THE DIGEST OR PANDECTS.

BOOK III.

TITLE I.
CONCERNING THE RIGHT OF APPLICATION TO THE COURT.

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

The prætor has proposed this Title for the purpose of preserving order, and maintaining his dignity; and to prevent applications from being made to him casually and indiscriminately.

(1) With this end in view, he established three classes of persons, namely: those whom he forbade to apply to him and all others whom he permitted only to apply in their own behalf; and still others, whom he permitted to apply both for certain persons and for themselves.

(2) To apply to the court is to state one's own wish, or that of one's friend before a magistrate who has jurisdiction, or to oppose the wish of another.

(3) The prætor begins with those who are absolutely forbidden to make an application to him, and in this portion of the Edict he has reference to those whom he excused by reason of youth, or on account of some accident. He forbids the party to apply to him on the ground of youth, when he is under seventeen years of age, for the reason that he considered this age to be too young to appear in public; although it is stated that Nerva, the son, gave opinions publicly on questions of law at that age, or a little later.

The prætor forbids a party to appear before him on account of accident, for instance where he is deaf and cannot hear at all; for no one ought to be allowed to make an application to court who is unable to hear the decree of the prætor, as this would be a source of danger to him, since if he did not hear the decree, he could be punished, as being contumacious, if he did not obey.

(4) The prætor states: "If the parties have no advocate I will give them one". Not only is the prætor accustomed to show this favor to such persons, but also he will do so where anyone is not able to obtain an advocate for certain reasons; as for instance, because of the intrigues of his adversaries, or through fear.

(5) Under the second section of the Edict those are referred to who cannot appear for others, and in this portion of it the prætor includes such as are incapacitated by their sex, or by an accident, and he also mentions persons who are branded with infamy.

On the ground of sex, he forbids women to appear for others, and the reason for this prohibition is to prevent them from interfering in the cases of others, contrary to what is becoming the modesty of their sex, and in order that women may not perform duties which belong to men. The origin of this restriction was derived from the case of a certain Carfania, an extremely shameless woman, whose effrontery and annoyance of the magistrate gave rise to this Edict.

On account of accident, where a prætor rejects the application of a man who is entirely blind, because he cannot see the insignia of the magistracy and pay them proper respect. Labeo says that Publius, a blind man, the father of Asprenas Nonius, had his chair turned around, and was denied a hearing by Brutus, when he wished to make a statement before him. But although a blind man cannot appear in court for another, he can still retain his Senatorial dignity, and perform the duties of a judge. Can he then, also hold the office of a magistrate? We will consider this matter. There is an example of one who did hold such an office, for Appius Claudius, a blind man, was present at public councils, and gave a very severe opinion in the Senate with reference to prisoners taken from Pyrrhus. The better opinion is for us to say that he can hold the office of magistrate which he has already obtained, but should be forbidden to aspire to a new one; and this rule has been established by many examples.

(6) He also forbids a party to appear before him in behalf of others, who has suffered his body to be used like that of a woman. If, however, he has been violated by robbers or by enemies, he should not be branded with infamy, as Pomponius says. A party who has been convicted of a capital crime cannot appear in behalf of another. It is also forbidden, by a decree of the Senate, that a person who has been convicted in court of false accusation, shall appear before a judge of inferior jurisdiction. Moreover, a man who has hired himself to fight with wild beasts is forbidden to appear. We should understand the term "wild beasts" to rather apply to their fierceness, than to the kind of animals; but what if the animal should be a lion, but a tame one, or some other animal which was tame but still provided with teeth? For this reason a man who has hired himself to fight, is branded with infamy by that very fact, whether he fight or not; because if he should fight, when he did not hire himself to do so, he would not be liable but only one who has hired himself for that purpose. Therefore, the ancient authorities hold that those are not liable who, for the sake of showing their courage, do this without compensation; unless they suffer themselves to be honored in the arena; for I think that, in this instance, they cannot avoid being branded with infamy. Where, however, anyone hires himself to hunt wild beasts, or to fight with one that is committing damage in the neighborhood, outside the arena, he is not to be branded with infamy; hence the prætor permits persons to appear in court before him in their own behalf, who have not fought with wild beasts in order to show their courage, but forbids them to do so for others. Nevertheless, it is perfectly proper to permit such persons, where they are exercising the office of guardian, or any other of the game kind, to appear in behalf of those whose affairs they are transacting. Where anyone violates this provision of the Edict, he is not permitted to appear for others, but may also be punished by a pecuniary fine, whose amount is to be arbitrarily fixed by the judge.

(7) As we stated in the beginning of this Title, the prætor divides parties who cannot appear into three classes, and the third of these is one by which he does not refuse them altogether the right of appearing, but says that they must not appear for everybody, and they are, so to speak, less guilty than those mentioned under former heads.

(8) The prætor says: "Those who are forbidden to appear by law, plebiscite, a decree of the Senate, an edict, or an Imperial Ordinance, unless in behalf of certain persons, cannot appear before me in court for anyone else than persons authorized by law". All others who are branded with infamy by the Edict of the prætor are included in this Edict, and cannot appear except in their own behalf, and in that of certain specified persons.

(9) The prætor then adds: "Where any one of those who are mentioned above has not been restored to his original condition". One who is included in "those mentioned above", is understood to mean one of those who come under the third clause of the Edict, who are forbidden to appear in behalf of certain persons; for if they were included under the other clauses, complete restitution would be obtained with difficulty.

(10) Pomponius asks what restitution the prætor has reference to, whether it is that granted by the Emperor, or that granted by the Senate? And he is of the opinion that either is referred to; but the inquiry arises as to whether the prætor can grant restitution, and it seems to me that such decrees of the prætor should not be observed unless they form part of the duties of his jurisdiction; as in the case of youth, where anyone has been deceived, and in the other instances which We snail examine under the Title, "Concerning Complete Restitution". The proof of this opinion is that where anyone is convicted of an offence involving infamy, and the sentence is annulled by complete restitution, Pomponius thinks that he is freed from the infamy.

(11) The prætor also says: "They cannot appear for anyone except a parent, their patron, their patroness, their children, or the parents of their patron or patroness"; with reference to which persons we have spoken more fully under the Title: "Concerning Summons". He also adds "Or in behalf of their children, their brother, sister, wife, father-in-law, mother-in-law, son-in-law,

daughter-in-law, stepfather, stepmother, stepson, stepdaughter, male or female ward, or a person of either sex who is insane".

2. *Gaius, On the Provincial Edict, Book I.*

Or for an idiot of either sex, (for curators are also appointed for persons of this description).

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

"Where guardianship, or curatorship, has been given over any such persons by a parent, or by a majority of the guardians, or by a magistrate who had jurisdiction in the matter."

(1) When affinity is mentioned, we must not understand that which formerly existed, but that which exists at the present time.

(2) Pomponius says that the words, daughter-in-law, son-in-law, father-in-law, and mother-in-law are intended to include degrees which are more remote than those which the preposition *pro* generally designates.

(3) And that, with reference to curators, he ought to have added persons who are dumb, and others for whom it is customary to appoint curators, that is to say, persons who are deaf, spendthrifts, and minors.

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

Those also, for whom, on account of ill health, the prætor is accustomed to appoint curators:

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

And those, as well, who, by reason of some chronic disease, are unable to transact their own business.

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

I am of the opinion that those can appear in court without violation of the Edict, who, not voluntarily but through necessity, are discharging the duties of an office, even if they are such as cannot appear in their own behalf.

(1) Where anyone is forbidden to act as an advocate, if this has reference to the time during which the magistrate exercises jurisdiction, I think that he can afterwards appear before his successor.

7. *Gaius, On the Provincial Edict, Book VII.*

Where the prætor forbids any person to appear before him, the prohibition is absolute, even if his adversary consents for this to be done.

8. *Papinianus, Questions, Book II.*

The Emperor Titus Antoninus stated in a Rescript: "That he who had been forbidden to practice the profession of an advocate for the term of five years, was not forbidden to appear in court in behalf of anyone after the five years had elapsed". The Divine Hadrian also stated in a Rescript, "That a man could appear in court after he returned from exile"; nor was any distinction made as to the crime for which the sentence for silence or exile was imposed; otherwise, after the time of the punishment had elapsed, it might be still further prolonged contrary to the terms of the sentence.

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

A who is forbidden to appear in behalf of another for a reason which does not imply infamy, and therefore is not deprived of the right

of appearing for every one, is only legally excluded from appearing for others in the province over which the governor who imposed the sentence has jurisdiction; and he is not forbidden to

do so in any other, even though it may have the same name.

10. *Paulus, Rules*.

Those who act in behalf of the Treasury are not prohibited from acting for their children, their parents, or their wards, of whose guardianship they have charge, even though the case may be in opposition to the Treasury.

(1) Decurions are also forbidden to conduct causes against their own municipal towns, except for such persons as have been previously mentioned.

11. *Tryphoninus, Disputations, Book V*.

It was stated by our Emperor in a Rescript: "That a guardian is not forbidden to appear for a ward in a matter in which he had been employed as an advocate against his father". And he is also allowed by this to act against the Treasury; even where he had appeared for the Treasury previously in some proceedings against the father of his ward.

(1) Who those are that are considered infamous will be explained in the following Title.

TITLE II.

CONCERNING THOSE WHO ARE BRANDED WITH INFAMY.

1. *Julianus, On the Edict, Book I.*

The words of the prætor are as follows: "He who is discharged from the army for disgraceful conduct, either by the Emperor, or by one to whom authority has been granted to act in the matter, is branded with infamy. This also applies to one who appears upon the stage for the purpose of acting, or declaiming; to one who follows the occupation of a procurer; to one who has been convicted in court of false accusation or betrayal of his client's interest; to one who has been convicted of theft, robbery, injury, bad faith, or fraud, in his own name, or has compromised any of these offences; to one who has been condemned in his own name in an action based on partnership, guardianship, mandate, or deposit, in a direct action; to one who gave his daughter, who was under his control in marriage after the death of his son-in-law, he knowing him to be dead before the time had elapsed which is customary for a widow to mourn for her husband; to one who married her, being also aware of this, without the order of the person under whose control he was; to him who permitted him to marry her while he was under his control, being aware of the above mentioned facts; and also to one who, on his own responsibility, and not by the order, or in the name of the party under whose control he was, permits any male or female whom he has under his control, to contract two betrothals, or two marriages at the same time".

2. *Ulpianus, On the Edict, Book VI.*

The words of the prætor: "Who is discharged from the army", must be understood to refer to one who wears the military insignia, as, for instance, where anyone up to the rank of centurion, or prefect of a cohort, or of a troop, or of a legion, or the tribune of a cohort, or of a legion, is discharged. Pomponius goes still further, and says that the commander of an army, even though he may wear the badges of consular rank, if dismissed by the Emperor for some disgraceful cause, is branded with this mark of infamy. Therefore if a general is discharged while in command of the army he is branded with infamy, and where the Emperor discharges him, and adds that this is done on account of disgraceful conduct, as he generally does, there is no doubt that he is branded with infamy under the Edict of the prætor. This is not the case, however, if a successor is appointed for him without his having incurred the displeasure of the Emperor.

(1) By an "army" we do not mean a single cohort, or a single troop, but several bodies of soldiers; hence we say that a man commands an army when he has charge of a legion, or a number of legions which, with the auxiliaries, have been entrusted to him by the Emperor.

But, in this instance, where a man has been dismissed from the command of any body of soldiers, we must understand that he has been dismissed from the army.

(2) The phrase, "Discharged on account of disgraceful conduct", is added for the reason that there are several kinds of discharges, one of these is an honorable discharge allowed by the Emperor, where a man has finished his time of service, or where this was done previously through the indulgence of the Emperor; another is where a soldier is released from military service on the ground of ill health; and there is also dishonorable discharge. The latter occurs whenever he who orders it adds expressly that it is done on account of disgraceful conduct, and they ought always to add why the soldier is discharged. But where a man is degraded, that is to say deprived of his insignia of rank, he becomes infamous, even though the words, "degraded on account of disgraceful conduct", were not added. There is a fourth kind of discharge where a party enters the military service in order to avoid performing the duties of an office, but this does not affect his reputation, as has been very frequently stated in rescripts.

(3) A soldier who has been convicted under the *Lex Julia de Adulteriis*, becomes infamous to such a degree that the sentence itself ignominiously releases him from his oath.

(4) Those who have been dishonorably discharged are not allowed to live either at Rome, or where the Emperor resides.

(5) The prætor says: "He who appears upon the stage is infamous". The stage, as defined by Labeo, means any place whether public or private, or on the street, where anyone appears or moves about making an exhibition of himself; provided that it is a place where persons, without distinction, are admitted for the purpose of viewing a public show; and those who contend for gain, as well as all those who appear upon the stage for compensation, are infamous; as Pegasus, and the younger Nerva have stated.

3. *Gaius, On the Provincial Edict, Book I.*

He who hires himself for the purpose of appearing in public exhibitions, and does not do so, is not branded with infamy; because the offence is not so disgraceful a one that even the intention to commit it should be punished.

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

Sabinus and Cassius have given their opinion that athletes should not by any means be regarded as exercising the profession of an actor, because their object is to exhibit their strength; and, as a general thing, all men agree that it seems useful, and that neither musicians nor wrestlers, nor charioteers, nor those who wash horses, nor those who perform other duties in the sacred games, should be considered disgraced.

(1) Celsus holds that those who preside over the public games whom the Greeks call βραβζνλας, do not practice the theatrical profession, for the reason that they perform a public service, and do not act as players; and indeed this place is at present granted by the Emperor as an extraordinary favor.

(2) The prætor says, "Who acts as a procurer". He acts as a procurer who profits by the prostitution of slaves; but where anyone obtains such profit by means of persons who are free, he is in the same category. Moreover, where he makes this his principal occupation, or as an addition to some other business; as, for instance, where he is an inn-keeper or a stable-keeper and has slaves of this kind for attendance on strangers, and, by means of their opportunities he obtains money in this manner; or if he is a bath-keeper, as is the custom in some provinces, and has slaves for the purpose of taking care of the clothes of customers, and these are guilty of such practices in the baths, he is liable to the punishment of a procurer.

(3) Pomponius is of the opinion that a slave who uses for this purpose other slaves who are his private property, is branded with infamy after he has obtained his freedom.

(4) A party guilty of calumny is also branded with infamy, if judgment is rendered against him on that account; for it is not sufficient that he should have committed the act, and the same rule applies to a prevaricator. A prevaricator is, so to speak, a person who is not consistent, but who betrays his own side by assisting the other; the name Labeo says is derived from *Varia Gertatione*, for whoever prevaricates takes his position on both sides and, in fact, on the side of his adversary.

(5) Moreover, "Anyone who has been convicted of theft, robbery, injury, or bad faith in his own name, or has compromised any of these offences, in like manner, is infamous".

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

This is the case because a man who compromises a crime is considered as having committed it.

6. *Ulpianus, On the Edict, Book VI.*

The term theft must be understood to mean either that which is manifest or non-manifest.

