who has borrowed ten *aurei* without the authority of his guardian receives a legacy from his creditor on condition that lie will pay his heir the ten *aurei* which he borrowed, and he does so in one payment, he will both comply with the condition and be released from a natural obligation, so that the Falcidian Law will also apply to the money paid to the heir; although this would not be the case if it had been paid only for the purpose of complying with the condition. Moreover, this is considered a payment to such an extent that if the legacy should be rejected, or the slave Stichus, who was bequeathed, should die, the ward cannot recover anything.

(1) If my slave and myself are appointed heirs to unequal shares of an estate, and the three-fourths of the share of the slave are not exhausted by the payment of legacies, those legatees in whose favor I am charged will be benefited, in opposition to the Falcidian Law, by the amount which will come into my hands out of the share of the slave in excess of the Falcidian portion of his share.

On the other hand, if a slave is bequeathed to my slave, and ten *aurei* are bequeathed to me, the Falcidian portion of the slave will not, in conformity with the Falcidian Law, be deducted from the ten *aurei* bequeathed to me, for I shall retain the fourth of the person of the slave, even though my share of the bequest may not be exhausted.

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

"Nesennius Apollinaris to Julius Paulus. The following case actually occurred. Titia appointed her three daughters heirs to equal shares of her estate, and left them charged with legacies for the benefit of one another, but she charged one of them in such a way that the Falcidian Law would apply as well to her co-heirs as to strangers to whom other property was bequeathed."

I ask whether the Falcidian Law is applicable against her co-heirs who were themselves charged with legacies for her benefit, and, if it should not be applicable, and she is barred by an exception on the ground of bad faith, how can the computation of the Falcidian portion be made as against the foreign legatees? I answered that what is received from a co-heir, as a legacy, does not profit the legatee by releasing him from the operation of the Falcidian Law.

Where, however, an heir who is obliged to pay a legacy demands something from the same person under the terms of the will, he should not be heard, if he wishes to avail himself of the benefit of the Falcidian Law against the said person, if what he is entitled to receive under the will of the testator, is equal to what he wishes to deduct from the legacy. With reference to the other legatees, it is evident that the heir will not be required to subject to the operation of the Falcidian Law all that he pays to his co-heir, but only what he actually gives him, that is, if he receives nothing from him.

(1) Where a slave is appointed an heir by someone, and his master is charged with a trust and the slave with a legacy, the calculation must first be made with reference to the legacy, and then the trust will be discharged out of what remains. The master, however, will only be liable for what comes into his hands, and, moreover, he will only receive what remains after the legacies have been deducted. It is clear that the Falcidian Law will apply.

(2) But if the master who was appointed heir fails to accept the estate and orders his slave, who was substituted for him, to do so, the legacies with which the master himself was charged must first be paid, and then, after reserving the Falcidian portion, payment should be made of those with which the slave was charged.

(3) Where a release from his obligation is bequeathed to a debtor, even though the latter may not be solvent, the entire legacy must be computed, although the bequest of the claim cannot

increase the estate except in the event of payment. Therefore, if the Falcidian Law is applicable, what was bequeathed to the debtor will be held to have increased the amount of the legacy. The other legacies will also be diminished by this one, and it will be diminished by the others; for the debtor is considered to receive the legacy by the mere fact of his being released from liability.

(4) Where, however, the claim is bequeathed to a third party, the legacy is void, and it will not be liable to contribution with the others.

23. *Scsevola, Questions, Book XV.*

Where a tract of land with a right of way is devised to me, and, after the deduction of the Falcidian portion, the estimated value of the right of way is greater, I will be entitled to the land without incumbrance, and the right of way will be extinguished. If, however, the right of way should be bequeathed, and the estate should prove insolvent, the right of way will not be due.

Where the land and the right of way are both devised, it should also be considered whether the heir will be entitled to make, from one or the other, a deduction of less than the value of the right of way. Strictly speaking, it may be said that, in this instance, the devisee will not only be entitled to the entire tract of land, but can also file an exception on the ground of bad faith, in order to obtain what is lacking, so that he may not have more than can be claimed under the Falcidian Law. Hence the right of way will only be lost where the requirements of the Falcidian Law amount to more than its value.

24. *Paulus, Opinions, Book XIV.*

Paulus says that where property belonging to an estate has been abstracted by the heir, and the amount due under the Falcidian Law must be ascertained, the estimate shall be made just as if what has been taken had been included in the estate.

(1) The same authority gives it as his opinion that the offspring of female slaves born before the day when the trust took effect will belong to the heirs of him who was charged with the execution of the trust; and where a question with reference to the Falcidian Law arises, a fourth of the value of the children and a fourth of the interest on the same must be computed.

(2) The same authority gives it as his opinion that where a legacy of property belonging to the heir is bequeathed, any profits of said property, which have been collected by him after the day when the trust became operative, cannot be charged against the fourth of the heir, even though he is not required to deliver them to the beneficiary of the trust.

25. *Scsevola, Opinions, Book IV.*

A woman appointed her husband and their son heirs to equal shares of her estate. The question arose whether, in calculating the portion allowed by the Falcidian Law, the share of the husband which had come into his hands from the same estate through his son should be charged. The answer was that, if by the appointment of his son, he had received as much as was sufficient for the Falcidian portion, nothing should be deducted on that account.

(1) A testator bequeathed an estate to his freedman, and charged him by a trust to pay ten *aurei* to Seia, every year. The question arose, if the Falcidian Law diminished the legacy of the freedman, whether the annual trust with which he was charged for the benefit of Seia would also be diminished, provided that the income exceeded the annual payment. The answer was that, according to the facts stated, it would not appear to have been diminished, unless the intention of the testator was proved to be otherwise.

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

A testator bequeathed a string of thirty-five pearls, which was in the possession of the legatee at the time of his death. I ask whether the said string of pearls should be restored to the heir, in

order to enable him to reserve a portion of them under the Falcidian Law. The answer was that the heir could bring an action to compel its restitution to him, and if he preferred to do so, he could bring suit to recover that portion of the string of pearls which he was entitled to keep under the provisions of the Falcidian Law.

(1) The question arose whether the value of statues is subject to the operation of the Falcidian Law. The answer was that it is.

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

"Let Seius and Agerius be my heirs, if within thirty days after my death they execute a bond to my town that they will be content with such-and-such a sum of *aurei,* and will renounce the benefit of the Falcidian Law; and I hereby substitute the said heirs for one another. If they should not comply with my wishes, let them be disinherited."

The question arose whether the appointed heirs, having been substituted under the same condition, could enter upon the estate if they refused to comply with the condition. The answer was that Seius and Agerius, who were appointed in the first place, could enter upon the estate, just as if the condition which had been fraudulently imposed had not been imposed at all.

28. *Msecianus, Trusts, Book I.*

Where a foreign heir has been appointed by a son, the Falcidian Law applies even to a legacy which the son has bequeathed to his father.

29. *Paulus, Trusts, Book II.*

When I am charged with a trust or a legacy for your benefit, and you are requested after a certain time to deliver the same to me, I do not think that this should be subject to the operation of the Falcidian Law, because I shall begin to receive the property subsequently as the beneficiary of a trust.

30. *Msecianus, Trusts, Book Vill.*

In the application of the Falcidian Law, losses caused by the death of slaves and other animals, or by theft, robbery, fires, the ruin of houses, shipwreck, and violence of enemies, depredators and thieves, or by debtors, in fine, any loss whatsoever, must be borne by the heirs, provided that the legatees are not to blame.

In like manner, the profits obtained by the heir from crops, the offspring of female slaves, and any acquisitions made by slaves (as, for instance, through stipulations, the delivery of property, legacies, or estates left to them, and other donations of every description) as well as servitudes—where lands become more valuable through being released from them—or where any rights of action, for example, those for theft, damage, injury, and others of this kind, are none of them liable to the operation of the Falcidian Law.

(1) Where the heir is directed either to sell or purchase a tract of land or any other kind of property for a certain price before estimating the Falcidian portion, in order to ascertain the amount of the legacy, only that sum is considered as bequeathed which either amounts to more or less than the price which the testator ordered to be paid or received for the said property. Then, from the portion which remains after the legacies have been deducted, a still further deduction will be made, since the said price is not acquired *mortis causa,* but after the deduction has been made, the remainder is understood to have been bequeathed.

(2) It should also be carefully noted that the ordinary rule, "All losses which occur after the death of the testator concern the heir alone," is of universal application, and must be accepted without any distinction. For as even where the Falcidian Law does not apply at all, the heir will legally be compelled to bear the entire loss, so he must bear his share of it in cases where the Falcidian Law is operative. For, generally speaking, this is the rule, since losses sustained

after the death of the testator cannot be deducted, in order to prevent the portion which is lost from being taken from the legacies or trusts.

(3) It is, however, true that no deduction can be made except with reference to such articles alone as can be weighed, counted, or measured; and where any loss happens after the death of the testator the deduction must be made from the share belonging to the legatee, dependent upon the appraised value of the estate of the deceased at the time of his death.

(4) With regard to property which can be positively designated, and other articles left as follows, "The money which I have in such-and-such a chest," "The wine which I have in such-and-such casks," "The weight of silver which I have in such-and-such a building," and the property is lost, or becomes deteriorated without the fault of the heir, there is no doubt that either none of the legacy will be due under such circumstances, or, after the deduction of the Falcidian portion, the legatees will be entitled to a share of whatever remains, based upon an estimate of the value of the property belonging to the testator at the time of his death.