(1) Where a party who has been convicted of theft, or any other infamous offence, appeals, he is not to be included among infamous persons while the case is pending, but where the time fixed for the appeal has elapsed, he is considered infamous from the date of his conviction; although if his appeal appears to be ill founded, I am of the opinion that he should be branded from that day, and not from the time of the judgment.

(2) Where anyone loses a case while acting for another, he does not incur infamy; and, therefore, neither my agent, nor defender, nor guardian, nor curator, nor heir, will be branded with infamy in an action for theft, or any other of the same character; not even if the action was defended by an agent from the beginning.

(3) "Or compromised." We understand compromise to mean where an agreement was made for a sum of money without reference to the amount; for, otherwise, if a party, by force or entreaty induces another not to proceed against him, he will be branded with infamy, so that no indulgence will be considered; which is inhuman. He who compromises for a given sum by order of the prætor is not deemed infamous.

(4) But where an oath has been tendered, and the party swears that he has done no wrong, he will not be considered infamous, because he, to a certain extent, proves his innocence by his oath.

(5) Where anyone loses a case of mandate, he is, by the terms of the Edict, branded with infamy; and this applies not only to him who accepted the trust, but also to those who did not keep faith, where the other party depended upon his doing so; as, for instance, where I have become your surety and have made payment, if I obtain judgment against you in an action of mandate, I render you infamous.

(6) It should, by all means, be added that an heir sometimes has judgment rendered against him on his own account, and therefore becomes infamous; for instance, if he is guilty of bad faith with reference to a deposit, or a mandate. For an heir cannot have judgment rendered against him on his own account in cases arising out of guardianship, and partnership, because he does not succeed a deceased person either in guardianship or partnership, but only incurs liability for debts of the deceased.

(7) A party who loses his case in a contrary action brought against him, is not infamous; and not without reason, for in contrary actions there is no question of bad faith, but only one of calculation, which is generally decided by the court.

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

In actions arising out of contracts, even though they involve infamy, and those who lose them are branded with it, still, where a party makes an agreement he does not become infamous,

and very properly, since a compromise in cases of this kind is not disgraceful, as it is in the preceding ones.

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

The prætor says "When the son-in-law is dead", and appropriately adds, "When he knows that he was dead", to prevent his being punished for ignorance; for, as the time of mourning is continuous, it is fitting that it should run from the day of the husband's death, even if his widow is ignorant of the fact; and therefore, if she learns of it after the time fixed by law, Labeo says that she can put on mourning, and leave it off, on the same day.

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

Husbands are not compelled to mourn for their wives. (1) There is no mourning for one betrothed.

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

It is customary to obtain permission from the Emperor for a widow to marry within the time fixed by law.

(1) A woman can be betrothed during the time she is in mourning for her husband.

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

Mourning for children or parents is no impediment to marriage.

(1) Even where the husband was such a person that it was not proper to mourn for him, by the custom of our ancestors his widow cannot be married until the period prescribed by law has elapsed; for the prætor goes back to the time during which a husband should be mourned, for this is customary in order to prevent confusion of blood.

(2) Pomponius thinks that where a woman has had a child within the time fixed by law, she can marry without delay, which I hold to be correct.

(3) It is not customary, as Neratius says, to mourn for enemies, or for persons condemned for treason, or for those who hang, or otherwise lay violent hands upon themselves, not from being tired of life, but on account of bad consciences. Therefore if anyone, after the death of a husband of this kind, marries his widow, she will be branded with infamy.

(4) He also is branded who marries her if he is aware of the fact; for ignorance of the law is not excusable, but ignorance of the fact is. He is excused who married her by the order of someone under whose control he was, and he who permitted him to marry her is branded with infamy. In both these instances, the rule is a very proper one, for he who obeyed is worthy of pardon, and he who suffered him to marry is branded with ignominy.

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

He who marries a woman under such circumstances, by the order of his father, even if he retains her after he is freed from the control of his father, is not branded with infamy.

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

What then if he did not suffer him to marry, but ratified the marriage after it was contracted, for instance, if in the beginning he was ignorant that the woman came within the terms of the Edict, but ascertains this subsequently? He will not be branded with infamy, for the prætor goes back to the commencement of the marriage.

(1) Where a party contracts two betrothals in the name of another, he will not be branded with infamy unless he contracted them in the name of a person of either sex whom he has under his control. Where a party suffers his son or his daughter to contract a betrothal, he is, to a certain extent, held to have contracted it himself.

(2) When the prætor says, "At the same time"; it is not to be understood that the betrothals were contracted at the same time, but also that they existed during the same period.

(3) Moreover, where a woman is betrothed to one man and married to another, she is punished by the terms of the Edict.

(4) Since it is the act which is branded with infamy, likewise, where a man contracts marriage or betrothal with a woman whom he either cannot lawfully marry, or with whom marriage is not right, he will be branded with infamy.

(5) An arbiter does not incur infamy by reason of a reference to arbitration because his award is not in every respect equivalent to a judgment.

(6) As to what relates to infamy, it makes a great difference where judgment is rendered after the trial of a case in which something was stated which was not to the purpose, for infamy is not incurred by matters of this kind.

(7) Where a penalty more severe than that authorized by law is imposed, the reputation of the party is preserved. This has already been established by rescripts and opinions; as, for instance, where a magistrate banished a party who should have been fined a portion of his property, it must be said that by this more severe sentence the party has compromised for the maintenance of his reputation, and that therefore he is not infamous. Where, however, in a case of non-manifest theft, the judge fines the culprit fourfold the amount, the latter is, in fact, oppressed with an increased penalty; (for in a case of nonmanifest theft he only should be sued for double the amount) but this does not preserve his reputation, although if he had not been oppressed with a pecuniary penalty, he would still have been considered to have made a compromise.

(8) Conviction for the crime of swindling imposes infamy upon the offender, even though it may not be the subject of a criminal prosecution.

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

Where a master defended his slave in a noxal action, and afterwards liberated him and made him his heir, and judgment was rendered against the slave in the same action, he does not become infamous, for the reason that he was not condemned on his own account, since in the beginning he was not a party to the joinder of issue.

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

A woman is branded with infamy who is placed in possession of an estate in the name of an unborn child by fraudulently representing that she was pregnant;

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

Whether she was not actually pregnant, or whether she had conceived by another.

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

She also ought to be punished who deceives the prætor, but a woman only is branded with infamy who does this while she is her own mistress.

18. *Gaius, On the Provincial Edict, Book III.*

A woman who is herself deceived by a false impression, cannot be held to have been fraudulently placed in possession.

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

No woman becomes infamous except one who has been judicially decided "to have been placed in possession of the property through fraud". This rule also applies to a father who permitted his daughter, while under his control, to fraudulently be placed in possession in behalf of her unborn child.

20. *Papinianus, Opinions, Book I.*

A party to whom the following words of a sentence of the governor of a province were addressed, namely: "You seem to have been the instigator of an accusation by means of a crafty device"; is held to rather cover him with shame than to brand him with ignominy, for he who urges anyone does not perform the functions of a mandator.

21. *Paulus, Opinions, Book II.*

Lucius Titius brought a charge against Gaius Seius, stating that he had suffered injury from him, and read written evidence to that effect in the presence of the prætorian prefect. The prefect, without paying attention to the testimony, ruled: "That Lucius Titius had not suffered any injury at the hands of Gaius Seius". I ask whether the witnesses whose evidence was rejected are to be considered infamous from having given false testimony? Paulus answered that nothing was shown which would justify that the parties concerning whom the inquiry is made should be considered infamous, since it is not proper where a judgment, either just or unjust, is given in favor of one party for another to be prejudiced by it.

22. *Marcellus, Public Affairs, Book II.*

Blows with rods do not of themselves cause infamy, but the reason for which the person deserved to suffer the punishment does, if it was of such a nature as to render him who was convicted infamous. The same rule also applies to other kinds of punishment.

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

Mourning should take place for parents and children of both sexes, as well as for other agnates and cognates, in accordance with the dictates of affection and the mental suffering to the extent that a person may desire; but anyone who does not mourn for them is not branded with infamy.

24. *The Same, On the Edict, Book VI.*

The Emperor Severus stated in a Rescript that a woman was not branded with infamy, who had been compelled to prostitute herself for money while in slavery.

25. *Papinianus, Questions, Book II.*

It has been settled that a son, although disinherited, should mourn for the memory of his father; and the same rule applies to a mother whose estate does not pass to her son.

(1) Where anyone is killed in battle he must be mourned for, even though his body may not be found.

TITLE III.

CONCERNING AGENTS AND DEFENDERS.

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

An agent is one who transacts the business of another by the direction of his principal.

(1) An agent may be appointed to transact business generally, or one thing in particular; he may also be appointed in the presence of his principal, by a messenger, or by a letter, although some authorities (as Pomponius states in the Twenty-Fourth Book) think that anyone who undertakes the management of a single matter, is not an agent, just as a man is not properly styled an agent who undertakes to carry an article, or a letter, or a message; but the better opinion is that a party is an agent who is appointed to attend to only one transaction.

(2) The employment of agents is absolutely necessary, in order that those who are either unwilling, or unable to attend to their own affairs, may sue or be sued by means of others.

(3) An agent can be appointed even when he is absent.

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

Provided that the person who is appointed is known, and consents to his appointment.

(1) An insane person is not to be considered as absent, because he is deficient in intellect, and cannot ratify his appointment.

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

An agent can also be appointed in a case which is not yet begun, or for future time, or under a condition, and also until a certain day.

4. *Paulus, On the Edict, Book VIII.* And for an indefinite time.

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

A .... is considered to be present who at the time is in his garden; . . . .

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

And also one who is in the Forum, in the city, and where the buildings are continuous.

7. *Ulpianus, On the Edict, Book VII.* So that his agent is held to be present.

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

The son of a family can appoint an agent for the purpose of bringing an action, where it is one that he himself could bring, not only where he has property of his own, but any son of a family can do so; as for instance, having suffered an injury, he can appoint an agent to bring an action for injury, if his father is not present and no agent of his father desires to try the case, and where an agent is appointed by the son of the family himself his act will be valid. Julianus carries this still further, for he says where the son of a family has a son who is under the control of the same person that he is, and an injury is done to him through his son, and his grandfather is not present, the father can appoint an agent to prosecute for the injury which the grandson of the absent party sustained. The son of a family can also appoint an agent for the purpose of conducting the defence of a case in court.

The daughter of a family can also appoint an agent for the purpose of bringing an action for injury. Valerius Severus stated, that where the daughter joins with her father in the appointment of an agent, this is superfluous, since it is sufficient for the father to make the appointment with the consent of his daughter. I am of the opinion, however, that if the father should happen to be absent, or is a man of suspicious character, (in both of which instances the daughter has a right to sue for her dowry), she can appoint an agent. The son of a family can also be appointed an agent for the purpose of bringing or defending an action.

(1) It is not customary for an agent to be appointed when he is unwilling. We must understand the term "unwilling" to mean not only where a party refuses, but also where he is not proved to have given his consent.

(2) Veteran soldiers can be appointed agents, but soldiers in active service cannot be appointed, even if the adversary consents; unless at the time that issue was joined this was overlooked through some accident, except in case the soldier was appointed in a matter in which he himself was interested; or where he appears as the representative of his company in the prosecution or defence, in which instance his appointment as agent is permitted.

(3) The prætor says: "Where an agent has been appointed to defend a case, and, with his consent, his principal has agreed to pay the judgment, I will compel him to conduct the trial". But he should not be compelled to do so under certain circumstances; as, for instance, where deadly enmity arises between the agent and the principal; as then Julianus says an action should not be permitted against the agent. The same rule applies where some high office has been conferred upon the agent, or where he is absent on business for the State;

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

Or if he alleges bad health, or a necessary journey.

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

Or where he is occupied with an estate which has descended to him, or where some other good reason exists. There is all the more reason for the agent not to be compelled to take charge of the case, if his principal is present.

11. *Paulus, On the Edict, Book VIII.*

If, however, the principal can be compelled to do so.

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

It is held that sometimes, even under these circumstances, an agent can be compelled to take charge of the case; as, for instance, where the principal is not present, and the plaintiff states that by further delay the property involved will be lost.

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

All these things should not indiscriminately be admitted or rejected, but should be settled by the prætor after he has ascertained the facts.

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

If, after an agent has been appointed, deadly enmity arises between him and his principal, he cannot be compelled to take charge of the case, nor is a stipulation entered into to defend a case violated, as the conditions are different.

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

If the principal should die before issue is joined, and after a stipulation has been made by him that the judgment will be paid by the agent, the latter can be compelled to take charge of the case, provided, however, the principal entered into it with the knowledge of the agent; because, otherwise, it would be contrary to the rules of law for the agent to be bound for an act of which he had no knowledge; an action can, however, be brought under the terms of the stipulation because the suit was not defended.

(1) Where an agent is appointed for conducting a case for the partition of property, he is also held to be appointed for the purpose of defence, and a double bond must be furnished.

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

Before issue is joined, the principal has full power either to change the agent, or to take charge of the case himself.

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

After issue has been joined, if the defendant has appointed an agent, he can either change him, or transfer the conduct of the case to himself, while the agent is still living, or residing in the city; but cause for this must first be shown.

(1) This is permitted, not only to the party who appointed the agent, but also to his heir and other successors.

(2) In making an investigation for cause, not only the matters that we mentioned above which do not compel an agent to take charge of a case, must be considered, but also his age;

18. *Modestinus, Pandects, Book X.*

Or any privilege of a religious character.

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

If the agent is a suspicious person, or in prison, or in the power of the enemy, or of robbers:

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

Or if he is prevented by a criminal or a civil action, by ill health, or by important affairs of his own;

21. *Gaius, On the Provincial Edict, Book III.*

Or if he has been banished, or is concealed, or subsequently becomes the enemy of the principal;

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

Or if he is connected with his adversary by marriage, or becomes his heir;

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

Or if a long journey, or some other similar matters prevent him;

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

Under such circumstances the agent ought to be changed, even at his own request.

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

All these things should be observed, not only on the part of the defendant, but also with respect to the plaintiff. If the adverse party, or the agent himself, alleges that the principal is lying, this must be settled by the prætor; for he is not to be tolerated as an agent who asserts his own right to be one, for he becomes liable to suspicion, by the fact that he is forcing his service upon an unwilling principal; unless, perhaps, he undertook the agency rather to justify himself than to merely carry it on, and he should be heard if he alleges: "That he is willing to surrender the agency if this can be done without injury to his reputation". Moreover, he must be heard if he attempts to clear his character. If he states plainly that he was appointed agent in a matter in which he himself was interested, and proves this, he ought not to be deprived of the right of instituting proceedings in his own behalf. Again, if an agent desires to make use of some reservation, it will not be easy to deprive him of the right of action;

26. *Paulus, On the Edict, Book VIII.* Unless the principal is ready to pay him.

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

In the trial of the action, care must be taken not to permit the agent to be deprived of the conduct of the case, unless, the party is ready to deprive him of the whole of it; for if he wishes to take away only a portion and leave the remainder, the agent can justly refuse to accept this arrangement. This happens where an agent acts under the direction of a principal, but where no direction is given, and nothing is proposed in court, and you have not approved acts performed without your consent, they do not prejudice you; and therefore the transfer of the case to yourself is not necessary lest you may be oppressed by the acts of another party. Application for the change of an agent must be made before the prætor.

(1) When a transfer of the case is made on the part of the plaintiff, we hold that a stipulation made by the defendant that he will comply with the judgment, is valid; and this opinion is adopted by Neratius and Julianus, and we still make use of this rule, provided the principal has accepted the security. But where the agent has accepted it, and the conduct of the case has been transferred to the principal, it is the better opinion that it is valid, and that the right of action under the stipulation is transferred from the agent to the principal. But where it is transferred from the principal, or from the agent to another agent, Marcellus has no doubt that the stipulation is valid; and this is the better opinion, and even though the right of action under the stipulation may have vested in the agent, still, an action on the same should be granted the

principal, the direct right of action having been extinguished.

28. *The Same, Disputations, Book I.*

Where my agent has accepted a bond for compliance with the judgment, I am entitled to an equitable action on the stipulation, just as one to. enforce judgment is given me. If my agent, by virtue of that stipulation, has brought suit without by consent, nevertheless, a right of action on the stipulation is granted me; hence it follows that my agent can be barred by an exception for bringing suit on the stipulation in the same way that he can when he brings suit on the judgment, where he has not been appointed in a matter in which he is himself interested, or empowered as agent for that very purpose. On the other hand, however, if my agent has given security to comply with the judgment, no action on the stipulation will be granted against me. If the party charged with my defence gives security, an action on the stipulation is not granted against me, because suit cannot be brought against me on the judgment.

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

If the plaintiff prefers to bring suit against the principal rather than against the person who is appointed agent in his own behalf, it must be said that he can do so.

30. *Paulus, Sentences, Book I.*

The agent of a plaintiff who has not been appointed in his own behalf, may ask that the expenses which he has incurred during the trial be paid out of the judgment, if the principal in the action is not solvent.

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

Where anyone who has lost a case in which he appeared as agent becomes the heir of the principal, he cannot lawfully deny his liability on the judgment; and this happens where he is the heir to the entire estate. If, however, he becomes heir to only a share of the estate, and pays the entire amount, provided he was directed to pay it all, he would be entitled to an action of mandate against his co-heir; but if he was not directed to do so, a right of action on business transacted is granted him. This rule also applies if the agent pays and should not become an heir.

(1) It is not forbidden to appoint several agents in a case where several parties are interested.

(2) Julianus says that where a party has appointed two agents at different times, he is considered to have rescinded the appointment of the first by the appointment of the second.

32. *Paulus, On the Edict, Book VIII.*

Where several agents have been appointed at the same time for one purpose, he who acts first takes precedence; so that he who comes after cannot act as agent in a case which the former one has brought.

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

It is said that a slave and the son of a family can both have an agent, and, so far as this applies to the son of a family it is correct; but, with respect to the slave, we dispute it. We admit, however, that a party can transact business relating to the *peculium* of a slave, and, in this instance, act as his agent; which opinion is also held by Labeo, but he is forbidden to bring suit.

(1) There is no doubt that he can have an agent to bring suit to establish his condition, not only for the administration of his property, but also to conduct actions either for or against him, whether they involve his possession as a slave, or his status as a freeman. On the other hand, it is clear that he can be appointed an agent.

(2) It is for the public welfare that absent persons should be defended by someone, and

defences are also granted in capital cases. Therefore, whenever a party can be condemned while absent, it is but just that someone should be heard who will maintain his innocence, and speak in his favor; and this is customary, as appears from a Rescript of our Emperor.

(3) The Prætor says, "Where anyone asks that he be granted the right to bring an action in the name of another, he must defend him in accordance with the judgment of a good citizen, and he must furnish security to the person against whom he brings suit in the name of another that the party interested will ratify his acts".

(4) It is held by the prætor to be only just that he who acts as agent in behalf of another, should also undertake the same party's defence.

(5) Where anyone appears as agent in a matter in which he is interested, it is still the rule that he should defend his principal, unless where the latter was compelled to appoint him.

34. *Gaius, On the Provincial Edict, Book III.*

Where anyone brings suit as agent in his own behalf, as, for instance, as the purchaser of an estate; ought he, on the other hand, to defend the vendor? It has been established that if the business was transacted in good faith, and not to defraud those who might wish to bring suit against the vendor, he will not be obliged to defend him.

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

However, the following persons acting as agents will be obliged to defend their principals, being such as are permitted to bring suit without a mandate, that is to say, children, provided they are under the control of others; parents, brothers, parties connected by affinity; and freedmen.

(1) A patron can, by means of an agent, accuse his freedman of being ungrateful, and the freedman can answer by an agent.

(2) Not only if the action is asked for by the agent, but also where he applies for a preliminary inquiry, or an interdict; or where he wishes to give security by a stipulation for the payment of legacies, or for the prevention of threatened injury; he will be obliged to defend his principal, while absent, in a competent court and in the same province. It would be a hardship, however, to be compelled to leave Rome and go into a province, or *vice versa*, or to go from one province to another, for the purpose of defending him.

(3) The term "defend" means to do whatever the principal would do in the conduct of a case, and to furnish proper security; and a harder condition should not be imposed upon an agent than upon his principal, except in giving security. With the exception of the security, an agent is held to undertake the defence when he assumes charge of the case. For which reason the question was asked by Julianus whether he can be compelled to do so, or whether it is sufficient, where no defence is offered, for an action to be brought on the stipulation; and Julianus says in the Third Book of the Digest, that he should be compelled to undertake the conduct of the case, unless he shows proper cause for refusing to act, or where he ought to be removed for some good reason. An agent also defends who permits what his principal would allow.

(4) An agent is held to conduct the defence even when he suffers the adverse party to take possession, where the latter demands security for the prevention of threatened injury, or for the payment of legacies,

36. *Paulus, On the Edict, Book VIII.*

Or where the notice of a new structure is given. If he permits a slave to be removed in a noxal case he is held to defend him provided, however, that in all these instances he furnishes security that his principal will ratify his acts.

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

An agent must defend his principal in all kinds of actions, even in such as are not granted against an heir.

(1) The question arose, where an adversary brought several actions, and there were several defenders who were prepared to undertake the defence of the same, whether a party who is absent is held to be defended? Julianus says that he appears to be properly defended, and Pomponius states that this is now the practice.

38. *The Same, On the Edict, Book XL.*

However, we should not go to the extent of holding that if suit is brought for ten thousand *aurei*, and two defenders should appear ready to defend for five thousand each, they shall be heard.

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

An agent should defend his principal not only in actions, interdicts, and stipulations, but also with reference to interrogatories; so that, if he is interrogated in court, he may answer in every instance in which his principal could do so. Therefore, if he is asked whether the heir is absent, he must answer; and whether he answers or keeps silent, he will be liable.

(1) He who brings any kind of an action in behalf of another must furnish security that his principal in the case will ratify whatever is done. Sometimes, however, although the agent brings suit in his own name, he must still give security, that his acts will be ratified, as Pomponius states in the Twenty-Fourth Book; for instance, where the other party tendered an oath to the agent, and he swore that something was due to the principal; and, in this case, he acts in his own name on account of his oath, for this action could not be brought by the principal; nevertheless, the agent will be obliged to give security that it will be ratified. But where an agreement for something was made with the agent, and he brings suit on this ground, there is no doubt that there is good reason for requiring security for ratification; and this Pomponius stated to be the fact.

(2) Julianus raises the question as to whether the agent is obliged to give security that his principal alone will ratify his acts, or that the other creditors will likewise do so; and he says that security must only be given with reference to the principal; for in the words, "the party interested in the matter", the creditors are not included; for an undertaking of this kind is not required of the principal himself.

(3) Where a father brings an action for the dowry of his daughter, he must give security that his daughter will ratify his act, and he must also defend her; as Marcellus stated.

(4) Where a father brings a suit for injury in the name of his son, as there may be two actions, one brought by the father, and one by the son, no bond for ratification is required.

(5) Where an agent contests the condition of anyone, whether the latter institutes proceedings against him as a slave, in order to obtain his freedom, or whether the agent brings suit to reduce to slavery a person who claims to be free, he must furnish security that his principal will ratify his act; and this is set forth in the Edict, so that, in either instance, he is considered as plaintiff.

(6) There is a case in which a party is obliged to give security for ratification as well as for compliance with the judgment in the same action; as, for instance, when application is made for complete restitution, where a minor is said to have been cheated in a sale, and the agent appears for the other party. In this case the agent must give security that his principal will ratify his act; as, otherwise, the principal, having returned, might wish to make some demands. Again, he must give security that he will comply with the judgment, so that if anything must be given to the minor on account of this restitution, it may be done. These

things Pomponius mentioned in the Twenty-Fifth Book on the Edict.

{7) He also says that where a guardian is accused on account of being suspected, his defender must furnish security for ratification, *far* fear that the principal may return and attempt to set aside what has been done. It is not an easy matter to have anyone who is suspected accused by an agent, as the case involves reputation; unless it is clear that the agent has been specially appointed by a guardian; or, if the latter is absent, the prætor is about to hear the case as if it was not defended.

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

Pomponius says that all kinds of actions cannot be brought by an agent. Hence, he states that an interdict cannot be applied for to remove children who are said to be under the control of some person who is absent, unless, as Julianus holds, proper cause is shown; that is to say, if he has been expressly directed to do this; and the father is prevented by ill health, or for some other good reason.

(1) Where an agent demands security for the prevention of threatened injury, or for the payment of legacies, he must himself give a bond for ratification.

(2) Also he who is acting as defender, and against whom a real action is brought, must, in addition to the ordinary security to comply with the judgment, also execute an undertaking for ratification; for, indeed, if the party whose defender appears comes forward and claims •the land after it had been declared to be mine by the judgment, will it not seem that he had not ratified it? In fact, if there had been a general agent, or the party himself had conducted his own case, and been defeated, and then brought suit against me to recover the property; would he be barred by an exception on the ground of *res judicata?*" This Julianus stated in the Twentieth Book of the Digest, for when property was decided to be mine, it was decided the same time that it was not his.

(3) A bond for ratification is also required from an agent before issue is joined, since, after this has been done, he cannot be compelled to furnish it.

(4) With regard to those persons of whom we do not require a mandate, it must be held that if it is evident that they are bringing suit against the wishes of those for whom they appear, their applications should be rejected. Therefore, we do not require them to prove that they have consent, or a mandate, but merely that they are not acting against the will of their principal, even though they may offer a bond for ratification.

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

Women are permitted to bring suit for their parents where proper cause is shown; for example, if their parents are prevented by disease, or by old age, and have no one to represent them.

42. *The Same, On the Edict, Book VIII.*

Although an agent cannot be appointed in a popular action, nevertheless, it is very properly stated that where a party brings suit with reference to a public right-of-way, and would sustain some private loss by being prevented from doing so; he can appoint an agent, as he could in a private action. With much more reason can an agent be appointed to bring suit for the violation of a tomb by a party interested.

(1) An agent can be appointed under the *Lex Cornelia*, in an action for injury; for, although the action is employed for the public welfare, it is nevertheless of a private nature.

(2) The obligation which usually exists between principal and agent gives rise to an action of mandate; sometimes, however, an obligation based upon mandate is not contracted; which occurs when we appoint an agent in his own behalf, and promise, under the circumstances, to comply with the judgment; for if we pay anything on account of the promise, we cannot bring suit on mandate, but on the ground of sale, if we have sold an estate; or on account of some

former mandate, as is done when a surety appoints the principal debtor his agent.

(3) He to whom an estate has been restored under the Trebellian Decree of the Senate, can legally appoint the heir his agent.

(4) Likewise, the creditor in the Servian Action can legally appoint the owner of the property pledged his agent.

(5) Moreover, if a party makes an agreement, concerning a preexisting debt, with one of the several joint creditors, and appoints another of them to bring suit on the agreement, his right to do so cannot be denied. And where there are two joint debtors, one of them can appoint the other to defend him.

(6) Where there are several heirs, and a suit is brought for the partition of the estate, or one for the division of common property; it is not permissible for the same agent to be appointed by several principals, since the matter cannot be settled without adjudications and condemnations. But it is certain that it will be permitted where there are several heirs of one co-heir.

(7) Where a debtor remains concealed after issue has been joined, his sureties are not held to legally defend him, unless one of them defends him for the entire amount involved; or all, or several of them appoint one of their number to whom the management of the case shall be entrusted.

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

A person who is dumb and deaf is not forbidden to appoint an agent in any way in which he can do so; and persons of this description may also be appointed themselves; not, however, for the purpose of bringing suit, but for the transaction of business.

(1) When the question is asked if a certain individual can have an agent, it must be considered whether or not he is forbidden to appoint one, for this Edict is prohibitory.

(2) In popular actions, where a party acts as one of the people, he cannot be compelled to conduct the defence as an agent.

(3) Where anyone applies for the appointment of a curator for a party who is present, the latter must consent, unless he is of age; and if he is absent, the agent must be required to furnish security for ratification.

(4) The penalty to which an agent who does not defend his principal is liable is that the right of action shall be denied him.

(6) Where an agent brings suit, and a slave of the principal who is absent is present; Atilicinus says that security must be given to the slave, and not to the agent.

(6) Where a party is not compelled to defend someone who is absent, still, if he has furnished security that the judgment shall be complied with, on account of his having undertaken the defence, he can be forced to proceed; for if he does not, he who accepted the security will be deceived; as those who are not compelled to defend a case are required to do so after security has been furnished.

Labeo thinks that indulgence should be granted where proper cause is shown, and if injury results to the plaintiff on account of lapse of time, the other party should be compelled to conduct the case; but if, in the meantime, some relationship by marriage has been destroyed, or enmity has arisen between the parties, or the property of the person who is absent has been taken possession of;

44. *Ulpianus, Disputations, Book VII.*

Or if he is about to depart on a long journey, or any other good reason should be advanced;

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

He should not be compelled. Sabinus, however, thinks that it is not one of the functions of the prætor to compel one party to defend another, but that suit can be brought under the stipulation, because the action was not defended; and if the agent has good reason for refusing to act in the case, his sureties will not be liable, because an arbitrator would not be a good man if he forced a party who had a valid excuse to undertake a defence. If he did not give security, but reliance was placed upon his promise, the same rule should be observed.

(1) Parties who act on behalf of the public, and who at the same time, defend matters in which they are personally interested, are permitted to appoint an agent upon showing proper cause; and anyone who brings suit afterwards will be barred by an exception.

(2) Where notice of a new structure has been given to an agent, and he avails himself of the interdict which provides: "that no force is to be used against the party who builds"; Julianus holds that he occupies the place of a defender, and cannot be compelled to furnish security that his principal will ratify his acts; and if he does furnish security, (Julianus says), "I do not understand under what circumstances suit can be brought on the stipulation".