(5) Where property is left which is of an uncertain character, a distinction must be made; for if a testator should bequeath some articles without specifically designating them, as, for instance, where he leaves to anyone the silver plate which he may select, and all the silver plate should be lost without the heir being to blame, nothing will be due to the legatee.

If, however, a certain amount of silver was absolutely bequeathed, even though all the silver of the testator should be lost, the Falcidian Law will apply, and that portion of the amount can be taken which was with the property of the estate at the time that the testator died, and any losses which may subsequently have occurred will not cause any diminution of the legacy.

(6) The heir will not be liable for any portion of the property bequeathed which is lost, and not even for the appraised value of the same, any more than if all the articles bequeathed had been specifically enumerated.

(7) In estimating the amount due to the heir under the Falcidian Law, anything which is paid to him in compliance with the conditions of the will shall not be charged against his fourth; still, it is held by Celsus and our Julianus that a charge should be made when he was directed to receive a sum of money from the beneficiary of the trust, to whom he has been ordered to deliver the estate, where the testator did not direct the beneficiary to pay the said sum under some condition; as, for instance, where the heir was directed to sell the property for a specified amount, for then he will pay the money to the heir, not for the purpose of complying with a condition, but as a price.

In a similar case, it has also been asked whether the beneficiary of the trust can be compelled to pay the said sum, and take the estate, even if he is unwilling to do so, just as if he himself had been charged with a trust for the benefit of the heir. This is not probable, however, as a provision of this kind appears to have been made in favor of the beneficiary of the trust rather than against him.

(8) When the Falcidian Law applies, that property is not subject to contribution where the heir himself is charged with a trust for the benefit of himself, or his slave. The case, however, is different where the legacies to the slave are payable at a certain time; for when the day of his freedom arrives he will be entitled to them, and they become subject to contribution. Where, however, anyone makes a bequest to a slave without the grant of his freedom, and which, for this reason, is void, or leaves it subject to a trust, it will not be considered as liable to contribution under this law.

(9) Property, which it is certain cannot legally be left in trust, is not included in that liable to contribution under the Falcidian Law.

31. *Pomponius, Trusts, Book II.*

The person to whom payment is made in compliance with the terms of a trust, just as one to

whom a legacy is bequeathed, is obliged to give security to return anything which he receives in excess of what he is entitled to under the Falcidian Law; as, for example, where the amount due under the Falcidian Law is still in suspense, on account of the condition upon which other trusts or legacies are dependent not having yet been fulfilled.

But, according to the opinion of Cassius and the ancient authorities, where a minor is charged with a trust, he to whom the amount is paid should furnish security with reference to the property with which the substitute was charged; for although there may be a repetition of what has been paid under the provisions of the trust, which really is not due, still it is more satisfactory for security to be given to him by whom the money is paid, so that he may not sustain any loss through the party who receives it becoming insolvent.

32. *Msecianus, Trusts, Book IX.*

Penal actions, whether they are derived from the Civil or the Praetorian Law, with the exception of popular actions, should, none the less, be reckoned among the assets of the party entitled to them, because they become extinguished by the death of the criminal. Moreover, on the other hand, these actions do not take anything from the estate of the culprit in case of his death. But a right of action for injury sustained cannot be counted as a part of the estate of the person entitled to the same, in case of his death; because it itself is extinguished at that time, just as an usufruct, or an allowance which is payable to anyone at stated periods, for instance monthly or annually, as long as he lives. For an obligation of any kind only affords ground for the diminution of the property of a debtor, where it is transferred to his heir; nor, on the other hand, should the debtor be understood to have had that much less property during his lifetime, since, if anyone should stipulate that a sum shall begin to be due when he dies, his estate will, nevertheless, be increased, just as if he himself should promise, under the same condition, that it shall be diminished at the time of his death.

(1) Honorary actions, also, which are permitted by the Praetor to be brought within a certain time, increase the estate of the person entitled to bring them, at the time of his death, and decrease that of the person against whom they can be brought, if they are such as also pass to the heir.

(2) Julianus says that if the shares of two heirs are exhausted by legacies, and one of them has received a Praetorian bond from the legatees, he will be entitled to bring an action on the stipulation, not for half, but in proportion to his share of everything acquired by them over and above the amount authorized by the Falcidian Law. For all Praetorian stipulations are subject to the same interpretation, as where a stipulation has been made it is settled that the judgment shall be paid, whether the plaintiff or the defendant leaves several heirs. The action cannot be brought by all, or against all of them, but only in favor of the heirs -of those who gained the suit, and against the heirs of those who lost it, and in favor of those against whom no defence was made, and against those who did not defend the suit.

(3) Where a legacy of a hundred *aurei* is left, payable in one, two, and three years, it has been decided that the Falcidian portion shall be deducted from all the payments made, and not merely from the last one.

(4) Where part of the legacy of twenty *aurei* bequeathed to Titius has been deducted under the Falcidian Law, and the legatee was requested to pay five *aurei* to Seius, our Vindius says that the same proportion can be deducted by the legatee from the five due to Seius as was deducted from the twenty due to Titius.

This opinion is founded both on equity and reason, because, like the heir, the legatee is obliged to execute the trust, and, as he cannot, personally, profit by the Falcidian Law, the loss which he has sustained must not be borne by him, unless the testator had charged him to deliver everything that he had received under the terms of the will.

(5) If, however, the legatee should be requested to manumit either his own slave, or one belonging to another, he must, by all means, give him freedom. This is not contrary to what is above stated, because the favor conceded to liberty frequently gives rise to other and even more indulgent decisions.

33. *Paulus, Trusts, Book HI.*

Where a slave is bequeathed to you, and you are charged to manumit him, and there is nothing more from which you can obtain the fourth which an heir can reserve under the Falcidian Law, the Senate has decided that the Falcidian Law will not apply.

34. *Marcellus, Digest, Book XLH.*

The Falcidian Law is applicable to the case of a slave bequeathed for manumission by the testator; but if the latter left money, or anything else, and charged the legatee to manumit his own slave, or that of another, the law will apply.

35. *Ulpianus, Disputations, Book VI.*

If anything besides was left to the slave, it is clear that the Senate declared that the Falcidian Law would be applicable. Therefore, Scse-vola says that the Falcidian Law will apply to anything which was bequeathed to the slave in addition to his freedom, and hence the price which is to be paid for him would be liable to contribution.

36. *Paulus, Trusts, Book HI.*

Where the slave himself has not been bequeathed, but a sum of money has, and the legatee is asked to manumit his slave, he will be subject to the operation of the Falcidian Law, and will, nevertheless, be compelled to manumit him; because his slave is considered to be worth as much as the sum bequeathed.

(1) But what if the slave should belong to another? In this instance he cannot be compelled to pay more for him than he received.

(2) If, however, the heir is charged to manumit the slave, it has been decided that the value of the latter should be deducted as a debt of the estate.

(3) Where a slave alone is bequeathed, and presented with his freedom, under a trust, although the Falcidian Law will apply, the legatee can claim or recover the entire slave, and even if the legatee should have received something in addition to the slave, the entire slave can still be demanded, but the fourth part of each legacy shall be retained, in order that the grant of freedom may take effect.

(4) Where it is uncertain whether freedom should be granted or not, for instance, because it was bequeathed under some condition, or to take effect after a certain time, and while the uncertainty exists whether it should be bestowed or not, should the application of the Falcidian Law be permitted, as, in the meantime, the slave may either die, or the condition fail of fulfilment?

When the slave is entitled to his freedom, or it is due, can the legatee claim that portion which was deducted on account of the Falcidian Law? It was held by Csecilius that if the heir, during the intervening time, had gained anything through the services of the slave, he should include it in the value of the latter in deducting the Falcidian portion.

37. *Valens, On Trusts, Book VI.*

The appraisement of such a slave should be made in the same way as that of one who is to become free under a certain condition.

(1) Where, however, the heir was charged to manumit a slave belonging to another, it was decided that the price of the said slave should also be deducted from the assets of the estate.

38. *Hermogenianus, Epitomes of Law, Book I. A* slave who is to become free under a certain condition does not increase the number of the slaves of the heir.

(1) Slaves held in common are counted as belonging to the estate of each of their masters.

(2) When the usufruct of a slave belongs to another, his ownership forms part of the estate of his master; when he is pledged, he belongs to the estate of the debtor when he is sold under the terms of the *Lex Commissoria,* or conditionally, for a certain time, he belongs to the vendor.

39. *Paulus, Decisions, Book III.*

Not only the value of those slaves to whom freedom was granted, but also that of those who have been condemned to death, is deducted from the assets of the estate, just as the value of those whom the Praetor has liberated on account of their having given information of projected assassination, or for having revealed a conspiracy, is also deducted.

40. *Hermogenianus, Epitomes of Laio, Boole IV.*

The Falcidian Law applies to the will of a veteran, whether he be the head of a household or a son under paternal control, even if he should die within a year after his discharge.

(1) If a tract of land of the value of twenty *aurei* should be devised to anyone on condition of his paying ten, the devisee will be entitled to the entire tract of land.

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

He is not considered to be free from bad faith who pays legacies without security having been furnished, where a controversy has already arisen with reference to the estate.