46. *Gaius, On the Provincial Edict, Book HI.*

Where a party has undertaken the management of a case in his own name, and desires to appoint an agent whom the plaintiff can accept in his stead, he should be heard, if he gives security in the regular form that the judgment will be complied with.

(1) He who defends another in whose behalf he does not bring suit, has a right to conduct the defence with reference to one particular point.

(2) He who defends another is compelled to give security; for no one is understood to act as a proper defender in a suit with another party without giving security.

(3) It is also asked where a defender agrees to conduct a case, and the plaintiff obtains complete restitution, whether he can be compelled to take charge of the action for restitution? The better opinion is that he can be compelled to do so.

(4) An agent is required to render an account in good faith in matters connected with litigation, just as he is required to do in other business transactions. Therefore, whenever he obtains anything in a suit, whether he does so directly on account of the claim, or indirectly by means of it, he must surrender it in an action of mandate; so that if, by mistake, or through the erroneous decision of the judge, he obtains something that was not due, still, he must surrender it also.

(5) Again, on the other hand, whatever the agent pays on account of a judgment, he can recover by a counter action of mandate. He cannot, however, recover any penalty which he paid because of some unlawful act of his own.

(6) Equity demands that any expenses of the suit incurred in good faith by either the agent of the plaintiff, or by that of the defendant, shall be repaid to him.

(7) Where the transaction of business has been entrusted to two parties by the direction of another, and one of whom is a debtor of the person who appointed them, can the other legally bring suit against him? There is no doubt that he can, for he is none the less understood to be an agent, because the party against whom he brings suit is an agent also.

47. *Julianus, On Urseius Ferox.*

Where a man leaves two agents to attend to all his business, unless he expressly states that one is to bring suit against the other for money, it cannot be maintained that such a mandate was given to either of them.

48. *Gaius, On the Provincial Edict, Book HI.*

Therefore, where such an express mandate was given, if one of them who is sued by the other alleges against the action: "that no direction was given to me to bring suit against debtors"; the plaintiff can reply: "or was given to me to bring suit against you".

49. *Paulus, On the Edict, Book LIV.*

The condition of the principal cannot be rendered worse by his agent without his knowledge.

50. *Gaius, On the Provincial Edict, Book XXII.*

In whatever way your agent may be discharged from liability by me, it should benefit you.

51. *Ulpianus, On the Edict, Book LX.*

If a minor under twenty-five years of age appears as a defender, he is not the proper one in any case in which he is entitled to complete restitution; because a decree of this kind releases both him and his sureties.

(1) As to undertake a defence subjects a party to the same liability as the principal debtor, the defender of a husband should not be made liable for anything more than the husband himself can pay.

(2) Where a man who has undertaken the defence of another, even though he may be of large means;

52. *Paulus, On the Edict, Book LVII.* Or of consular rank;

53. *Ulpianus, On the Edict, Book LX.*

He is not held to properly defend him unless he is ready to furnish security.

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

Neither a woman; nor a soldier; nor a person about to be absent on business for the State; nor one who is afflicted with a chronic disease; nor.one about to assume the duties of a magistrate; nor one who cannot be compelled against his will to be a party to judicial proceedings, is understood to be a proper defender.

(1) Guardians who have transacted the business of their office in any place must also be defended in that place.

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

Where a man has been appointed agent in a matter in which he is interested, his principal is not to be preferred in bringing the suit, or in collecting money; since he who has a right of action in his own behalf can properly attend to these matters.

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

An agent appointed for the purpose of bringing an action for the recovery of personal property can properly apply for its production in court.

57. *The Same, On the Edict, Book LXX1V.*

He who appoints an agent for the purpose of instituting proceedings immediately should be understood to permit the agent to conduct the case to a conclusion afterwards.

(1) Where a party neglects to offer an exception to an agent, he cannot introduce it subsequently, if he changes his mind.

58. *Paulus, On the Edict, Book LXXI.*

An agent to whom has been committed, in general terms, the free transaction of business, can collect what is due, and can also exchange one piece of property for another.

59. *The Same, On Plautius, Book X.*

He is also held to have been directed to pay creditors.

60. *The Same, Opinions, Book IV.*

The power to compromise for the purpose of settlement is not included in a general mandate; and therefore if the party who gave the mandate does not afterwards ratify the compromise, he will not be prevented from making use of his original right of action.

61. *The Same, On Plautius, Book 1.*

Plautius says that it is the opinion of everyone that an agent who has had judgment rendered against him cannot himself be sued; unless he was appointed in a matter in which he was interested, or offered himself for the place when he knew no bond had been furnished. The same rule must be observed where he himself offered to undertake the defence in the case, and give security.

62. *Pomponius, On Plautius, Book II.*

Where an agent is appointed for the collection of a legacy, and makes use of an interdict against the heir for the production of the will, an exception against the agent on the ground that he is not authorized to do this by the mandate, cannot be pleaded against him.

63. *Modestinus, Differences, Book VI.*

An agent appointed for the purpose of transacting the affairs of his principal, in general cannot alienate either the real or the personal property of his principal, nor his slave, without an express mandate to that effect; with the exception of fruits, or other things which may be easily spoiled.

64. *The Same, Rules, Book III.*

If he in whose behalf the defender appears should himself come into court before issue is joined, and ask permission to conduct the case in his own name, he ought to be heard, if proper cause be shown.

65. *The Same, On Inventions.*

Where a principal desires to relieve his agent, who is absent, from the necessity of giving security, he should send a letter to his adversary, and state therein that he has appointed a certain party to act against him, (mentioning in what case,) and promise that he will ratify all the acts performed by said agent; and, in this instance, if the letter is approved, it is understood that the party referred to appears as the agent of the principals as if he were present. Therefore, if afterwards, having changed his mind, he is not willing that the party should act as his agent, the proceedings, nevertheless, shall be considered valid.

66. *Papinianus, Questions, Book IX.*

Where a person stipulates for "Stichus or Damas, whichever he may choose," and Titius brings suit, as agent, to recover one of them,

and his principal ratifies his act; the result is that the matter is held to be brought under the jurisdiction of the court, and annuls the stipulation.

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

Where an agent pledges his own faith for the title of lands which he sold, he will not be released from liability from his obligation by the aid of the Prætor even after he has ceased to act as agent; for an agent who assumes the bond of an obligation for his principal cannot refuse to support his burden.

68. *The Same, Opinions, Book HI*.

Where an agent made an agreement with respect to property belonging to his principal, which was not contrary to the terms of his mandate, the principal can then bring suit, even if his agent is unwilling.

69. *Paulus, Opinions, Book III*.

Paulus held that a party who appointed an agent to defend a case is not forbidden to appear in the same in his own behalf.

70. *Scævola, Opinions, Book I*.

A father appointed Sempronius, one of his creditors, the guardian of his son; and he, having administered the guardianship appointed his brother his heir, who himself died, and left the debt owed by his father in trust to Titius, and the rights of action were assigned to him by the heirs. The action of guardianship as well as that for money loaned being both derived from the estate of Sempronius, I ask whether the right of action on mandate is only granted him if he defends the heirs by whom the rights of action were assigned to him? I answered that he should defend them.

71. *Paulus, Sentences, Book I*.

An absent defendant can state the cause of his absence by means of an agent.

72. *The Same, Manuals, Book I*.

We do not always acquire a right of action by an agent, but we retain one that is already acquired; as, for instance, where suit is brought within the time prescribed by law; or where notice of objection to some new structure is served; so that we can make use of the Interdict *Quod vi aut clam* for here our former right is reserved for us.

73. *The Same, On the Office of Assessors*.

Where the defendant is ready to pay the money demanded, before issue is joined, suit having been brought by an agent, what must be done? It would be unjust for him to be compelled to join issue, and be regarded as a suspected person, because he did not tender the money when the principal was present. But if, at that time, he did not have the money, ought he be compelled to proceed with the case? What if the action was one in which infamy was involved? It, however, is settled that, before issue has been joined, the judge may order the money to be deposited in some sacred building, as is done in the case of money belonging to wards. Where issue has been joined, however, the whole matter devolves upon the judge for settlement.

74. *Ulpianus, Opinions, Book IV*.

An official who acts for a city cannot transact public business through an agent.

75. *Julianus, Digest, Book III*.

A party who defended an absent purchaser of land, who was also in possession, and who took charge of the case in his name, requested the vendor to undertake the defence, and the vendor demanded that the agent give security that the purchaser would ratify his acts. I am of the opinion that he ought to give security to the vendor for ratification; because if the latter should restore the land to the plaintiff, nothing would prevent the principal from bringing suit for the same, and the vendor would be compelled to defend the action a second time.

76. *The Same, On Minicius, Book V*.

Titius, while he was defending a case for an absent party, gave security, and before issue was joined, the debtor became insolvent; for which reason the defender refused to permit issue to be joined as against himself. I ask whether he should be permitted to do this? Julianus answers

that the defender should be held to occupy the place of the principal, when he gave security; and if the prætor did not compel him to accept joinder of issue, it would not be of much benefit to him, as recourse could be had to the sureties, and whatever these paid could be recovered from the defender.

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

When one person is defended by another it should be done in accordance with the judgment of a good citizen.

78. *Africanus, Questions, Book VI.*

Therefore, he cannot be considered to properly defend an action in accordance with the judgment of a good citizen, who, by thwarting the plaintiff, prevents the matter in controversy from being brought to a conclusion.

(1) Where an agent is appointed to bring suit for two things, and he does so for only one, he will not be barred by an exception, and has brought the case into court properly.

TITLE IV.

HOW PROCEEDINGS ARE INSTITUTED FOR, OR AGAINST CORPORATIONS.

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

All persons are not permitted indiscriminately to form corporations, associations, or similar bodies, for this is regulated by laws, Decrees of the Senate, and constitutions of the Emperors. Associations of this description are authorized, in very few instances; as, for example, the right to form corporations is permitted to those engaged as partners in the collection of public taxes, or associated together in working gold, silver, and salt mines. There are also certain guilds at Rome whose organization has been confirmed by Decrees of the Senate, and Edicts of the Emperors; as, for instance, those of bakers, and some others, as well as that of ship-owners, which also exists in the provinces.

(1) When persons are allowed to form associations under the title of a corporation, guild, or any other body of this kind, they are, like a municipality, entitled to have common property, a common treasure chest, and an agent or a syndic, and, as in the case of a municipality, whatever is transacted and done by him is considered to be transacted and done by all.

(2) Where an association has no one to defend it, the proconsul says that he will order its common property to be taken into possession, and if, having been warned, they do not take measures to defend themselves, he will order the property to be sold. We understand that an association has no agent, or syndic, when he is absent, or prevented by illness, or is otherwise incapable of transacting business.

(3) Where a stranger appears to defend a society, the proconsul permits him to do so, as happens in the case of the defence of private persons; because in this way the condition of the society is improved.

2. *Ulpianus, On the Edict, Book VIII.*

Where the members of a municipality, or of any association, appoint an agent to attend to their legal business, it must not be said that he shall be considered to have been appointed by several individuals, for he appears for the entire community, or association, and not for the members separately.

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

No one is allowed to institute proceedings in the name of a city or a *curia* except he who is authorized to do so by law; or, where there is no law, he is authorized by a vote of the members, when two-thirds, or more then two-thirds of them are present.

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

It is evident that, in order to make up the two-thirds of the decurions, the person appointed may be included.

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

It must be noted, as Pomponius says, that the vote of a father will be accepted for the benefit of his son and, that of a son for the benefit of his father.

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

The votes of those who are under the same control shall be counted in like manner; for each party casts his vote as a decurion, and not as a person belonging to the household. The same rule is to be observed where votes are cast for the candidate for an office; unless some municipal law, or long established custom forbids it.

(1) If the decurions have decided that legal proceedings shall be instituted by the party selected by the *duumvirs*, he is considered to have been elected by the entire body, and therefore he can proceed; for it makes but little difference whether the body itself chose him, or someone who had authority to do so. But if they have decided that whenever a controversy arises, Titius should have authority to bring suit with reference to it; the resolution would be of no effect, because it cannot be held that the right to bring suit is conferred with reference to a matter which is not yet in controversy. At the present time, however, it is usual for all matters of this kind to be attended to by syndics, according to the custom of the various localities.

(2) Where an agent is appointed, can he afterwards be prevented from acting by a resolution of the decurions? Will he be barred by an exception? It is my opinion that it should be understood that he is only allowed to act so long as his permission lasts.

(3) Where the agent of a corporate body brings suit, he is also compelled to defend it when it is sued; but he is not required to give security for ratification. Sometimes, however, where doubt exists concerning the resolution which conferred authority upon him, I think that security for ratification should be furnished; therefore a syndic of this kind performs the functions of an ordinary agent, and a right of action for the execution of judgment is not conferred upon him by any edict, unless he was appointed with reference to a matter in which he was interested, and he can also accept a promise to pay. The power of a syndic can also be revoked for the same reason as that of an ordinary agent. The son of a family may be appointed a syndic.

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

As the prætor grants a right of action in behalf of a municipal corporation, so also he thought that it is perfectly just that the Edict should give a right of action against it. I am of the opinion, however, that a right of action is granted to a deputy against a municipality where he has incurred expense in some matter of public business.

(1) Where anything is owing to a corporation, it is not due to the individual members of the same, nor do the latter owe what the entire association does.

(2) In matters which have reference to the body of decurions, or to other associations, is a matter of no consequence whether all the members remain in it, or only a portion, or whether they are all changed; but where the entire body is reduced to a single member, the better opinion is that he can sue, and be sued, since the right of all is merged in one, and the name of association remains.

8. *Javolenus, On Cassius, Book XV.*

Where a municipal corporation is not defended by those who have charge of its affairs, and no common property exists of which possession may be obtained, payment must be made to

those who bring suit for debts owing to the corporation.

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

If you have an interest in an estate in common with a municipality, a right of action can be brought by both of you for a division of the property. The same thing may be stated with reference to an action for the establishment of boundaries, and for the prevention of the flow of rain-water upon your premises.

10. *Paulus, Manuals, Book I.*

A syndic can also be appointed in the case of notice of a new structure, and for the purpose of entering into stipulations; as for instance, in case of legacies, the prevention of threatened injury, or for the enforcement of a decree; although it is preferable for security to be given to a slave of the municipality, still, if it is given to the syndic, the party who has charge of the business of the municipality will have an equitable right of action.

TITLE V.

CONCERNING THE TRANSACTION OF THE BUSINESS OF OTHERS.

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

The following edict is a necessary one, since it is of great advantage to parties who are absent not to be exposed to the loss of possession of their property, or the sale of the same; or the alienation of a pledge; or an action for the recovery of a penalty; or to the loss of their property unjustly through their being unrepresented.