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

In estimating the amount due under the Falcidian Law, the actual value of the property must be appraised.

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

Where slaves who have been in the hands of the enemy return after the death of the testator, they increase the value of the estate, so far as the Falcidian Law is concerned.

44. *The Same, On the Edict, Book XXI.*

The Falcidian Law will not be applicable where a slave is to become free on condition of his paying a certain sum, and he does so with money belonging to another person, and not with what forms part of the estate of the deceased, or where he who is to comply with this condition becomes free for other reasons.

45. *Paulus, On the Edict, Book LX.*

In the consideration of the Falcidian Law, anything which is left to be paid within a certain period is not held to have been absolutely bequeathed; for the value of advantage enjoyed by the heir in the meantime must be computed.

(1) Proculus thinks that where a question arises under .the Falcidian Law with reference to legacies conditionally bequeathed, that only such property as is salable is included in them. If this is the case, and the deduction can be made, as much will be considered to be due as the claim will bring, if sold. This opinion, however, has not been adopted, therefore it is better that the transaction should be arranged by both parties giving security.

46. *Ulpianus, On the Edict, Book LXXVI.*

Where a person who is entitled to retain the Falcidian portion promises, in compliance with the will of the testator, that he will renounce his claim to it, he will be compelled to carry out his agreement.

47. *The Same, On the Edict, Book LXXIX.*

When, the Falcidian Law is operative, it includes all payments. Sometimes, however, it can only be determined subsequently whether it is applicable or not, as for example, where a legacy is left payable annually, as long as the Falcidian Law does not apply, the payments will be made every year without deduction. If, however, a year should come when it does apply, and what is payable exceeds three-fourths of the value of the estate, the result will be that all the payments previously made every year will be diminished.

(1) Neither the legatee nor the beneficiary of a trust can enjoy the benefit of the Falcidian Law, even though the estate may be delivered to him under the terms of the Trebellian Decree of the Senate.

48. *Paulus, On the Edict of the Curule ^Ediles, Book II.*

Where the purchaser of a slave becomes the heir of the vendor, or *vice versa,* and the slave is evicted, shall double his value be deducted, or only his actual value, in computing the amount due under the Falcidian Law; for the amount would be double if there should be another heir? The more equitable opinion is, that while the heir is the same, only the actual value of the slave should be calculated.

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

Plautius: I devised a tract of land to a slave whom I had already bequeathed to you. Atilicinus, Nerva, and Sabinus think that the Falcidian portion should be first calculated with reference to the slave, and whatever part should be deducted from his value ought not to be considered, so far as the land which was devised was concerned; and then the Falcidian portion should be deducted from the remainder of the land, just as is the case with all legacies. Cassius says that as soon as the Falcidian portion is deducted, the slave begins to become the common property of the heir and the legatee.

When, however, a legacy is made to a slave held in common by him and another, the entire legacy will belong to the other joint-owner, because it can only be valid with reference to his person; for which reason the deduction of the portion authorized by the Falcidian Law can be made from the land but once.

Paulus: We adopt the opinion of Cassius, for the Divine Pius stated in a Rescript that where the slave was made the beneficiary of the trust, under these circumstances the entire bequest would belong to the joint-owner.

(1) It sometimes happens that a second legacy is extinguished on account of the Falcidian Law; as, for example, where a tract of land and a right of way through another tract to give access to it is granted. For if a part of the land should be retained by the heir under the Falcidian Law, the devise of the right of way cannot stand, because a servitude cannot be partially acquired.

50. *Celsus, Digest, Book XIV.*

There is no doubt that those legacies from which the heir can exclude the legatee by means of an exception should be included in his fourth, and hence they do not diminish the legacies of others.

51. *Julianus, Digest, Book LXI.*

It makes no difference whether a legacy becomes void in the beginning, or something occurs subsequently on account of which an action cannot be brought by the legatee to recover it.

52. *Marcellus, Digest, Book IX.*

A freedman appointed his patron heir to his entire estate, which amounted to two hundred *aurei,* and then bequeathed a hundred and twenty to his son, and the balance to a stranger. The

diminution of the legacy which was paid to the stranger will benefit the son in acquiring the entire legacy which was bequeathed to him.

(1) Where, for some reason or other, legacies are not required to be paid, they are included in the fourth part which the heir is entitled to retain under the Falcidian Law.

53. *Celsus, Digest, Book XVII.*

Where the portion due under the Falcidian Law is in suspense, on account of some condition which has been imposed on the payment of the legacy, those legacies which are due at once cannot be claimed in full.

54. *Marcellus, Digest, Book XV.*

A father appointed his son, by whom he had three grandsons, his heir, and charged him not to alienate a certain tract of land, but to leave it in the family. The son, at his death, appointed his three sons his heirs. The question arose whether each of the said sons, as the creditor of his father, could make a deduction of anything from the estate, on account of the Falcidian Law; as it was in the power of their father to bequeath the entire trust to any one of his sons whom he might select. None of them for this reason could deduct anything on account of the Falcidian Law.

It appears, however, that this opinion will be productive of hardship, for as the father considered the land as a debt due to his children, he was necessarily obliged to leave it to them.

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

Where ten *aurei,* payable every year, are bequeathed to Titius, the judge having jurisdiction under the Falcidian Law to establish the proportion payable by the heir and other legatees should estimate the value of the legacy at whatever it could have brought during the life of Titius, it being uncertain how long Titius might live. After the death of Titius, however, the judge should not consider anything else than the amount that the heir owned by reason of the legacy.

56. *The Same, Digest, Book XXII.*

The owner of a slave who was liable to an action having reference to the *peculium* of the latter became the heir of the creditor. You ask what time should be considered in computing the value of the *peculium* under the Falcidian Law. Several authorities hold that the value of the *peculium* at the time that the estate was entered upon should be considered. I doubt whether this is the case, as it has been determined that the time of the death of the testator is the date to be observed in calculating the proportion due under the Falcidian Law. But what difference does it make whether the *peculium* of the slave is diminished after the death of the creditor, or whether the debtor becomes poorer?

(1) On the other hand, someone may ask what course should be pursued if the slave acquires property before the estate was entered upon? I, myself, ask whether, the means of the debtor who, at that time, was not solvent, are increased. And, as it has been decided in the latter instance that the estate has, after this event, been increased in value; so, if the condition upon which the claim depended was fulfilled after the death of the creditor, the increase of the *peculium* would augment the value of the estate.

(2) Scsevola inquires what should be done if the said slave owed ten *aurei* to the deceased and another person, and had ten *aurei* altogether in his *peculium.* Of course the estate is increased by the ten *aurei,* which were naturally due to him, and remain as a portion of his estate.

(3) A certain person, whose entire estate only consisted of one slave, bequeathed him to Titius, and charged the latter to manumit him at the end of three years. The heir will, in the meantime, while he is employed by Titius, be entitled to one-fourth of the value of the

services of the slave, in the same manner .as if the testator had directly given the slave his freedom after the lapse of three years, and had bequeathed the usufruct or the ownership of said slave to someone under a trust.

(4) A testator bequeathed his slave Stichus to you, and ten *aurei* to your slave; or, on the other hand, he bequeathed ten *aurei* to you and Stichus, your slave, and charged you to manumit Stichus. The Falcidian Law diminishes the legacy, and you should purchase a part of the slave from the heir, just as if the testator had bequeathed you both legacies.

(5) It frequently happens that the heir does not enjoy the benefit of this law, for if a testator, whose estate amounted to a hundred *aurei,* should give twenty-five to someone and then appoint him his heir, and bequeath three-fourths of his estate to another, the heir cannot obtain anything else under the Falcidian Law, because the testator, during his lifetime, is considered to have made provision for his future heir.

57. *The Same, Digest, Book XXVI.*

Where a husband bequeaths a dowry of his wife to someone in order that it may be returned to her, it must be said that the Falcidian Law does not apply; and it is clear that in very many instances arrangements are made to leave out the intermediate party for the benefit of the person entitled to the legacy.

58. *Modestinus, Rules, Book IX.* The heir is not prevented from claiming the benefit of the Falcidian Law, even a long time after the death of the testator.

59. *The Same, Pandects, Book IX.*

He is considered to be unworthy of the benefit of the Falcidian Law, who acts in such a way as to cause the trust to be extinguished.

(1) Moreover, where an heir is requested to transfer the estate to some one who is not entitled to receive it, he will not, by the Plancian Decree of the Senate, be permitted to retain the fourth of said estate; but the said fourth, in accordance with a Rescript of the Divine Pius, will belong to the Treasury.

60. *Javolenus, On Cassius, Book XIV.*

Where a father substitutes an heir for his daughter, who has not yet arrived at puberty, any property which has been received as a legacy by the substitute from the father will not, when the estate passes to the former, be included in the computation made to ascertain the proportion due under the Falcidian Law.

(1) Where a legacy is claimed, and an oath was made in court by the legatee, the amount due under the Falcidian Law shall not be ascertained from the sum to which the legatee has made oath, but from the true value of the property which is claimed; for what accrues by way of penalty does not come within the scope of the Falcidian Law.

61. *The Same, Epistles, Book IV.*

A tract of land belonging to another was bequeathed to you. As the heir could not obtain it, except at an unreasonable price, he bought it for a sum far above its actual value, and the result of the purchase was that a reduction of the legacies was required under the Falcidian Law.

I ask if the land had been bought for what it was really worth, and the legacies had not been subject to diminution, whether, in this instance, the heir would have the right to reserve a part due to the legatees, because, in compliance with the will of the deceased, he had purchased the land for more than its value. The answer was that the heir could not, under the Falcidian Law, charge the other legacies with what he had paid to the legatee over and above the true price of the land, because his negligence ought not to prejudice the legatee, any more than he

could release himself from liability by tendering the actual value of the property.

62. *Ulpianus, On the Lex Julia et Papia, Book I.*

Julianus says that, in estimating the portion due under the Falcidian Law, the following rule should be observed, namely, where there are two promising, or two stipulating debtors, and they are partners, the common obligation should be divided between them; just as if each one had stipulated or promised to pay the amount individually.

If, however, no partnership existed between them, the matter would remain in abeyance, and a calculation should be made in order to determine what is due to the estates of the creditors, or what should be deducted from those of the debtors.

(1) Any property belonging to the estate of the deceased must be estimated at its value, that is to say, at the price it will bring at the present time; and it should be understood that the appraisement must not be made of the value which the property would have under certain conditions.

63. *Paulus, On the Lex Julia et Papia, Book II.*

The value of property should be estimated, not by affection nor according to any particular advantage attaching to it, but for what it can be disposed of at an ordinary sale. For where a father is in possession of a slave who is his natural son, he is none the more wealthy because, if the slave was in the possession of another person, he would be willing to pay a larger sum to recover him than someone else.

Nor will he who has possession of the natural son of another be considered to have the value of the price for which he could sell him to his father, since the prospective time of his sale ought not to be considered, but his value at present; and not the fact that he is the son of someone else, but what he is worth as a slave. The same rule applies to a slave who has caused some damage, for no one becomes any more valuable for having committed an offence.

Pedius says that a slave who has been appointed an heir after the death of his master is no more valuable for the reason that he will bring more at a sale; for it is absurd to suppose that where I have been appointed an heir, I am any the richer before I accept the estate, or where my slave is appointed an heir, that I immediately become more wealthy, as there may be many reasons why he should not accept the estate by my order. It is certain that he will acquire the estate for me when he does enter upon it, but it is preposterous to assume that we become enriched thereby before we obtain the property.

(1) Where a debtor of the testator is not solvent, the claim is only considered to be worth what can be collected from him.

(2) Places and times occasionally cause a difference in the price of property, for oil does not sell at the same price in Rome that it does in Spain, nor has it the same value in continuous bad years that it has in favorable ones; hence, under such circumstances, the value of articles should not be fixed by their scarcity at certain periods, nor on account of something which rarely occurs.

64. *Ulpianus, On the Lex Julia et Papia, Book XIII.*

Where the following provision is included in a will, "Let my heir be charged with the payment of ten *aurei* to Lucius Titius, and let as much more be given him as he will lose by the operation of the Falcidian Law," the will of the testator must be executed.

65. *Paulus, On the Lex Julia et Papia, Book VI.*

Where a tract of land, worth fifty *aurei,* is devised under the condition that the party to whom it is left shall pay fifty *aurei* to the heir, many authorities think that the devise is valid,

because the reason for complying with the condition is stated. It is established that the devise is subject to the Falcidian Law. Where, however, fifty *aurei* are bequeathed on condition that the legatee pays fifty to the heir, the legacy is not only void, but also ridiculous.

66. *Ulpianus, On the Lex Julia et Papia, Book XVIII.*

The following must be noted with reference to the operation of the Falcidian Law, where a legacy is bequeathed to anyone conditionally, or payable after a certain time. If ten *aurei* should be bequeathed to someone under a condition, and the condition is fulfilled, for instance, after the lapse of ten years, the said ten *aurei* will not be considered to have been bequeathed to the legatee, but a smaller amount, for the interval, and the interest during that interval cause reduction of the original sum of ten *aurei.*

(1) Just as legacies are not payable unless a balance remains after deducting the amount of the debts from the property of the estate, so donations *mortis causa* will not be due, but may be annulled by the indebtedness of the estate. Therefore, if the indebtedness is very large, no one can receive property given to him *mortis causa,* out of the funds of the estate.

67. *Terentius Clemens, On the Lex Julia et Papia, Book IV.*

Whenever more is bequeathed to any person than he is legally entitled to receive, and the Falcidian Law is applicable, the amount due under it must first be estimated, so that, after what is excepted by the Falcidian Law has been deducted, the balance will be payable, if it does not exceed the amount specified by law.

68. *Mtmlms Macer, On the Law of Five Per Cent Tax of Estates, Book II.*

Ulpianus says that the following rule should be adopted in making the estimate of maintenance to be furnished. The amount bequeathed to anyone for this purpose from the first to the twentieth year is computed to have lasted for thirty years, and the Falcidian portion of that sum shall be reserved. From twenty to twenty-five years, the amount is calculated for twenty-eight *years,* from twenty to thirty years, the amount is calculated for twenty-five years; from thirty to thirty-five years, the amount is calculated for twenty-two years, from thirty to forty years, it is computed for twenty years; from forty to fifty years,

the computation is made for as many years as the party lacks of the sixtieth year after having omitted one year; from the fiftieth to the fifty-fifth, the amount is calculated for nine years; from the fifty-fifth to the sixtieth year, it is calculated for seven years; and for any age above sixty, no matter what it may be, the computation is made for five years.

Ulpianus also says that we use this same rule in making the calculation with reference to the legacy of an usufruct. Nevertheless, it is the practice for the computation to be made for thirty years from the first to the thirtieth, but after the age of thirty years it is made for as many years as the legatee lacks of being sixty; hence the computation is never made for a longer time than thirty years. Finally, in like manner, the computation is made for the period of thirty years, where the usufruct of property is bequeathed to the State, either simply, or for the purpose of celebrating games.

(1) Where one of the heirs claims that certain property belongs to him individually, and it is afterwards proved to constitute part of the estate, certain authorities hold that the Falcidian portion cannot be reserved out of said property, because it makes no difference whether the heir appropriated it, or denied that it belonged to the estate. This opinion Ulpianus very properly does not accept.

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

Where the usufruct of property is bequeathed, the debts must be deducted from all the assets of the estate; as, according to the Decree of the Senate, there is no property which is not included in the legacy of an usufruct.

70. *Ulpianus, On Sabinus, Book XIX.*

The stipulation for the Falcidian portion takes effect immediately, when the condition on which the legacy or the debt depends is fulfilled.

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

In disposing of his rights to an estate, an heir can provide that in case the Falcidian Law should apply, the entire legacy shall be paid by the purchaser, because this law was enacted for the benefit of the heir, and the latter is not defrauded, if he himself diminishes his own right.

72. *Gaius, On the Edict of the Prsetor with Reference to Legacies, Book III.*

The value of an estate is estimated after having deducted any expenses which may be incurred by the sale of property.

73. *The Same, On the Provincial Edict, Book XVIII.*

In appraising an estate, it has been decided that its value at the time of the death of the testator should be ascertained. Therefore, if anyone has property worth a hundred *aurei* and bequeaths all of it, no profit will accrue to the legatees, if, before the estate is entered upon it should be increased by anything obtained through slaves belonging to it, or by the birth of the offspring of female slaves, or from the increase of flocks, to such an extent that the hundred *aurei,* included in the legacies, having been paid, the heir will still have enough for his fourth; but it will, nevertheless, be necessary for the fourth part of the legacies to be deducted.

On the other hand, if the testator should bequeath seventy-five *aurei* out of the hundred, and, before the estate was entered upon, the amount should be diminished (for instance by fire, shipwreck, or the death of slaves), to such an extent that not more than seventy-five *aurei,* or even less than that sum, remains, the legacies must be paid in full; for this cannot be considered injurious to the heir, as he is at liberty not to accept the estate. Hence it becomes necessary for the legatees to compromise with the heir for a part of their legacies, in order to avoid obtaining nothing in case he should refuse to take under the will.

(1) Very serious doubts arise with reference to certain matters, the condition of whose accomplishment depends upon the time of the death of the testator; that is to say, where a debt is due under a condition, shall it be counted as part of the assets of the stipulator, or shall it be deducted from the estate of the promisor? Our present practice is that the amount which the obligation will bring, if sold, shall be considered as added to the estate of the stipulator, but deducted from that of the promisor; or the question can be settled by the parties giving security to one another; so that the claim may be considered as absolutely due, or as if nothing was due at all; therefore the heirs and the legatees can furnish one another security, so that, if the condition should be fulfilled, the heir may pay to the legatees the amount which he has withheld, or the legatees may refund whatever they have received in excess of that to which they were entitled.

(2) Even where some legacies have been absolutely bequeathed, and some have been bequeathed under a condition, and the condition was fulfilled, the Falcidian Law will apply, but the legacies absolutely bequeathed should only be paid after security has been taken. In a case of this kind, it is generally the custom for the legacies absolutely bequeathed to be paid just as if no others had been left conditionally; the legatees, however, should give security that after the condition has been complied with, they will return any excess which they may have received.

(3) A bond of this kind is considered necessary, where freedom is granted to certain slaves conditionally by the same will, because the value of said slaves should be deducted from the bulk of the estate, after the condition has been complied with.