2. *Gaius, On the Provincial Edict, Book HI.*

Where a person has transacted the business of someone who is absent, even though the latter may not be aware of the fact; still, whatever he expends on behalf of the other, or whatever obligation he assumes with respect to the property of the absent party, he will be entitled to a right of action for it upon that ground. Thus, in this instance, a right of action arises on both sides, which is designated an action based upon the transaction of business; and in fact, as it is proper that he who acts for another should give an account of what he has done, and have judgment rendered against him for that reason, whenever he did not transact the business as he should, or retains any property derived from said business; so, on the other hand, it is but just to reimburse him for anything which he either lost, or is about to lose on this account, if he attended to the business properly.

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

The prætor makes use of the following language: "Where anyone has transacted the business of another, or attended to any matters in which a party was interested at the time of his death, 'I will grant him a right of action on this account.' "

(1) The term "anyone" is to be understood as also referring to women; for women have a right to bring suit based upon business transactions, and there is no doubt that suit can also be brought against them.

(2) "Transactions" must be understood as meaning one, or several.

(3) The term "another" refers to individuals of both sexes.

(4) Where a ward transacts business, suit can be brought against him to the amount by which he has become more wealthy, in accordance with a Rescript of the Divine Pius; but where he brings suit, he must allow his compensation to be set off.

(5) If I have transacted the business of an insane person I am, for that reason, entitled to an action against him. Labeo says that a right of action should be granted to the curator of an insane person of either sex.

(6) These words, "attended to any matters in which a person was interested at the time of his death"; refer to the time during which he transacted anyone's business after his death; and this it was necessary to state in the Edict, since he could not be said to have transacted the business of the testator who was already dead, nor that of the heir who had not yet entered upon the estate. Where, however, there was any addition to the estate after his death; as, for instance, the children of slaves, the young of animals, or crops, or if any of the slaves had acquired property; although these additions are not embraced in the terms of the Edict, they must, nevertheless, be considered as included therein.

(7) As this right of action arises from the transaction of business, it is available both for, and against the heir.

(8) If a party who has been appointed by the prætor to carry the judgment into execution defrauds me, I will be entitled to an action against him.

(9) Labeo says, that sometimes in an action founded upon business transacted, the only point to be considered is fraud; for example if, induced by affection, you have interfered in my affairs to prevent my property from being sold, you should only be liable in case of fraud. This opinion is founded on equity.

(10) Not only he who voluntarily, and impelled by no necessity, interfered in the affairs of others, and transacted them, is liable to this action; but also he who, impelled by some urgent necessity, or by the impression that such necessity existed, attended to them.

(11) The question is raised by Marcellus in the Second Book of the Digest, whether, when I had intended to offer to transact business for Titius, and you ordered me to do so, I would be entitled to both actions? I think that I would, just as Marcellus himself says if I took a surety when about to assume charge of the business; for he holds that under these circumstances as well, I would be entitled to an action against both.

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

Let us consider whether a surety would have a right of action in this instance, and it is certain that he has a right to bring one on the ground of the business transacted, unless he assumed the obligation entirely through generosity.

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

Moreover, if I transacted your business while under the impression that you had directed me to that effect; here also a right of action, based upon the transaction of business, arises; but the action on mandate will not lie. The same rule will apply if I become surety for you, thinking that I had been directed by you to do so.

(1) And also if, while under the impression that the business of Titius was concerned, while in fact it was that of Sempronius, I attend to it; Sempronius alone will be liable to me in an action based on business transacted.

6. *Julianus, Digest, Book III.*

If I attend to the business of your ward, without your mandate, but to prevent you from being liable in an action of guardianship; I will render you liable to an action on the ground of business transacted and I will also be entitled to one against your ward, but only if he has become more wealthy on this account.

(1) Moreover, if I lend money to your agent on your account, to enable him to pay your creditor, or release property of yours which is pledged, I will have a right of action against you based on the transaction of business; but none against your agent, with whom I made a contract. But what would be the case if I stipulated with your agent? It can be stated that I have still an action against you, based on business transacted, because I interposed this stipulation by way of superabundance of caution.

(2) If anyone has received money or other property, in order to bring it to me, I will be entitled to an action against him based on business transacted.

(3) Where anyone transacts my business, not through consideration for me but for the sake of profit, Labeo held that he was rather attending to his own affairs than mine; for he aims at his own advantage and not at mine, if he acts for the purpose of personal gain. Nevertheless, there is all the more reason that he should be liable to a suit based on business transacted. If, however, he has expended anything while attending to my business, he will be entitled to an action against me; not for what he has lost, since he was guilty of bad faith in meddling in my affairs, but merely to ascertain the amount by which I am enriched.

(4) Where anyone is foolish enough to think that while he was transacting his own business, he was attending to mine; no right of action will arise on either side, because good faith will not permit it. And if he transacted both his and my business believing that he was only transacting mine, he will only be liable to me for mine. For if I direct anyone to transact my business, in which you also were interested, Labeo says that it must be held that if he attended to your affairs and was aware of the fact, he is liable to you in an action for business transacted.

(5) Where anyone, acting as my slave, transacts my business while he was either a freedman, or a freeborn person, a suit founded on business transacted will be granted him.

(6) If I attended to the affairs of your son or your slave, let us consider whether I shall be entitled to a suit against you on the ground of business transacted? It seems to me to be the better opinion to adopt the doctrine of Labeo which Pomponius approves in the Twenty-sixth Book, namely: if through Consideration for you I have transacted business relating to the *peculium* of either, you will be liable to me; but if through friendship for your son or your slave, or through consideration for them, I did this; then an action only to the amount of the *peculium* involved should be granted against the father or the owner. The same rule applies if I thought that they were their own masters, for if I purchase from your son a slave that he does not need, and you ratify the purchase, your ratification is not valid.

Pomponius states in the same place that he thinks that even if there is nothing in the *peculium* because the amount due to the father or owner is greater than its value; still, an action should be brought against the father for the amount by which he is enriched as the result of my administration.

(7) If I transacted the business of a man who was free, but who was serving you as a slave in good faith, and I did so thinking that he was your slave; Pomponius states that I would be entitled to a suit against you based on business transacted with reference to as much of the *peculium* of the slave as you can retain; but as to what he can remove, I have no right of action against you, but I have one against him. If, however, I knew that he was free, I should be entitled to an action against him for whatever *peculium* he could take, and also one against you for whatever you could retain.

(8) If I pay money to prevent a slave of Sempronius, whom I think belongs to Titius, from being killed; I will be entitled to a suit against Sempronius on the ground of business transacted, so Pomponius says.

(9) The question is asked by Pedius in the Seventh Book; if I notify Titius, as your debtor, out of court, to pay me when he is, in fact, not indebted to you, and you afterwards learn of it, and ratify what I have done; can you bring an action against me based on business transacted? He says that this may be doubted, because no business of yours was attended to, as the party was not your debtor, but he holds that the ratification makes the affair yours; and just as anyone from whom payment was exacted has a right of recovery granted against him who ratifies the act; in the same manner, he who has paid will be entitled to an action against me after ratification. Thus the ratification makes the affair yours, which was not yours in the beginning,

but only transacted on your account.

(10) He also says that if I, in like manner, bring suit and exact payment from a debtor of Titius, whom I think to be your heir, when in fact, Seius is your heir; and you afterwards ratify what I have done, I will have a right of action against you, and you will have one against me, both based on business transacted. However, this is not your business which has been transacted, but your ratification makes it such; and the result is that the transaction is held to be yours, and suit can be brought against you on the part of the estate.

(11) What would be the case then, Pedius asked, if I, believing that you were the heir, should repair a house belonging to the estate, and you should ratify my act? Would I be entitled to an action against you? He says that there would be no ground for one, because the heir has become more wealthy through my act, and the transaction has been conducted with reference to the property of another; so it is not possible where a benefit accrues to another by the transaction itself that this should be held to be your business.

(12) Let us examine the case where a man, while transacting business for another, attended to some matters and neglected others, and another party noticing this, did not take charge of what was neglected, while a diligent man — for this is what we require — would have attended to all these things; should it be held that he ought to be considered liable in a suit based on business transacted, including those things which he neglected? I think this to be the better opinion, for truly if there was anything for which he was undoubtedly responsible, he should by all means be required to give an account of it; for even though he cannot be blamed for not having brought suit against the other debtors, since he had not the power to do so, as he was not authorized to institute any legal proceedings, still, he is to be held responsible for not having paid his own indebtedness; and if the debt did not bear interest it at once begins to be due; as the Divine Pius stated in a Rescript to Flavius Longinus, unless, as he says, he had released him from the payment of interest:

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

Because the office of judge has the same force in *bona-fide* actions, as interrogation has in a stipulation expressly made for the same purpose.

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

If, however, he who administers the affairs of another belongs to that class who have no need of a mandate, he can be called to account for not having brought suit against a debtor, if a bond for ratification was tendered; provided he could easily give security. This is unquestionably true with respect to a personal debt, and therefore, if the liability of the party was to be terminated at a certain time, and he was released for that reason, he would, nevertheless, be liable in an action based on business transacted. The same rule must be held to apply to a case where an heir is not liable; which was the opinion of Marcellus.

(1) Moreover, if I bring suit for land which belongs to you, or to a city, and employ improper means while transacting either your business or that of the city, and obtain more profit than I was entitled to; I shall be obliged to refund this to you, or to the city, although I could not have brought an action for it.

(2) If it happens, under any circumstances, that an account for set-off is not allowed by the court a contrary action can be brought; but if, after examination, the set-off should be rejected, the better opinion is that the contrary action cannot be brought, because the matter has already been judicially decided; and an exception on the ground of *res judicata* can be interposed.

(3) Julianus, in the Third Book treats of the following case. "Where one of two partners has forbidden me to transact the business of the partnership, and the other has not, will I be entitled to an action on the ground of business transacted against the partner who did not forbid me? The difficulty lies in the fact that if an action is granted against him, it would be

necessary for the one who forbade me to be affected also; and it would be unjust for him who did not forbid me to be released by the act of another; for if I lend money to one partner against the express prohibition of the other, I would have a valid claim upon the former; and I think with Julianus that it should be held that an action on the ground of business transacted will lie against him who did not forbid me, so that he who did, shall not suffer loss in any respect, either through his partner, or through him who transacted the business.

9. *Scævola, Questions, Book I.*

Pomponius says that if I approve of any transaction by you, even though it was badly done, still, you will not be liable to me on the ground of business transacted. It must be taken into consideration if it is not true that, so long as it is doubtful whether I will ratify it or not, the right of action based on business transacted is in abeyance; for, when it has once accrued, how can it be annulled by the mere will alone? He holds, however, that this is only true when you are not guilty of any bad faith. And Scævola states that even if I ratified what had been done, an action on the ground of business transacted will still lie; and where it is said that you are not liable to me, this is because I cannot disapprove of what I have once agreed to; and just as anything which has been properly done must be considered by the court as ratified, so, also must whatever has been approved by the party himself. Moreover, if no action based on business transacted will lie where I have given my approval, what must be done if the other party collects money from my debtor, and I approve of it? How can I recover it? And, also, suppose he has sold property belonging to me, how then can he recover any expense which he has incurred? For, as there is no mandate, an action based on business transacted will lie, even after ratification.

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

But is an action granted me also for the expenses which I have incurred? I think that this is the case, unless it has been expressly agreed that neither party should have an action against the other.

(1) Where a man brings an action based on the ground of business transacted he employs this action not only when what he did had some effect, but it is sufficient if he conducted the business properly even if it produced no effect; and therefore if he repaired a building, or cured a slave who was ill, he still has a right of action on this ground, even if the house was burned, or the slave died; and this opinion Labeo also adopted; but Celsus says Proculus states in a note on Labeo that the action should not always be granted; for what if he repaired a house which the owner had abandoned as not being worth repairing, or which he did not think he needed? According to the opinion of Labeo, he is imposing a burden upon the owner in this instance, since everyone is allowed to abandon property to avoid an action for threatened injury. Celsus very properly ridicules this opinion; for he states that the party who transacts business in a suitable manner has a right of action on this ground; but he does not attend to the matter as he should, who adds something which was not necessary, or imposes a burden upon the head of the household. What Julianus wrote is applicable where he who repairs a house or cures a sick slave is entitled to an action based on business transacted, if what he does is an advantage, even if the general result was not beneficial. I ask what must be done if he thought he was acting advantageously, but it did not profit the head of the household? I say that he will not be entitled to an action based on business transacted, for the beginning ought to be advantageous, even though we do not consider the result.

11. *Pomponius, On Quintus Mucius, Book XXI.*

If you transact the business of an absent party without his knowledge, you should be responsible both for negligence and fraud; but Proculus is of the opinion that you ought sometimes to be responsible for accidents, as for instance, where you attend to some new business in the name of the absent party which he was not in the habit of transacting, for example, by purchasing new slaves, or by engaging in some other enterprise, for if any loss to

him resulted therefrom, you would be responsible; but any profit would belong to the absent party, and where profit accrued in some instances, and loss was sustained in others, the absent principal should set off the profit against the loss.

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

This action should be granted to the successor of a person who dies in the hands of the enemy, and to whom the business belonged.

(1) Where I have acted for a son under the control of his father, and who died in the service after making a will, an action should likewise be granted.

(2) It is also sufficient for business to be transacted advantageously in the case of persons who are living, as well as with reference to property left by those who are dead; even though the result may be different from what was expected.

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

My debtor who owed me fifty *aurei* died. I undertook the care of his estate, and expended ten *aurei*. I then deposited in a chest a hundred *aurei* which were the proceeds of the sale of property belonging to the estate, and this sum was lost without my fault. The question arose whether, if an heir should appear, I could bring an action against him for the sum of fifty *aurei* which I had lent, or for the ten which I had expended? Julianus says that the question which we should consider depends upon whether I had good reason for putting aside the hundred *aurei;* for, if I should have paid myself and the other creditors of the estate, I ought to be responsible not only for the sixty *aurei*, but for the remaining forty as well. I might, however, retain the ten which I expended; that is to say, I should only pay over ninety. If, however, there was good reason for putting aside the entire sum of a hundred; as, for instance, if there was danger that land forming part of the estate would be forfeited for taxes; or that the penalty for money borrowed on bottomry would be increased; or that payment would be required on account of an award; I could collect from the heir not only the ten *aurei* which I had expended in connection with the business of the estate, but also the fifty which were due to me.

14. *Ulpianus, On the Edict, Book X.*

Where the son of a family volunteers to transact the business of others, it is only just that an action should be granted against his father also, whether the son has property of his own, or whether his father has profited by his acts. Where a female slave has had charge of the business, the same rule applies.

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

Pomponius states in the Twenty-sixth Book that, where business is transacted, the condition of the parties must be considered in the beginning; for, as he says: "Suppose I begin to transact the affairs of a minor who, in the meantime, arrives at the age of puberty? Or of a slave, or of the son of a family, and, in the meantime, he becomes free, or the father of a family?"

I, myself, have stated that this is the better opinion, unless, in the beginning, I have only undertaken to attend to a single matter of business, and afterwards I have taken charge of another, with a different intention, at the time when the party either arrived at puberty, or became free, or the father of a family; for here several things, so to speak, were attended to, so that the action, as well as the judgment, will be arranged and regulated in accordance with the condition of the parties.