(4) It is evident that the law is different, where legacies are bequeathed payable within a certain time, since it is absolutely certain that they will be due to the legatee himself, or to his heirs. It must, however, be understood that as much less will be deducted from the assets of the estate as the heir, in the meantime, until the day for payment arrives, will obtain by way of profit from the crops, or from interest.

(5) Therefore the best course will be for the testator, in bequeathing his property, to make such a disposition of the same that nothing over three-fourths of it will remain. If anyone should exceed the three-fourths, the legacies will be diminished *pro rata,* by operation of law. For example, where a man has an estate of four hundred *aurei,* and bequeaths the whole of it in legacies, the fourth part of his legacy will be taken from each legatee. If he should bequeath three hundred and fifty *aurei,* the eighth of each legacy will be deducted; if, however, he should bequeath five hundred *aurei,* and should only have four hundred; in the first place, the fifth part, and afterwards the fourth part will be deducted, for the amount should first be deducted which is in excess of the value of the property of the estate, and afterwards what the heir is entitled to out of the actual assets of the same.

74. *The Same, On the Edict of the Prsetor with Reference to Legacies, Book V.*

Where, however, it is said that an heir who is entitled to his fourth under the will of the deceased is obliged to pay the legacies in full, we must understand that this applies where he receives the estate by hereditary right, for what anyone receives from his co-heir, as a legacy, shall not be charged to his fourth.

75. *Marcellus, On the Digest of Julianus, Book XL.*

Where a bequest is made to an heir in order that he may pay the legacies in full, as well as the trust with which he is charged, an action based on the legacy will be refused him if he prefers to avail himself of the benefit of the Falcidian Law.

76. *Gaius, On the Edict of the Prsetor, Book III.*

Any property, however, which is given either by a co-heir, a legatee, or a slave who is to be free conditionally, for the purpose of complying with the condition, shall not be charged to the Falcidian portion, because it is obtained *mortis causa.* It is clear that if the heir should receive any money from the *peculium* of the slave, he must charge it proportionally to his share, because the said proportional share does not pass to him *mortis causa,* but he is understood to acquire it by hereditary right.

(1) For which reason it has been decided that any bequests which legatees have no right to receive, and which, on this account, will belong to the heirs, the latter do not obtain by hereditary right, and therefore they must be charged to the fourth; for it does not make any difference whether property is bequeathed to him in the first place, or whether, after it has been bequeathed, it remains in his hands.

77. *The Same, On the Provincial Edict, Book XVIII.*

There is no doubt that the advantages conferred by the Falcidian Law are available by every individual heir, and therefore, if Titius and Seius have been appointed heirs, and the half of the estate belonging to Titius is exhausted in legacies, so that the fourth part of the entire property is left to Seius, Titius will be entitled to the benefit of the Falcidian Law.

78. *The Same, On the Edict of the Urban Prsetor with Reference to Legacies, Book III.*

If, however, one of two heirs should fail to accept his share of the estate, and the other should become the sole heir to the same, will the Falcidian Law apply, just as if the entire estate had been left to the latter heir in the beginning, or should the two portions of it be considered separately with reference to the operation of the Falcidian Law? It is established that if the share of the legacy of him who became the heir is exhausted, the legatees will be benefited by

the share which was not accepted, for the reason that it was not burdened with legacies, since those remaining in the hands of the heir will cause either nothing at all, or only a small sum to be deducted from what is to be paid to the other legatees. If, however, the share which was not accepted is exhausted, it will be subject to the operation of the Falcidian Law, just as if it belonged to the party by whom it was refused.

79. *The Same, On the Provincial Edict, Book XVIII.*

In the case of double wills, when we make inquiry with reference to the estate, only the property which the father possessed at the time of his death should be considered, as it does not make any difference whether the son either gained or lost anything after the death of his father; and, when we investigate the legacies, both those which are bequeathed in the first, as well as in the second will, are liable to contribution, just as if those with which the testator charged his son, as heir, had been left to him under some other condition.

80. *The Same, On the Edict of the Praetor with Reference to Legacies, Book HI.*

Where a testator left an estate of four hundred *aurei,* and, having appointed his son who had not reached the age of puberty his heir, bequeathed him two hundred *aurei,* and substituted Titius and Seius for him as heirs, and charged Titius with a legacy of a hundred *aurei;* let us see what the law is, if the minor should die before the legacies with which the two substitutes were charged have been paid.

The heir Titius is the only one who can make use of the Falcidian Law, for as the two hundred *aurei* forming part of the estate of the minor belong to him, he will owe two hundred on account of the legacy, that is a hundred out of the two hundred which the minor owed, and the hundred which he himself was ordered by the testator to pay. Therefore, having deducted the fourth of each of these sums, he will have fifty.

The Falcidian Law, however, is not applicable to Seius personally, since the two hundred *aurei* belong to him as a part of the estate of the minor, and he will owe in legacies a hundred out of the two hundred which were left by the minor. If, however, the minor himself should pay the legacies, his guardians should see that the legatees furnish him with security.

(1) There are certain legacies which are not susceptible of division; for instance, those of rights of way, of rights of passage, and of rights to drive cattle through land, for things of this kind cannot partly belong to anyone. Where, however, an heir is directed to build some public work for a municipality, the legacy is considered to be undivided, for it is not understood that he constructed a bath, a theatre, or a racecourse, until it has assumed its proper form, which only happens at its completion. In cases of this kind, even though there are several heirs, they are individually liable, and the bequest belongs to all the legatees. Hence, where bequests which are not susceptible of division are made, they belong wholly to the legatee. Still, relief can be granted to the heir, if he notifies the legatee to return to him his share of the amount, after an estimate has been made of the value of the legacy. If he should not do this, the heir can avail himself of an exception on the ground of fraud, in bar to legal proceedings instituted by the legatee to recover the bequest.

81. *The Same, On the Provincial Edict, Book XVIII.*

The bequest of an usufruct, however, is subject to computation under the terms of the Falcidian Law, for it is susceptible of division; so that if it is bequeathed to two parties, they will each be entitled to his share under the law.

(1) Where a dowry is bequeathed to a wife, it does not come within the terms of the Falcidian Law, for the reason that she is considered to have received her own property.

(2) It is expressly provided by the Falcidian Law that such property as has been purchased or prepared for the use of a wife is not subject to its operation.

82. *Ulpianus, Disputations, Book Vill.*

The question arose, where a testator, whose sole estate consisted of a claim of four hundred *aurei,* bequeathed to his debtor the release of his claim, but left four hundred *aurei* to Seius, if the debtor should be insolvent, or was not worth the hundred *aurei,* how much each one would be compelled to contribute under the Falcidian Law. I stated that the Falcidian Law intended that a fourth should be paid to the heir out of what could be obtained from the estate, and that the remaining three-fourths should be distributed among the legatees. Therefore, when a claim which is not perfectly good forms part of an estate, a distribution of what can be collected should be made *pro rata,* and the remainder should be sold so that the value of what can be sold should only be counted among the assets of the estate.

Where, however, a release of the claim is bequeathed to the debtor, he himself is considered to be solvent, and, so far as he himself is concerned he is rich, although, if he had received the amount which he owed *mortis causa,* he would be considered to have received four hundred *aurei,* even though he could not pay anything, for he is understood to have been fully released from liability, even though he may have nothing if he is released; and hence, upon the application of the Falcidian Law, the heir should give him a receipt for three hundred *aurei,* and retain the remainder of the obligation of a hundred, for if the debtor should become solvent, he can only collect a hundred *aurei* from him.

The same rule must be held to apply where, on account of a donation *mortis causa,* a receipt is given to the debtor for four hundred *aurei.* Wherefore, it has been very properly held that the effect of the release remains in suspense, for if, at the time of the death, the entire four hundred *aurei* should be found belonging to the debtor, the release of three hundred will be valid. If, however, any property, in addition, should be found which would be sufficient for the fourth of the heir, the release will be valid for the entire sum of four hundred *aurei.*

But if the debtor can only pay a hundred, for the reason that he is always considered solvent so far as he himself is concerned, he will be required to refund a hundred *aurei* to the heir. Therefore, as the debtor is considered to be individually solvent, the result will be that if an heir should be appointed, and a release should be bequeathed to the debtor, and four hundred *aurei* to someone else; if the debtor should be solvent, the heir can retain a hundred and fifty *aurei* out of the three hundred, and can pay a hundred and fifty to the legatee, and in this way he will have his hundred. But if the debtor can only pay a hundred *aurei,* a fourth of the same should be reserved by the heir, and consequently the hundred which can be paid will be divided into four parts, three-fourths of which will belong to the legatees, the heir will have twenty-five, the insolvent debtor will credit himself with a hundred and fifty, the balance of the claim which cannot be collected should be sold, and this shall be considered as the only property belonging to the estate.

If, however, the debtor is unable to pay anything, he must also be released from liability for the said one hundred and fifty *aurei,* and Neratius says a sale should be made of the balance of the claim, which opinion we also approve.

83. *Julianus, Digest, Book XII.*

If the creditor of your son should appoint you his heir, and you should desire to obtain the portion due to you under the Falcidian Law, the amount of the *peculium* which existed at the time that the estate was entered upon shall be included in your fourth.

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

A case sometimes occurs in which the heir is entitled to an action, although the testator could not have availed himself of it; as, for instance, where a guardian, at the time when he paid the legacies with which his ward was charged, did not enter into a stipulation with the legatees, binding them to refund anything which they might receive above the amount allowed by the

Falcidian Law. The ward, indeed, cannot bring suit against his guardian on this account, but the latter will be liable to the heir of the minor.