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

When anyone transacts my business, there are not several different matters but only one contract; unless, in the beginning, the party undertook to do only one thing, and to retire when it was finished; for in this case if he undertook to do anything else after having changed his mind, there is a new contract.

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

Where a party performed an act while in slavery, he is not compelled to render an account of it after being manumitted. When, however, such a connection between the transactions exists that the account of what was done in slavery cannot be separated from the acts performed in freedom; it is settled that what was done in slavery can be brought into court in an action on mandate, or on business transacted. For if while he was in slavery, the party purchased land, and built a house upon it, and the house fell down, and then, after he was manumitted, he should rent the ground, the lease of the land would only be included in the suit based on business transacted, for the reason that nothing more arising from the transactions of previous date could be included; unless the account of the business done during the time that the party was free cannot be made up without it.

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

Proculus and Pegasus are of the opinion that a person who began to transact business while in slavery, must act in good faith; and therefore, the amount which he would have been able to make if some one else was managing his business, he must, as he did not exact it from himself, pay it over to his principal in an action based on business transacted; if his *peculium* amounted to so much that by retaining it, he could have made that sum. Neratius is of the same opinion.

19. *The Same, On Neratius, Book II.*

Even if he had no *peculium*, but was a debtor by nature and afterwards continued to act, he is bound to pay, himself; just as he who is liable in an action which would be barred by lapse of time, is also compelled by a suit based on business transacted to pay his principal, after the time has expired.

(1) Our Scævola says that he thinks the statement of Sabinus that the account ought to be rendered from the beginning should be understood to mean that it ought to show what was left at the time when the party first became free, and not that he should be held liable for any malice or negligence of which he was guilty while in slavery; and, therefore, if it is ascertained that, while he was in slavery, he expended money in an improper way, he should be released from liability.

(2) If I direct a freeman who is held as a slave by me in good faith to perform some act; Labeo thinks that I would not be entitled to an action on mandate against him; since he is under restraint by reason of his servile condition; hence an action based on business transacted will lie, because, on the one hand, he had a desire to attend to my affairs, and on the other, he was in a position where I could compel him to attend to them.

(3) While you were transacting my business during my absence, you, without knowing it, purchased property which belonged to me; and, being still ignorant of this fact, you acquired its ownership by prescription. You are not obliged to restore it to me in an action for business transacted; but if, before you obtained its ownership by prescription you had learned that the property was mine, you must employ someone to bring suit against you for it in my name, so that he may recover it for me, and give you an opportunity to enforce your stipulation against eviction; and you will not be considered guilty of fraud in the employment of this person, since you should do this to avoid being liable in an action on business transacted.

(4) In an action based on business transacted, we must not only pay the principal, but, also the interest collected from the money of the other party, or even which we might have collected. On the other hand, also, we can by means of this action recover interest which we have paid, or interest which we might have collected on our own money, and which was expended in the business of the other party.

(5) I transacted the business of Titius while he was in the hands of the enemy; after his return I have a right of action against him based on business transacted, even though at the time when this was done he was not acting as principal.

20. *Ulpianus, On the Edict, Book X.*

But if he should die while in the hands of the enemy, both the direct action, and the counter action based on business transacted, will lie for, and against his successor.

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

Servius was of the opinion, as is stated by Alfenus in the Thirty-ninth Book of the Digest, that when three men were captured by the Lusitanians, and one of them was released on condition of his bringing a ransom for all three, if he did not return, the two others would be required to pay a ransom for himself also; and he having refused to return, and for this reason, the others having paid his ransom, as well as their own, Servius answered that it was just for the prætor to grant them an action against him.

(1) Where one transacts business relating to an estate, he binds the estate to a certain extent to himself, and himself to the estate; and therefore, it makes no difference whether a minor heir to the estate exists, because the debt, together with the remaining burdens of the estate devolves on him.

(2) If, during the lifetime of Titius, I began to manage his business, I should not cease to do so when he dies. I am not obliged, however, to begin anything new, but it is necessary to finish what has been commenced, and to take care of it; as occurs when a partner dies, for so far as anything is done for the purpose of terminating business already begun is concerned, it makes no difference at what time it was finished, but it does at what time it was commenced.

(3) Lucius Titius attended to my business by your order; if he did not do so properly, you will be liable to me in an action based on business transacted, not only to force you to assign your rights of action against him, but also because you have acted imprudently in selecting him, and you must indemnify me for any loss incurred through his negligence.

22. *Gaius, On the Provincial Edict, Book III.*

Where anyone, while transacting the business of an estate, or that of individuals, purchases property because it is necessary, he can bring an action based on business transacted for what he expended, even though the property was destroyed; for example, where he procured grain, or wine for slaves, and it was lost by some accident, such as fire, or the fall of a house. It should, however, be understood that the said fall, or fire must have occurred without his fault; for if he should have judgment rendered against him on account of either of said accidents, it would be absurd for him to be able to recover anything on account of the property destroyed.

23. *Paulus, On the Edict, Book XX.*

Where anyone, while transacting the business of another, has collected a debt which was not due, he can be forced to make restitution; but where he, in the course of the business, has paid a debt which was not due, it is the better opinion that he must blame himself for it.

24. *The Same, On the Edict, Book XXIV.*

If I pay money to an agent, with the intention that it shall belong to my creditor, the ownership of the same is not acquired by the creditor through the agent; the creditor, however, can, by ratifying the act of the agent, make the money his own, even against my consent; for the reason that the agent in receiving it only attended to the business of the creditor, therefore, I am discharged from liability by the ratification of the creditor.

25. *The Same, On the Edict, Book XXVII.*

Where anyone, while transacting business for another expends more than he should have

done, he can recover from his principal the amount which he ought to have paid.

26. *Modestinus, Opinions, Book I.*

Where an estate left to a municipality in trust was ordered to be delivered, the magistrate appointed Titius, Seius, and Gaius as being suitable agents for the management of the property. These agents subsequently divided the administration of the estate among themselves, and did so without the authority or consent of the magistrates. Sometime afterwards, the will containing the trust under which the estate was to be turned over to the municipality, was proved in court to be void; and Sempronius appeared as the heir-at-law, *ab intestato*, of the deceased, but one of the aforesaid agents died insolvent, and without leaving an heir. I ask if Sempronius should bring suit against these agents of the estate, who would assume the risk caused by the insolvency of the deceased agent? Herennius Modestinus answered that the action based on business transacted could not be employed against anyone of the agents on account of what he alone had done, and that any loss must be borne by him who claimed the estate as heir-at-law.

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

Two brothers, one of age, and the other a minor, owned an unproductive tract of land in common. The older brother erected large buildings on the tract where the residence of his father stood, and when he divided the land with his brother, he claimed that he should be paid for what he had expended, since the property had been improved by what he had done; his younger brother having at that time become of age. Herennius Modestinus answered that he for whom the inquiry was made had no right of action on account of expenses incurred, when there was no necessity for them, and where they had been made only for the sake of pleasure.

(1) I gave it as my opinion that if Titius brought up his niece through affection for his sister, no action would lie against her on this ground.

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

Where anyone has transacted the business of Seius by the direction of Titius, he is liable to Titius in an action of mandate, and in the action the amount of the interest of both Seius and Titius should be taken into consideration; the interest of Titius, however, must be determined by the amount he has to pay Seius, to whom he is liable either on mandate, or for business transacted. Titius has a right of action also against the party whom he directed to attend to the affairs of another, before he himself pays anything to his principal; because he is held to have lost the amount for which he was liable.

29. *Callistratus, Monitory Edict, Book HI.*

Where a father by his will, appointed a guardian for his posthumous son, and the guardian, in the meantime, administered the guardianship, and the child was not born; an action will lie against him, not on the ground of guardianship, but on that of business transacted; but if a posthumous child should be born, there will be an action on guardianship, and this would include both terms of administration, the one before the child was born, and the one afterwards.

30. *Julianus, Digest, Book III.*

An inquiry was made with respect to the following fact. A certain man was appointed by the resolution of a municipality to purchase wheat, and another person who was appointed to act under him as a subordinate curator spoiled the wheat, by mixing other grain with it. The price of the wheat which was bought for the municipality was charged to the curator; what kind of an action could the curator bring against the subcurator, so that he might be reimbursed for the loss which he had sustained on his account? Valerius Severus answered that a guardian has a right of action against his fellow-guardian, on the ground of business transacted and, he also stated that the same right of action is granted one magistrate against the other; provided,

however, that he was not aware of the fraud. In accordance with these opinions it must be said that the same rule applies to a subcurator.

31. *Papinianus, Opinions, Book II.*

A certain man directed a freedman or a friend to borrow money, and the creditor, on the faith of the letter, made the agreement, and the surety was given. In this instance, although the money was not expended upon property, still an action is granted to the creditor or his surety, against the party, on the ground of business transacted; which certainly bears a resemblance to the *Actio Institoria*.

(1) A man who was transacting business for Sempronius, ignorantly attended to a matter in which Titius was interested. He will be liable to Sempronius also, on account of this particular matter, but he can make an application to the court for a bond of indemnity against Titius, to whom a right of action is granted. The same rule applies to the case of a guardian.

(2) Where a case was ready to be heard, and the defendant did not appear, a friend of his voluntarily took his place, and stated the cause of his absence to the court. The latter will not be considered to have been guilty of negligence, if he did not appeal where a judgment was rendered against the party who was absent. Ulpianus says in a note, that this is correct, because the first party in default lost his suit; but where a friend defends an absent person and permits judgment to be taken against him, and brings suit on the ground of business transacted, he will be rendered liable, if he does not appeal when he could do so.

(3) A person who transacts the business of another is obliged to pay interest on any money in his possession, after the necessary expenses have been settled.

(4) A testator stated that his freedman should be paid a certain sum of money for the expense of erecting a monument; and if anything beyond that amount was expended, suit cannot be brought for it on the ground of business transacted, or on that of a trust, since the wish of the testator established a limit to the expenditure.

(5) The heir of a guardian, who is a boy under the age of puberty, is not liable for matters attended to by his guardian with reference to the property of the female ward of his father; but the guardian of the boy may be sued in his own name on the ground of business transacted.

(6) Although a mother may transact the business of her son in accordance with the will of his father, through the inducement of natural affection; still, she will not have authority to appoint an agent, at her own risk, for the purpose of instituting legal proceedings, because she cannot herself legally act in behalf of her son, or alienate her property, or discharge a debtor of the minor by accepting payment.

(7) Where one party defended a case in which a common right of water was involved, and judgment was rendered in favor of the owner of the land; he who paid the necessary, reasonable expenses in the case where both were interested, will be entitled to an action on the ground of business transacted.

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

A surety, through inexperience, received pledges or securities relating to another contract in which he was not interested, and paid both debts to the creditor, thinking that he could obtain indemnity by combining the securities. On account of this, a suit on mandate brought against him would be of no effect, and he himself could not bring suit against the debtor, but it would be necessary for each of them to sue the other on the ground of business transacted. In the trial of this it will be sufficient to take into consideration the negligence, but not the accident, for the reason that a surety is not considered to be a robber. The creditor in this instance, cannot be held liable in an action of pledge for the restitution of the property as he seems to have sold his right.

(1) Where a mother has received from a man who is betrothed to her daughter gifts for the latter of which the girl is ignorant; an action on mandate or deposit does not lie in her favor, but one can be brought on the ground of business transacted.

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

The heir of a deceased husband cannot bring suit against his wife (who during marriage had the property of her husband under her control) for plundering an estate; and he will act more wisely if he should sue her for production of property on the ground of business transacted, if she actually attended to the affairs of her husband.

34. *Paulus, Questions, Book I.*

Nesennius Apollinaris to Julius Paulus, Greeting. A grandmother transacted the business of her grandson, and after the death of both of them the heirs of the grandmother were sued by the heirs of the grandson in an action based on business transacted, but the heirs of the grandmother filed a claim for support furnished the grandson. Answer was made to this that the grandmother had furnished it out of her own property through natural affection, since she had not asked that the amount of the maintenance should be fixed, and that it had not been fixed; and moreover, it has been established that if the mother had furnished maintenance she could not recover that which he had provided out of her own property under the inducement of natural affection. On the other hand, it was stated, and I hold it to be correct, that this is the case where it is proved that a mother had furnished maintenance out of her own property; but in the present instance it is probable that the grandmother who transacted the business of her grandson supported him out of his own property. It was a subject of discussion as to whether the expense should be considered as having been paid out of both estates, and I ask what seems to be the more just conclusion? I answered that the decision in this instance depends upon the facts. For I am of the opinion that what has been established in the case of the mother should not always be observed; for what would be the effect if the mother had positively stated that when she was supporting her son, she did so in order to bring an action either against himself or his guardians? Suppose, for instance, that his father had died far from home, and that his mother, while returning to her country had supported her son and the slaves; in this instance the Divine Pius Antoninus established the rule that a suit on the ground of business transacted could be granted against the minor himself. Therefore, as the question is one of fact, I think that the grandmother or her heirs should be heard if they wish an accounting for maintenance, and especially so if it appears that the grandmother had entered the items in the expense account. I think that it by no means should be admitted that the expenses should be charged to both estates.

35. *Scævola, Questions, Book I.*

Where a husband has transacted the affairs of his wife after a divorce has taken place, her dowry can be recovered not only by an action for dowry, but also on the ground of business transacted. This is the case where the husband was able to deliver the dowry while he was attending to the business; otherwise, he cannot be made responsible, for not exacting it from himself; but after he has lost his property, a full right of action on the ground of business transacted will lie against him; although if the husband is sued in an action for dowry he must be discharged. But in this instance a limit should be fixed, so if the statement of the complaint is: "As far as he was able although he afterwards lost his property"; where he was able to pay her during that time; for he was not guilty of wrong-doing, so far as his duty was concerned, if he did not immediately sell his property in order to obtain the amount, for he must have allowed some time to pass during which he appeared not to have done anything. If, in the meantime, before he had fulfilled his duty, the property was lost, he is not liable on the ground of business transacted any more than if he had never been able to pay the money. But where the husband is able to pay, an action founded on business transacted is permitted because there is danger if he ceases to be solvent.

(1) I do not think that a man who transacts the business of a debtor is bound to restore to him a pledge when he still owes the money, and there is no other way in which it can be paid.

(2) The action for the rescission of a contract does not belong to the class of actions based on business transacted, and is barred after six months have elapsed, if the party did not find the slave among the assets of the other; or, if he did find them, did not find, and therefore did not recover, certain additional property which belonged under the head of accessions, so that the slave was less valuable, or any thing that was acquired through the slave which was not derived from the property of the purchaser; and there was not enough obtained from the business of the purchaser for the vendor to satisfy his claim.

(3) Moreover, if the person who is transacting the business owes his principal on some other ground, and the obligation is one of long time, and the party is wealthy, he cannot be blamed for not paying the debt; that is, provided the payment of the interest does not give rise to complaint. The rule is different in the case where a guardian is a debtor to his ward, because there the latter was interested in the payment of the former debt, as he then might bring suit for the debt on the ground of guardianship.

36. *Paulus, Questions, Book IV*.

Where a man who is free, but serves me in good faith as a slave, has borrowed money and employed it for my benefit, let us consider by what action I must restore what he expended in my behalf; as he transacted the business for me not as a friend, but as his owner. An action based on the ground of business transacted should be granted, and this ceases to be proper as soon as his creditor is paid.

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

Where the business of a ward has been transacted without the authority of his guardian, it is customary to inquire, at the time issue was joined in the case, whether the ward has become enriched by the matter on account of which suit was brought against him.

(1) Where anyone transacts business for another in which money is involved, he is compelled also to pay interest and assume the risk in such investments, as he himself has contracted; except where, through accidental circumstances, the debtors have lost so much of their money that at the time when issue was joined in the suit they became insolvent.

(2) Where a father has charge of property belonging to his emancipated son and which he has given him, he is liable to a suit on the ground of business transacted.

38. *Tryphoninus, Disputes, Book II*.

A man who owed a debt which did not bear interest transacted the business of his creditor, and the question arose whether he could be compelled to pay interest on the above-mentioned sum by a suit based on business transacted. I stated that he would owe interest if he had been required to collect it for himself, but if the day for payment had not arrived at the time when he was transacting the business, he would not be compelled to pay interest; but if the time had elapsed, and he did not include the money owed by himself in the accounts of the creditor whose business he was transacting, he certainly would be compelled to pay interest in a *bona-fide* action. Let us see what interest he would owe, whether it would be that on which the same creditor would loan money to others, or would it be the highest rate? It is true that anyone who converts to his own use the money of a party whose guardianship or business he has charge of, or if a magistrate appropriates the money of a municipality, he must pay the highest rate of interest, as has been established by the Divine Emperors. But it is different in this instance, where a party did not appropriate money from the business which he was transacting, but borrowed it from a friend before he assumed the administration of the latter's affairs; for those to whom the above rule has reference were obliged to show good faith without compensation, at all events such as was absolute and without any profit whatever; and

where they appear to have abused their privileges they are forced to pay the highest rate of interest by way of a kind of penalty; but this party received property as a loan in a legal way, and is liable to interest because he did not pay the principal, and not because he appropriated to his own use money derived from the business which he was transacting. It makes a great deal of difference whether the indebtedness has just begun to be incurred, or whether it was done previously, because in the latter instance this is enough to make a debt bear interest which did not do so before.

39. *Gaius, On Verbal Obligations, Book HI.*

Where anyone pays a debt for another, even though the latter is unwilling, or ignorant of the fact, he discharges him from liability; but where money is owing to anyone, another cannot legally exact it without the consent of the former; for both natural reason and the law have established the rule that we may improve the condition of a man who is ignorant and unwilling, but we cannot make it worse.

40. *Paulus, On Sabinus, Book X.*

If I have a house in common with you and give security for the prevention of threatened injury for your part of said house; it must be stated that what I pay by way of damage I can sue you for rather on the ground of business transacted than on that of a common division of expense; because I was able to protect my own share without being forced to protect that of my partner.

41. *The Same, On the Edict, Book XXX.*

Where anyone has defended my slave in a noxal case, and I was ignorant of the fact, or absent, he will have a right of action against me for the entire amount on the ground of business transacted, and not one based on *peculium*.

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

If you undertake the transaction of my business at the request of my slave, and have done this merely at his suggestion, a suit based on business transacted will arise between us; but if you do so under the direction of my slave, it has been held that you can bring suit, not only to the extent of the *peculium*, but also on the ground of its having been for my benefit.

43. *Labeo, On the Last Epitomes by Javolenus, Book VI.*

When you pay money in the name of a party who did not specially direct you to do so, you will be entitled to an action based on business transacted; since by that payment the debtor was discharged by his creditor, unless the debtor had some interest in not having the money paid.

44. *Ulpianus, Disputations, Book VI.*

Where a man induced by friendship for their father makes an application for the appointment of a guardian for minors, or takes

measures for the removal of guardians who are suspected, he has no right of action against said minors, according to a Constitution of the Divine Severus.

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

Where an expenditure of money is advantageously made by some one while transacting the business of another, which includes expenses honorably incurred to secure public offices which are obtained by degrees; the sum expended can be recovered by an action based on business transacted.

(1) Where slaves have received their freedom absolutely by will, they are not compelled to give an account of the matters which they transacted during the lifetime of their master.

(2) Titius, being under the impression that his sister was the testamentary heir of the deceased,

paid a debt to the creditors of the estate. Although he did this with the intention of transacting the business of his sister, he was in fact doing it for the children of the deceased who would be the proper heirs of their father if there had been no will; and, because it is just that he should not be subjected to loss, it is established that he can recover what he has paid by a suit based on business transacted.

46. *Africanus, Questions, Book VII.*

You directed my son to buy you a tract of land, and when I heard of it I myself bought the land for you. I think it should be considered with what intention I made the purchase; for if I knew it to be on account of something which was necessary to you, and also it was your will that you would be glad to have the purchase, a right of action based on business transacted arises between us; as there would be if there had been no mandate of any kind, or if you would have ordered Titius to make the purchase, and I had made it because I could attend to the matter more conveniently. If, however, I made the purchase to prevent my son from being liable to an action on mandate, it is the better opinion that I could bring an action on mandate against you in his behalf, and you would be entitled to an action *de peculio* against me; because, even if Titius had executed a mandate, and, to prevent his being held liable on that account, I had made the purchase, I could bring an action against Titius on the ground of business transacted, and he could bring one against you, and you one against him, on mandate. The same rule applies if you ordered my son to be surety for you, and I become surety for you myself.

(1) If the suggestion is made that you have ordered Titius to become your surety, and for some reason he, having been prevented from doing so, I become your surety in order to release him from his promise, I will be entitled to an action based on business transacted.

47. *Paulus, Sentences, Book I.*

An action based on business transacted is granted to him who is interested in having a case of this kind brought.

(1) It makes no difference whether a party brings suit by a direct or other action, or whether suit is brought against him; (since in extraordinary proceedings where the use of formulas is not observed this distinction is superfluous), especially where both these actions have the same force and effect.

48. *Papinianus, Questions, Book HI.*

Where a brother, who transacts the business of his sister without her knowledge, stipulates for her dowry with her husband; an action can legally be brought against him on the ground of business transacted to compel him to release her husband.

49. *Africanus, Questions, Book VIII.*

Where a slave whom I have sold steals something from me, his vendor, and the purchaser sells the article, and then it ceases to exist, an action for the price should be granted me on the ground of business transacted; as would be the case if you had attended to some business which you thought to be yours, when in fact it was mine; or, on the other hand, you would be entitled to an action against me if, where you thought an estate belonged to you when it in fact belonged to me, you delivered to some person property of your own which had been bequeathed to you (since the payment of the legacy in this instance would release me).

TITLE VI.

CONCERNING PERSONS WHO BRING VEXATIOUS ACTIONS.

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

"Where anyone is said to have received money for the purpose of causing annoyance, or to abstain from doing so, a right of action *in factum* will lie against him for a year to recover fourfold the amount which he is said to have received; and after a year one will lie for the

actual amount."

(1) Pomponius states that this action is not only applicable to cases where money is involved, but also to public prosecutions, and especially as the party is liable under the *Lex Repetundarum* who receives money in consideration of doing something to cause annoyance or for refraining from doing so.

(2) Anyone who receives money before issue is joined in a case or who receives it afterwards, is equally liable.

(3) A Constitution of our Emperor directed to Cassius Sabinus, prohibits the giving of money to a judge or an adversary in public or private cases, or in those in which the Treasury is interested; and where this is done it orders the right of action to be lost. For it may be asked, if the adversary, not with vexatious intent but for the purpose of compromise, accepted the money; does the constitution apply? It is my opinion that it does not, since the right of action has ceased; for compromises are not forbidden but only base acts of extortion.

(4) Again, a party is also said to have received money where he has received something else instead of money.

2. Paulus, On the Edict, Book X.

Moreover, where anyone is released from an obligation this may be considered as receiving money; and also where money is loaned him to be used gratuitously, or property is sold or leased for less than its value. It makes no difference whether the party himself received the money, or ordered it to be paid to someone else, or ratified it after it had been accepted in his behalf by another.

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

In general, this rule also applies where a party obtains any benefit for such a consideration, whether he gets it from his adversary or from anyone else.

(1) Wherefore, if a party receives money for the purpose of causing some annoyance, he is liable whether he did so or not; and where he received it not to cause annoyance, if he does cause it, he is liable.

(2) He also is liable under this Edict who is *depectus*, which means one who has entered into a disgraceful contract.

(3) It should be observed that he who has paid money in order that some party might suffer annoyance, has himself no right of recovery, for he has acted dishonorably; but the right of action is granted to him on whose account the money was paid for the purpose of annoying him; for which reason if anyone receives money from you in consideration of causing me annoyance, and from me to prevent my being annoyed, he will be liable to me in two actions.

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

An heir, however, is not entitled to this action, because it should be sufficient for him that he has a right of action to recover the money which was paid by the deceased:

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

But this action is granted against an heir for whatever has come into his hands; as it has been established that this dishonorable profit can be recovered from heirs, although criminal actions are extinguished; as, for instance, where money is given for falsification, or to a judge for a favorable decree, and is recovered from the heir, as anything else may be recovered which has been obtained in an unlawful manner.

(1) Also, in addition to this action, one to recover the money also lies, where the only base conduct is that of the party who received it; for if this also applies to the giver then he who possessed it is in a better position. If a suit for the money should be brought, would this right

of action be lost, or should a suit for threefold the amount be granted? In a case of a thief we grant an action for fourfold the amount, as well as one for the recovery of the property. I am of the opinion that either of the actions alone is sufficient, for where an action for the recovery of the money will lie, then it is not necessary to grant an action *in factum* after the lapse of a year.

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

The year when a person is paid money to prevent suit being brought against him begins at the time when the payment was made, if he then had power to bring suit to recover it. But in the case of a person with reference to whom another paid money to have suit brought against him, it may be doubted whether the year should be reckoned from the day when the money was paid, or from the day when the party knew that it had been paid; for where he does not know that there is reason for suit to be brought against him, he is held not to have the power of bringing one, and the better opinion is that the year should be reckoned from the time when he did know.

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

Where anyone has received money from another in order to prevent me from being subjected to annoyance, then, if it was given through my direction, or by my agent who had charge of all my business, or by a party who voluntarily acted in my behalf, and whose act I ratified, I am considered to have paid the money myself. But if another party did not pay it on my order, even though he did it through consideration for me in order that the act should not be committed, and I did not ratify what he did; then the party who paid the money can recover it, and I have a right of action for fourfold the amount.

(1) If the money was paid for the purpose of having a vexatious suit brought against the son of a family, the father also is granted this action. In like manner, if the son of a family should accept money to induce him to bring a vexatious suit against anyone, or not to bring it; an action will be granted against his father. If another party paid him money not to bring the action without any direction from me, he can then recover it, and I will have a right to bring suit for quadruple the amount.

(2) Where a farmer of the revenue retains a person's slaves, and money was paid to him which was not due, he, also, is liable in an action *in factum* by this section of the Edict.

8. *Ulpianus, Opinions, Book IV.*

When a competent judge is informed by an innocent man that he has paid money on account of a crime which was not proved against him; he must order what has been unlawfully extorted to be refunded, according to the terms of the Edict which treat of persons who are said to have received money either to cause annoyance, or to refrain from doing so; and he must inflict punishment in proportion to the crime upon the party who committed it.

9. *Papinianus, On Adultery, Book II.*

Where a slave is accused he shall be put to torture, if this is demanded; and if he is acquitted, the accuser shall be condemned to pay his master double his value; and, in addition to double his value, an inquiry shall be made as to whether the prosecution was instituted for the purpose of annoyance, as the crime of illegal prosecution is separate from any loss which has been sustained by the master through the torture of the slave.

THE DIGEST OR PANDECTS.

BOOK IV.

TITLE I.

CONCERNING COMPLETE RESTITUTION.

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

The usefulness of this Title needs no commendation, for it speaks for itself. Under it the prætor in many ways comes to the relief of parties who have made mistakes, or have been cheated, and who, through intimidation, cunning, youth, or absence, have been overreached.

2. *Paulus, Sentences, Book I.*

Or through a change of condition, or excusable error.

3. *Modestinus, Pandects, Book VIII.*

All persons are promised complete restitution by the prætor when proper cause is shown; so that he may examine the justice of the case, and ascertain whether it belongs to that class to which he can afford relief.

4. *Callistratus, Monitory Edict, Book I.*

I know that it has been held by some authorities that a party who applies for complete restitution shall not be heard where some very insignificant affair or sum is involved, if this would prejudice the hearing of some more important matter, or the collection of a larger sum.

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

No one is held to be barred to whom the prætor promises to grant complete restitution.

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

Complete restitution may be granted to the successors of minors, as well as to the successors of those who are absent on public business, and, in fact, of all those who were themselves entitled to complete restitution; and this has very frequently been decided. Therefore, an heir, or a person to whom an estate has been delivered, or the successor of the son of a family who was a soldier, can obtain complete restitution. Hence if a minor of either sex is reduced to slavery, complete restitution will be granted to his or her master, within the time prescribed by law. But if it should happen that such a minor was overreached with reference to an estate which he had entered upon, Julianus says, in the Seventeenth Book of the Digest, that his master will have the right to reject it, not only on the ground of youth, but even where youth cannot be alleged; because patrons have used the benefit of the laws not for the sake of obtaining an estate, but for the purpose of revenge.

7. *Marcellus, Digest, Book III.*

The Divine Antoninus made the following statement in a Rescript addressed to Marcius Avitus, the prætor, on the subject of relieving a person who had lost his property while absent: "Although changes should not be readily made in matters which have been solemnly established, still, where equity clearly demands it, relief must be granted; and therefore, where a party who was summoned did not appear, and on this account judgment was formally rendered against him, and he soon afterwards appeared before the court where you were presiding; it may be supposed that his non-appearance was due, not so much to his own fault, as to the imperfectly heard voice of the crier, and therefore he is entitled to restitution."

(1) The aid of the Emperor does not seem to be limited to cases of this kind alone, for relief should be granted to persons who have been deceived without their own fault, and especially where fraud was committed by their adversaries, since it is usual for an action based upon fraud to be requested; and it is the duty of a just prætor to grant a new trial, which both reason and justice demand, rather than to allow an action involving turpitude to be brought, which

should be resorted to only when no other remedy is available.

8. *Macer, On Appeals, Book III.*

This difference exists between the case of minors under twenty-live years of age and parties who are absent on public business, namely: minors, even where they are defended by their guardians and curators, may still obtain complete restitution against the State, that is, where proper cause is shown; but where anyone is absent on public business, or where others who enjoy the same privilege, if they are defended by their agents, are usually only relieved by complete restitution to the extent of being permitted to appeal.