85. *The Same, Digest, Book XVIII.*

Where a dowry has been given to the father of the husband, and the son alone is heir to his father, the dowry will, in the first place, be included in calculating the amount of the estate and the Falcidian portion, and will be deducted as a debt; otherwise, it would appear that the wife had no dowry.

If, however, the son should have a foreign co-heir, he can always deduct as a debt of the estate that part of the dowry which he will inherit from his father, and his co-heir can also do so, before the dowry has been received by the son.

86. *The Same, Digest, Book XL.*

Titia, by her will, appointed her brother Titius heir to a third part of her estate, and charged him to transfer the estate to Secunda and Procula, after having reserved a fourth part of the same. She also left certain land to her brother as a preferred legacy. I ask whether Titius can retain all the land which was left to him in this way, or only what was in proportion to the share of the estate which he was asked to deliver to the beneficiaries. I answered that Titius could keep the entire devise, but that he should charge the twelfth part of said land to his fourth.

If it had not been stated that the fourth part of the estate must be deducted, he would have been obliged to include in his fourth the entire third of the land, under the Falcidian Law, as the Falcidian Law in this instance operates against the desire of the testatrix.

87. *The Same, Digest, Book LXI.*

Where a man left an estate composed of a tract of land worth a hundred *aurei,* and charged his heir to sell it to Titius for fifty, he should not be considered to have devised more than fifty, and therefore the Falcidian Law will not apply.

(1). Moreover, where a testator has an estate composed of two tracts of land, each worth a hundred *aurei,* and appoints Titius and myself his heirs, and charges me to sell the Cornelian Estate to Titius for fifty *aurei,* and, on the other hand, charges Titius to sell the Seian Estate to me for fifty *aurei,* I do not think that the Falcidian Law will apply, as each of the heirs will be entitled to half of one of the tracts of land by hereditary right, which is equal to half of the estate. For there is no doubt that the one who is charged to sell the Cornelian Estate will be entitled by hereditary right to half of the Seian Estate, and also he who is charged to sell the Seian Estate can retain by hereditary right the half of the Cornelian Estate.

(2) If any one should appoint as his heir a person to whom he had been asked to pay a hundred *aurei* at his death, the hundred *aurei* should be deducted in computing the proportion due under the Falcidian Law, because if anyone else had been the heir, the said hundred *aurei* would have been included among the debts of the estate.

(3) If you and Titius are each appointed heirs to the fourth part of an estate, and then you are appointed heirs to the remaining half under a condition, and legacies, as well as the freedom of slaves, have been bequeathed, they should obtain their freedom, and all the legacies should be paid while the condition is pending; because, if the condition is complied with, and you should become the heir, both the legacies and the grants of freedom will be valid; or if the condition should fail, Titius and yourself will become the heirs.

If you ask how the Falcidian portion can be estimated, and whether, when the condition is fulfilled, your quarter and your half of the estate should be combined, and hence the Falcidian portion must be calculated on three-fourths of the estate, if you pay the legacies with which you are absolutely charged as heir, we give it as our opinion that the two shares should be

combined.

(4) Where a testator appointed his son, who was under the age of puberty, and Titius, heirs to equal shares of his estate, and charged his son with legacies amounting to his entire half, but charged Titius with nothing, and substituted Titius for his son, Titius having entered upon the estate under his appointment, and the minor son having died, and Titius having become his heir by virtue of the substitution, the question arose how much he should pay as legacies. It was decided that he must pay the legacies in full, for the two halves of the estate having become merged, cause the Falcidian Law to apply to the entire inheritance, and hence the legacies would be due without any deduction.

This is, however, true only where the son dies before becoming the heir of his father. But if he should become his heir, the substitute ought not to pay more of the legacies than the minor would have been compelled to do, because he is not bound in his own name, but in that of the deceased minor, who would not have been required to deliver more than three-fourths of his half to the legatees.

(5) If, however, the entire half of the foreign heir should have been bequeathed, and he, by virtue of pupillary substitution, becomes heir to the minor, who was not charged with the payment of any legacies, it can be said that they will be increased, and proceedings must be taken just as if the party had been substituted for any heir whomsoever, and the latter having refused to accept the estate, the substitute becomes entitled to all of it; for the reason that the substitute, in fixing the portion due under the Falcidian Law, always takes into consideration the amount of the property which the father left.

(6) The same must be said if the father should appoint his two minor children his heirs, and substitute them for one another, as under these circumstances the estate will vest in the other by the right of substitution, and the amount of the Falcidian Law must be established.

(7) Where a testator had two minor sons, and appointed one of them his heir, and disinherited the other, and subsequently substituted the disinherited son for the one whom he had appointed heir, and then substituted Msevius for the one whom he had disinherited, and charged him with the payment of legacies, the disinherited brother became the heir to the other, and afterwards died. As, by his father's will, the estate of the latter passed to him by hereditary right under the terms of the substitution, it can be said that the legacies with which he was charged must, after deducting the Falcidian portion, be paid out of the property which the father left at the time of his death.

The following case is not opposed to this opinion, namely: when a father bequeaths a legacy to his disinherited son, the substitute is not obliged to pay the legacy on this account; because, in this instance, the son does not receive a part of his father's estate but only a legacy. Still, someone may ask what must be done if the disinherited son did not become the heir of his brother under the substitution, either by law, or through the intervention of some third party, and then should die before reaching the age of puberty. Could it be held, under such circumstances, that the substitute must pay the legacy with which he was charged? By no means. For it makes a difference whether the disinherited son becomes the heir of his brother by virtue of the substitution or in some other way, and it is clear that in one of these cases the father can charge the son with a legacy, but in the other he cannot; and hence it is agreeable to reason to hold that the testator has no more right with reference to the substitute than he would have had with reference to him for whom he was appointed.

(8) The co-heir of a minor, after reserving the Falcidian portion, paid the legacies bequeathed by the testator in proportion to his share of the estate. Then the minor having died, the other became his heir by virtue of the substitution, and the half of the estate which belonged to the minor having been exhausted, the portion due under the Falcidian Law should be deducted from all the legacies, so that all of them with which he and the minor were charged having

been subjected to contribution, the fourth part of the estate will remain in his possession; for although he is the heir of the minor, still the deduction under the Falcidian Law must be made, just as if he had been the heir of his father.

The legacies with which the heir was charged, and which amounted to more than three-fourths of his share, will not be increased unless the heir who was appointed to a part of the estate and substituted for his co-heir, should pay the legacies, after having deducted the Falcidian portion, while his co-heir was deliberating; and then, after the latter had rejected the estate, the other, by virtue of the substitution, should also acquire the remaining part of the same.

88. *Africanus, Questions, Book V.*

Where a man, who had an estate of four hundred *aurei,* bequeathed three hundred of them, and then devised to you a tract of land worth a hundred *aurei* under the condition that the Falcidian Law should not apply to his will, the question arises, what is the rule? I replied that this is one of those perplexing questions which are discussed by dialecticians, and are designated by them sophistical, or illusory; for, in a case of this kind, whatever we may decide to be true will be found to be false. For if we should say that the devise left to you is valid, there will be ground for the application of the Falcidian Law, and therefore the legacy will not be payable, as the condition has not been fulfilled. Again, if the legacy should not be considered valid, because the condition has not been complied with, there will be no ground for the application of the Falcidian Law.

If, however, the law is not applicable, and the condition should be complied with, you will be entitled to the devise. But as the intention of the testator appears to have been that the other legacies should not Be diminished on account of yours, the better opinion is to decide that the condition upon which your legacy is dependent has not been fulfilled.

(1) Therefore, what shall we say if the testator bequeathed two hundred *aurei* in other legacies, and left you two hundred under the same condition, for the condition upon which your legacy is dependent either was, or was not fulfilled; hence you will be entitled to all of it, or to none, and this will be considered unjust, and contrary to the intention of the testator.

Again, it is not reasonable to hold that you are entitled to a part of the legacy, when it is necessary for the condition on which the entire legacy depends either must have been fulfilled, or must have failed. Therefore the whole matter should be disposed of by having recourse to an exception based on fraud.

(2) For which reason, when a testator desires to obtain compliance with his wishes, he should provide as follows: "If I have bequeathed, or should bequeath anything more than is legal under the Falcidian Law, let my heir be charged to deduct as much as is necessary to make up his fourth out of the legacy which I have left to Titius."

(3) Where a testator left an estate of two hundred *aurei,* and bequeathed to me a hundred payable immediately, and also a hundred to you payable conditionally, and the condition was complied with after some time, in such a way, however, that out of the income which was left to you the heir did not receive more than twenty-five *aurei,* he will be entitled to the benefit of the Falcidian Law, and we must pay him twenty-five, and, in addition to this, the interest on fifty during the meantime, which (for example) amounts to five *aurei.* Therefore, as thirty *aurei* must be paid, certain authorities hold that fifteen shall be due from each of us, which opinion is entirely incorrect; for although we have each received the same amount, it is still evident that my legacy is somewhat more valuable than yours. Hence, it should be decided that your legacy is diminished by the amount that the heir has received from the profits; and according to this, the following computation should be made, namely, what is due to the heir must be divided into seven parts of which I will be required to pay four, and you three, since my legacy is a fourth larger than yours.

89. *Marcianus, Institutes, Book VII.*

The Divine Severus and Antoninus stated in a Rescript that money left for the support of children was subject to the operation of the Falcidian Law, and that it was the duty of the Governor of the Province to see that it was lent to persons who were solvent.

(1) The Divine Severus and Antoninus stated in a general Rescript, addressed to Bononius Maximus, that interest should be paid by anyone who claimed the benefit of the Falcidian Law for the purpose of committing fraud.

90. *Florentinus, Institutes, Book XI.*

Where an heir, who was charged by a trust to transfer the estate to someone after the receipt of a certain sum of money, refuses to carry out the will of the testator, and afterwards desires to avail himself of the benefit of the Falcidian Law, even though the money may not have been paid to him who, on receipt of it, was asked to transfer the estate; still, he will be compelled to execute the trust, since what the testator wished to be given him will take the place of the Falcidian portion.

91. *Marcianus, Institutes, Book XIII.*

An heir is entitled to have, as a fourth of the estate under the Falcidian Law, all that he acquires in this capacity, but not any property which he can claim by hereditary right, or which he received as a legacy, or by virtue of a trust, or in order to comply with a condition; for none of these things are included in his fourth.

But where he is charged under the terms of a trust to transfer the entire estate, or where either a legacy is left him, or he becomes the beneficiary of a trust, or where he is directed to take certain property as a preferred legacy, or to deduct or retain anything from the estate, this will be included in his fourth. With reference, however, to the share which he receives from his co-heir, this will not be included.

Even though he may be requested to transfer the estate on receipt of a certain sum of money, what he receives shall be included in his fourth, as has been decided by the Divine Pius. And where anything is given to him by the beneficiary of the trust in compliance with a condition, it should be noted that this must also be included in his fourth. But if the heir should receive anything from the legatee for the purpose of fulfilling a condition, this does not come within the scope of the Falcidian Law; therefore, if the deceased devised a tract of land worth a hundred *aurei,* provided the devisee paid fifty to the heir, the legacies should be counted as a hundred, and the heir will be entitled to fifty, in addition to his share of the estate, and this will not be included in his fourth.

92. *Macer, On Military Affairs, Book II.*

If a soldier, having made his will, directs half of his estate to be delivered to you, and then executes a codicil after he has been discharged, by which he requests the other half of his estate to be delivered to Titius, and dies a year after his discharge, the heir shall retain his fourth out of what was due to yourself and Titius; because the testator died at a time when his will could not receive the benefit of the Imperial privilege relating to military wills.

If, however, he should die within a year after his discharge, Titius alone must suffer the deduction of the Falcidian fourth, because the trust was left to him at a time when the testator could not make a will under military law.

93. *Papiniamis, Questions, Book XX.*

An heir was charged to transfer an estate to Maevius on condition of his receiving a hundred *aurei* from him, and at his death, to leave the money to Titius. Although the said hundred *aurei* were sufficient to compose a fourth of the estate, still, because of the subsequent trust, there will be ground for the retention of a fourth of the first bequest; for, according to a

Constitution of the Divine Hadrian, the amount only comes within the terms of the Falcidian Law where it remains in the hands of the heir; but he alone is subject to the operation of the Falcidian Law to whom the estate was bequeathed, hence it does not apply to the hundred *aurei* which were donated *mortis causa.*

It is clear that, if anyone should make the following testamentary provision, "I ask you to transfer my estate on the receipt of a hundred *aurei,"* and the testator should not designate any person to pay the money, it can be retained and deducted by the heir under the terms of the Trebellian Decree of the Senate, if it is sufficient to make up his fourth.

94. *Scsevola, Digest, Book XXI.*

A testator, after having appointed his son and daughter his heirs, bequeathed certain property to each of them as preferred legacies, but he left much less to his daughter than to his son. He devised to the former, in addition, a house which was encumbered, including everything belonging to it and all its utensils, and added the following clause, "I make this devise on condition that Titius, the freedman of my son, shall pay any debts due on said house, and if he does, the house shall belong to both of them in common."

If the daughter should desire to avail herself of the benefit of the Falcidian Law for the purpose of reserving her fourth, the question arose whether the debts should be deducted from the share of the estate which was left to her, and she should obtain her fourth out of what was left. The answer was that she could claim it by law, but that she could not accept what was left to her, if it was sufficient to make up her fourth, without complying with the wishes of the deceased, and paying what she had been charged with.

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

A husband had charge of the property of his wife, which did not include her dowry, and she, having died before her husband had rendered her an account of his administration, left him heir to her entire estate, and charged him, when he died, to deliver ten shares of the same to their common son, and to deliver two shares to her grandson. The question arose whether what was found to have remained in the hands of her husband from his administration of the property should be transferred to the son, along with the other assets, in proportion to ten shares of the estate. The answer was that what the husband owed the estate would also be included in the distribution.

(1) The paternal uncle of a girl, whom her mother requested to transfer her estate to Titius, if she should die before reaching the age of puberty, became her legal heir. In estimating the amount due under the Falcidian Law, the heir desired to deduct from the estate the principal, out of the interest of which the deceased minor had paid several persons money that was due for support furnished on account of the testatrix. If he should make this deduction, the question arose whether he ought to give security to pay the principal of said sums of money, the amounts of the same to be determined by the time of death of each of the parties entitled to support. The answer was that he should give such security.

(2) Three years after having entered upon the estate an heir wished to enforce the Falcidian Law against the legatees, for the reason that the testator had administered certain guardianships of which no account had yet been rendered, and because he denied that as much could be recovered from the claims due to the minor as had been deducted on account of the security given by the testator. The question arose whether on the demand of the legatees copies should be taken of the accounts of the deceased, and of all the documents belonging to the estate, as well as a statement of the sums due to the wards, in order to prevent the heir from producing what papers he might select, and in this way defraud the legatees. The answer was that it was the duty of the court to examine any documents by which the amount of the estate might be established.

96. *The Same, Questions, Publicly Discussed.*

If a civilian executed a will before he becomes a soldier, and then executes a codicil during his time of military service, the Falcidian Law does not apply to the codicil, but it does apply to the will.

TITLE III.

WHERE MORE IS SAID TO HAVE BEEN BEQUEATHED TO ANYONE THAN IS PERMITTED BY THE FALCIDIAN LAW.

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

Where more property is bequeathed to anyone than is permitted by law, and there is good reason to doubt whether the Falcidian Law is applicable or not, the Praetor will come to the relief of the heir, and compel the legatee to furnish him with security that, if it should become apparent that he has received a larger legacy than he is entitled to under the Falcidian Law, he will refund to him an amount equal to the excess, and that no attempt will be made to defraud him.

(1) It makes no difference whether this occurs in the first will, in the pupillary substitution, or in both, for it has already been decided that the Falcidian Law applies but once, even where there are two wills, and that all the legacies will be subject to contribution, not only those with which the minor himself is charged, but also those which his substitute is obliged to pay.

(2) Where no stipulation has been entered into with reference to the ward, the heir will be entitled to an action on guardianship against the guardian of the former. But, as Pomponius says, the stipulation can take effect with reference to both the ward himself and his heir, in which case the Falcidian Law will begin to become operative during his lifetime.

He also lays down the same rule with reference to the action on guardianship.

(3) Marcellus says that a man whose estate amounted to four hundred *aurei* appointed as his heir his son, who had not yet reached the age of puberty, substituted Titius and Seius for him, and did not charge the minor with any legacy, but charged Titius with the payment of three hundred *aurei.* Marcellus asks whether two hundred or a hundred and fifty *aurei* should be paid by the substitute, as, under no circumstances, he should be compelled to pay three hundred.

It seems to me to be the better opinion that he ought not to be obliged to pay the legatees more than his share, and certainly he ought not to pay them less. It follows, according to this, that the stipulation does not take effect, so far as he alone is concerned, but it should be carried out for the benefit of all the heirs, since the Falcidian Law becomes applicable after proper cause has been shown, and is determined by the amount of the legacies and the debts of the estate.

(4) If the indebtedness of the estate is evident, or certain, the calculation is easily made. If, however, the indebtedness is still uncertain, either because it is dependent upon some condition, or the creditor has brought an action to collect his claim, and the litigation has not yet been terminated, it will be doubtful how much is payable to the legatee on account of the uncertainty.

(5) At the present day something very similar to this occurs with reference to trusts.

(6) When it is said that the Falcidian Law is applicable, an arbiter is usually appointed to appraise the amount of the estate, even though there may be only one person demanding the execution of a very moderate trust. An appraisement of this kind should not prejudice others who have not been summoned before the arbiter. Still, it is usual for the other beneficiaries of the trust to be notified by the heir to appear before the arbiter and state their cases there. The creditors, frequently, are also notified to prove their claims before the arbiter. It is but reasonable that the heir should be heard against the claims of the legatees and beneficiaries of

the trust, if he should offer to pay all that is left, and desires to protect himself by a stipulation of this kind.

(7) Where certain legacies are bequeathed that are payable immediately, and others that are payable under a condition, this stipulation should be entered into with reference to the conditional legacies, provided those which are immediately due are fully paid.

Finally, Julianus says that where legacies are bequeathed absolutely and conditionally, in order to prevent the Falcidian Law from taking effect if the condition is complied with, an action will not be granted for the collection of the legacies which have been absolutely bequeathed, unless security is given to the heir to refund anything which has been received in excess of what is permitted by the Falcidian Law.

(8) Julianus also says that where a fourth of an estate is left to a person under a condition, and three-fourths of it is bequeathed absolutely, security must be given to refund all that has been received above the amount authorized by the Falcidian Law.

(9) Hence this stipulation also can be exacted, because, although the heir can recover any excess which he has paid, still, the party to whom payment was made may not prove to be solvent, and for this reason what has been paid will be lost.

(10) It can be said that this stipulation should also be entered into with reference to donations *mortis causa.*

(11) These words of the stipulation, "What you may have received as legacies in excess of what is authorized by the Falcidian Law," not only refer to one who has received more than is permitted by the Falcidian Law, and who must refund a part, and can retain a part of the same, but they also have reference to a person who is obliged to refund his entire legacy, for it should be understood that sometimes the Falcidian Law revokes a portion of the legacy which has been paid, and sometimes revokes all of it. For, as the calculation of the Falcidian portion is made after an account of the indebtedness has been taken, it frequently happens that other indebtedness is discovered, or a condition is fulfilled upon which the payment of a debt depended, and the entire amount of the legacy is exhausted; sometimes, however, a condition is fulfilled upon which the freedom of slaves depends, which renders a legacy not due under any circumstances, since the calculation of the amount of the legacies is not made until that of the slave has been completed, and their value deducted from the assets of the estate.

(12) Moreover, the Falcidian Law does not apply to certain wills; still, with reference to them, the rule is observed that although the heir may not be entitled to reserve his fourth, yet the legacies would only be payable in case the assets of the estate should be sufficient, of course, after deducting the indebtedness, as well as the value of the slaves who have received their freedom by the will either directly, or under the terms of a trust.

(13) Security should also be given by the beneficiary of a trust to the legatee who is charged with the execution of the same.

(14) Sometimes, the agreement set forth in this stipulation has reference not to the Falcidian, but to some other law; as, for instance, where a patron is appointed heir to an entire estate, and is charged absolutely with a legacy of five-twelfths of the same, and is afterwards charged conditionally with another bequest in excess of the amount to which he is entitled as patron; for in this instance recourse must be had to that law which provides for patrons, and not to the Falcidian Law.

(15) Where property which has been bequeathed is lost while in the hands of the legatee, the better opinion is that relief should be granted, by means of an exception, to the party who made the promise,

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

Even if he consented to pay the value of the property,

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

Unless some fraudulent act was committed by the legatee himself, for then he will also be liable under the clause relating to bad faith, which is included in this stipulation, and can be opposed by a reply.

(1) This bond, which is executed on account of the Falcidian Law, has reference to the furnishing of sureties.

(2) Where legacies are bequeathed which are payable at different times, as it is certain that the Falcidian Law will be applicable, Pedius says that there is no ground for a stipulation, but there is one for a calculation, and that an estimate should be made of the sum payable at different times, and in this way the total amount of the legacies will be established.

The result of the estimate is that the amount due under the Falcidian Law will be fixed in proportion to what is to be deducted from all the legacies.

(3) Whenever it is clear that a legacy will be due and payable even before the time the Falcidian Law will begin to apply, the calculation of the legacy must be made. If, however, fulfillment of the condition upon which it depends is delayed, we must wait until it is complied with. But where the time for its fulfillment has not yet arrived, in this instance, an account should be taken of the profits received during the intermediate time, and an estimate made, so that we can determine the amount under the Falcidian Law, and can say that the stipulation has become operative.

(4) Although all legatees and beneficiaries of a trust may by means of this stipulation be obliged to give security, still, the Divine Brothers stated in a Rescript that some of them are excused from doing so, as, for instance, those to whom small allowances for support have been bequeathed. For they stated in a Rescript, addressed to Pompeius Faustina: "The bequest of the ten *aurei* payable annually under the will of Pompeia Crispiana, your patroness, which you allege have been left to you, is different from that by which food and clothing were left to her other freedwomen, for which reason we think that a bond should not be required."

(5) Moreover, it should be noted that the Treasury ought not to be required to furnish security, but an action can be brought against it, just as if it had done so. Still, the Divine Pius stated in a Rescript that others, no matter what their rank, and though they may have already received their legacies, should be compelled to give security. We also learn from this Rescript that the Emperor intended that a stipulation should be entered into, even after the legacies have been paid.

(6) When a legatee has given security to an heir with reference to the return of the legacy which has been paid to him, and the heir is already involved in a controversy on account of the estate, or expects to be, and the estate is evicted, either on account of the negligence or fraud of him who paid the legacy, we hold that the stipulation will not take effect, so far as the judgment of a good citizen is concerned, because it contains the element of good faith.

(7) Likewise, if he who paid the legacy should, for some other reason, deprive himself of the estate (for instance, because he is appointed heir by a second will, under which the said legatee did not receive the legacy), we say that, in accordance with the judgment of a good citizen, the stipulation will become operative.

(8) And, generally speaking, where he who provided for himself by a stipulation of this kind, and has transferred an estate, or a sum of money, or some advantage, it must be said that the stipulation will take effect; provided he who entered into it was not guilty of bad faith.

(9) The question arose whether the stipulation can take effect more than once. And it is established that it can take effect repeatedly, if the heir is deprived of different parts of the

estate at different times.

(10) If the legacy should be paid before the stipulation is entered into, and legal proceedings are instituted to compel security to be furnished, this suggests the point that proceedings can be instituted where anything has been omitted, or paid through mistake. Therefore, in this instance, as no security was given, more is considered to have been paid than is due.

Pomponius says that an action to compel security to be furnished will lie, and I think that his opinion should be adopted on account of the benefit to be derived from it.

4. *Paulus, On the Edict, Book LXX11L*

Again, this security must be given where there appears to be good reason for it, as it would be unjust for it to be required where no controversy has as yet arisen with reference to the estate, and where only idle threats have been made, and therefore the Prastor must decide the question after proper investigation.

(1) Where each of two parties claims the entire estate for himself, under the will, for example, where they are both of the same name, actions can be brought by the creditors as well as the legatees against both the party in possession, and the one who demands the estate.

(2) This security is necessary where anyone pays his own money or delivers his own property. If he pays money or delivers property belonging to the estate, some authorities hold that security need not be furnished, for if he loses his case he will not be liable, since he was not in possession and did not commit fraud to avoid having possession.

If he should make payment before any controversy has arisen, this rule will apply; because if he made payment afterwards he would be liable on the ground of negligence.

(3) In the case of two persons having the same name, the question arises whether security must be furnished by him who transfers the property of the estate, for the reason that one of them is absolutely released from liability, just as if he had paid a debt due from the estate. If the party claiming the estate paid his own money, or delivered his own property, he will not have anything to retain, and therefore a bond must be given him.

5. *Marcellus, Digest, Book XXI.*

Let us see whether this stipulation, namely, "Do you promise to return whatever you may have received above what is allowed by the Falcidian Law?" will not be sufficient as against the party who is obliged to pay a legacy to another under the terms of a trust. It will be sufficient for the heir to say that there is nothing to be done by him under the trust. For, in this case also, he who receives the benefit of the trust must furnish security to indemnify the legatee, unless the latter should prefer to give security to the heir in order to avoid circumlocution.

Moreover, security must be given to the legatee if (as is perfectly proper), he should be permitted to retain a proportionate sum out of what was paid under the trust, even though enough of the legacy may remain in his hands to discharge the entire fiduciary obligation.

6. *Callistratus, On Judicial Inquiries, Book IV.*

If the legatee or the beneficiary of the trust cannot readily furnish security, and for this reason runs the risk of being deprived of the benefit conferred by the will, shall he be released from the necessity of giving security? This opinion seems to be adopted in a Rescript of the Divine Commodus, which is in the following words: "If the court having jurisdiction of the case should ascertain that application has been made to him to compel you to give security in order to prevent you from claiming the benefit of the trust, he must see that you are released from the requirement of furnishing it."

7. *Paulus, On the Lex Julia et Papia, Book VII.*

The Divine Pius forbade security from being exacted from a person who was directed to oversee the distribution of certain annual legacies, requiring him to return to the heir the shares of those who failed to accept them, unless he was expressly ordered to do so by the testator.

8. *Marcianus, Trusts, Book X.*

Where an heir alleges that part of an estate, or even all of it, is forfeited to the Treasury, and it should be established that he was also charged with a trust, it was decided that if the beneficiary should give security to restore the estate in case it should be evicted, he must be paid.

9. *The Same, Trusts, Book XII.*

When the ownership of property is not in controversy, but the usufruct of the same is (for it may happen that the ownership is bequeathed to Titius, and the usufruct to someone else), then security to restore it should not be given to th'e heir, but to Titius.

Sometimes, even if the heir is charged with the transfer of the usufruct, security should be given to Titius; for instance, if the usufruct, having been reserved, the ownership is left to him, and the usufruct to Seius; for, in this instance, what advantage would it be for security to be given to the heir, since no benefit will accrue to him if the usufruct should be extinguished?

If, however, the usufruct, having been bequeathed to Seius, and the ownership is left to Titius in such a way that when the usufruct ceases to belong to Seius, he will be entitled to the ownership, then security must be furnished to the heir by the usufructuary, and also by the heir to Titius, because it is not certain that, if the usufruct should be extinguished, the ownership will be acquired by Titius.