TITLE II.

WHERE AN ACT IS PERFORMED ON ACCOUNT OF FEAR.

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

The prætor says: "I will not approve anything which has been done through fear." It was formerly stated in the Edict: "What was done through force or fear." Mention was made of force to indicate compulsion imposed against the will, and fear to show trepidation of mind on account of some present or future danger; but afterwards the mention of force was omitted, because whatever is caused by a vehement display of force is held also to have been caused by fear.

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

Force is an attack of superior power which cannot be resisted.

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

This clause therefore contains both force and fear; and where anyone is compelled by violence to perform some act, restitution is granted to him by this Edict.

(1) But force we understand to be extreme violence, and such as is committed against good morals, not that which a magistrate properly employs, namely, in accordance with law and with the right of the office which he occupies. Still, if a magistrate of the Roman people, or the governor of a province, commits an illegal act, Pomponius says that this Edict will apply; as, for instance, if Re extorts money through the fear of death, or of scourging.

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

I am of the opinion that the fear of slavery, or any other of the same kind should be included.

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

Labeo says that the term "fear" must be understood to mean not any apprehension whatever, but the dread of some extraordinary evil.

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

The fear which we say is meant by this Edict is not that experienced by an irresolute man, but that which would reasonably affect a man of very decided character.

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

Pedius states in the Seventeenth Book, that neither the fear of infamy, nor that of being subjected to some annoyance, are included in this Edict, as affording ground for restitution under the same. Thus, if anyone who was constitutionally timid, should be apprehensive of something for which there was no foundation, he could not obtain restitution under this Edict, since no act had been performed either by force or intimidation.

(1) Therefore, if anyone who had been caught in the act of theft, or adultery, or any other crime, either paid something, or bound himself to do so; Pomponius very properly says in the Eighteenth Book, that this comes within the terms of the Edict, where the party was in fear of either death or imprisonment; although it is not lawful to kill an adulterer, or a thief, unless he

defends himself with a weapon, but they can be killed illegally; and therefore the fear was well founded. But where a party gives up his property to prevent the person by whom he was caught from betraying him, he is held to be entitled to relief under this Edict; since, if he had been betrayed, he would have been subject to the penalties which we have mentioned.

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

These persons indeed, come under the *Lex Julia*, because they have accepted money to conceal a detected act of adultery. The prætor, however, should intervene to compel them to make restitution, for the act is contrary to good morals, and the prætor does not consider whether the party who paid is an adulterer, or not, but only the fact that the former obtained the money by threatening the latter with death.

(1) If a person takes money from me by threatening to deprive me of the documents which establish my civil condition, if I do not pay; there is no doubt that I am under compulsion caused by extreme intimidation, above all if an attempt is being made to reduce me to slavery, and if the said documents were lost, I could not be declared free.

(2) If a man or woman gives anything to avoid being compelled to suffer a rape, this Edict applies; since to good persons the fear of this is greater than that of death.

(3) In these matters which we have mentioned as coming within the Edict, it makes no difference whether anyone fears for himself or for his children; as, because of their affection, parents are more easily alarmed on account of their children than on account of themselves.

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

We must understand the fear to be a present one, and not the mere suspicion that it may be exercised. This Pomponius states in the Twenty-eighth Book, for he says, "The fear must be understood to have been occasioned", that is to say, apprehension must have been excited by someone. Thereupon, he raises this point, namely: "Would the Edict apply if I have abandoned my land, after having heard that someone was coming armed to forcibly eject me?" And he states that it is the opinion of Labeo that the Edict would not be applicable in this instance, nor would the interdict *Unde vi* be available; for I do not appear to have been ejected by force, as I did not wait for this to be done, but took to flight. It would be otherwise if I had departed after armed men had entered upon the land, for, in this case the Edict could be employed. He also states that if you forcibly erect a building upon my premises by means of an armed band, then the interdict *Quod vi aut clam*, as well as this Edict would apply, because in fact I suffer you to do this through intimidation. If, however, I deliver possession to you because of the employment of force; Pomponius says that there will be ground for this Edict.

(1) It should also be noted, that the prætor in this Edict speaks in general terms and with reference to the facts, and he does not add by whom the act was committed; and, therefore, whether it is an individual, or a mob, or a municipality, or an association, or a corporation that causes the intimidation, the Edict will apply. But although the prætor includes violence committed by anyone, Pomponius very properly says that if I accept something from you, or induce you to bind yourself to me in consideration of my defending you from the violence of enemies, robbers, or a mob, or in order to obtain your freedom, that I should not be liable under this Edict, unless I myself employed this force against you. If, however, I was not guilty of violence, I should not be held liable; for I ought rather to be deemed to have received compensation for my services.

(2) Pomponius also says that the opinion of those is well founded who hold that restitution can be obtained under this Edict, when any person is forced to manumit a slave, or to demolish a house.

(3) Now let us see what is meant by the statement of the prætor, that he will not approve of something which has been done. And, indeed, a matter may remain unfinished, even though intimidation is used; as, for instance, where a stipulation was entered into but no money was

paid; or where the transaction was complete where the money was counted after the stipulation was entered into; or where a debtor is released by his creditor through intimidation; or any other similar circumstance occurs which completes the transaction.

Pomponius says that where the transaction is complete, the party will sometimes be entitled to an exception, as well as an action; but where it is incomplete, he will be entitled to an action alone. Still, I know of an instance where some Campanians, by the employment of intimidation against a party, extorted from him a promise in writing to pay a sum of money, and a Rescript was issued by our Emperor that he could apply to the prætor for complete restitution, and while I was with him as assessor, he decided: "That if the party desired to proceed against the Campanians by an action, he could do so; or if he wished to plead an exception against them, if they brought suit, it would not be without effect." It may be inferred from this constitution that whether the transaction is complete, or incomplete, an action as well as an exception will be granted.

(4) An action *in rem*, or one *in personam*, will be granted to a party who desires it, the discharge, or any other kind of release given by him having been rescinded.

(5) Julianus, in the Third Book of the Digest, thinks when property has been delivered to a person through intimidation, that the latter should not only restore it, but also be liable for malice.

(6) Although we are of the opinion that an action *in rem* should be granted, because the article delivered forms a part of the property of him who was subjected to violence; still, it is alleged, and not without reason, that if a man brings suit for fourfold damages, the action *in rem* is terminated, and the converse is also true.

(7) The restitution to be made under this Edict, that is, complete restitution by the authority of the judge is of this description, namely, where the property was given up through intimidation it must be surrendered, and the bond to indemnify the owner against malice (as already stated) provide against injury to the property. Where a release took place through a discharge, the obligation must be restored to its former condition; so that, as Julianus stated in the Fourth Book of the Digest, if money was owed and a release extorted by force, unless payment was made, or the obligation reestablished and issue joined, the party must be condemned to pay fourfold damages. Moreover, if through violence I made a promise by way of stipulation, there must be a release of the stipulation, and if any usufructs or servitudes were lost, they must be restored.

(8) As this action is *in rem*, it does not coerce any person who employed violence; but the prætor intends that where anything has been done through intimidation, the right of restitution shall be exerted against all; and it has not unreasonably been remarked by Mar-

cellus, with reference to a decision of Julianus, that if a surety used violence to obtain a discharge by a release, no action for restitution will be granted against the principal debtor; but the surety should be condemned to pay fourfold the amount, unless he restores the right of action against the principal debtor. The opinion stated by Marcellus is the better one, for he holds that this action will lie against the principal debtor, as it is stated *in rem*.

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

It is certain that if the sureties are released by the principal debtor employing intimidation, an action may be brought against the sureties to compel them to renew their liability.

(1) If I, compelled by you through fear, release your obligation, it is in the discretion of the judge, before whom proceedings are instituted under this Edict, not only to cause the obligation to be renewed by you personally, but to compel you to furnish sureties, either the same ones, or others, no less solvent; and, in addition, to renew the pledges which you gave in the same place.

11. *Paulus, Notes on the Digest of Julianus, Book IV*.

Where a third party, without fraud on the part of the surety, employs violence to obtain a release of said surety, the latter shall not also be liable to renew the obligation of the principal debtor.

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

The offspring of female slaves, the young of cattle, the crops, and everything depending upon the same, must be restored; not only those which have been already obtained, but, in addition, I must be indemnified for those I would have been able to obtain, if I had not been prevented by intimidation.

(1) It might be asked, if the person who employed violence also had violence used against him, whether the prætor would rule that under the Edict those things should be restored which he had alienated? Pomponius says in the Twenty-eighth Book, that the prætor is not required to come to his relief; for he holds that since it is lawful to repel force by force, he suffered the same thing that he inflicted. Wherefore, if anyone compels you by intimidation to promise him anything, and afterwards I compel him through fear to discharge you by a release, nothing can be restored to him.

(2) Julianus says that where a creditor employs force against his debtor to obtain payment of his debt, he is not liable under this Edict, on account of the nature of the action based on intimidation, which requires that loss should be caused; although it cannot be denied that the party comes within the scope of the *Lex Julia de vi*, and has lost his right as a creditor.

13. *Callistratus, On Judicial Inquiries, Book V*.

There is extant a Decree of the Divine Marcus in the following terms: "The best course to pursue if you think that you have any legal claim, is to test it by an action"; and when Marcianus said, "I have employed no force"; the Emperor replied, "Do you think that there is no force employed except where men are wounded? Force is employed just as much in a case where anyone who thinks that something is owing to him and makes a demand for it, without instituting judicial proceedings; therefore, if anyone is proved before Me to have boldly, and without judicial authority obtained possession of any property of his debtor, or any money which was due to him, and which was not voluntarily paid to him by the said debtor; and who has established the law for himself in the matter, he shall not be entitled to the right of a creditor".

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

Moreover, if I am protected against you by a perpetual exception, and compel you to give me a release, the Edict does not apply because you have lost nothing.

(1) The prætor promises that where a party does not make restitution, an action can be brought against him for fourfold damages, which means quadruple the entire amount which should have been restored. The prætor treats the debtor with sufficient indulgence by giving him the opportunity for restitution, if he wishes to escape the penalty. After a year has elapsed, however, he promises him only a simple action, but not always, and only where proper cause is shown.

(2) In the examination for cause, it is important that this action should be permitted only where another does not lie; and, in fact, since in a case of injury inflicted by intimidation, the right of action is lost in a year, by which is understood a year with the usual allowance; and there should be some suitable cause for this action to be granted after a year has elapsed.

Another right of action can be obtained in the following manner, that is, where the person against whom the violence was directed has died, his heir is then entitled to an action for the estate, as the party who employed violence is in possession; for which reason the heir will not be entitled to an action on the ground of intimidation, although if a year had not expired, the heir could bring suit for fourfold damages. The suit is granted to successors because it

includes the pursuit of the property.

(3) In this action, inquiry is not made whether the party who is sued employed intimidation, or whether someone else did so; for it is sufficient to establish the fact that either fear or force was used, and that the defendant, even though innocent of crime, nevertheless, profited by the transaction; for as fear includes ignorance, it is reasonable for a party not to be compelled to point out who employed intimidation or force against him; and therefore the plaintiff is only required to show that fear was used to compel him to give someone a release for money due, or to surrender property, or to perform some other act. For it does not seem unjust for one person to be condemned to pay fourfold damages on account of the act of another; because in the beginning the action is not brought for fourfold the amount involved, but where restitution of the property is not made.

(4) Since this action is one subject to arbitration, the defendant has the right to make restitution before the award has been made by the arbiter, as we have stated above; and if he does not do so, he justly and deservedly must have judgment rendered against him for fourfold damages.

(5) Sometimes, however, even where intimidation has been employed, the award of the arbiter discharges the defendant. For if Titius employed intimidation without my knowledge, and property obtained in this manner came into my possession, and, if, without any fraud on my part, it is no longer in existence, shall I be discharged by the mere act of the judge? Or, if the slave in question takes to flight, and the judge requires me to give security to restore him if he comes under my control, then I ought to be released. Wherefore, certain authorities are of the opinion that a purchaser who obtained property in good faith from the person who employed force, should not be held liable; nor should one who has received the property as a gift, or one to whom it has been bequeathed. It is very properly held by Vivianus, that these persons are liable, otherwise I should be placed at a disadvantage because I suffered intimidation. Pedius also stated in the Fourth Book, that the authority of the judge, in a case involving restitution, is such that he should order him who employed force to make restitution, even if the property has passed into the possession of a third party; or compel the latter to make restitution, even though another had employed intimidation; for intimidation employed by one person should not enure to the benefit of another.

(6) Labeo says that where anyone has been made a debtor through intimidation, and gave a surety who was willing, both the debtor and the surety will be released; but if the surety alone was intimidated, and not the principal debtor, only the surety will be released.

(7) Fourfold the value includes the entire property in question, that is to say, the crops, and all the increase.

(8) Where anyone is compelled by force to promise to appear in court, but afterwards furnishes a surety, both of them will be released.

(9) Where anyone has been compelled by force to enter into an agreement, and because he did not give a release has been condemned to pay fourfold damages; Julianus is of the opinion that he can reply, when he brings suit on the stipulation, and is opposed by an exception; as the simple value of the property obtained by the defendant was included in the fourfold damages. Labeo says, however, that even after the action for fourfold damages has been settled, the party who used violence would nevertheless be barred by an exception; but as this seems hard, it should be modified so as to render him liable for triple damages, and also so that in every instance he shall be compelled to give a release.

(10) With reference to what we have said concerning the simple value being included in the quadruple damages, this should be understood to mean that in the order granting quadruple damages, the property obtained by violence is of course included; and hence restitution of the same is made, so that the penalty is limited to triple damages.

(11) What if a slave should be lost without the malice or negligence of the person who employed force, and against whom judgment was rendered? In this instance, if the slave should die before suit is brought on the judgment, the rule will be relaxed in enforcing the judgment; because the party is compelled to give satisfaction for his offence by the penalty of triple damages.

With reference to a slave who is said to have taken to flight, the defendant shall be compelled to give security that he will pursue him, and restore him; and nevertheless the party who has suffered the violence will fully preserve all his rights of action *in rem*, or for production, or any other which he possessed for the recovery of the slave; so that, if his master should in any way recover him, and the other should be sued on the stipulation he will be protected by an exception.

All this takes place after judgment has been rendered, but if the slave should die before the judgment, without the malice or negligence of the defendant, the latter will nevertheless be liable. This results from the following words of the Edict: "If the property is not restored in consequence of the decision of the Court".

Hence, if the slave should take to flight without the malice or negligence of the party against whom the suit was brought, security must be furnished in court that he will follow up and return the slave; but where the property has not been lost through the negligence of the defendant, still, if it would not have been lost at all if intimidation had not been employed, the defendant will be liable, just as is the case in an interdict *Unde vi,* or *Quod vi aut clam;* for the reason that a man can sometimes recover the price of a dead slave whom he would have sold if he had not suffered intimidation.

(12) Where anyone uses force against me, as he obtains possession from me, he is not.a thief; although Julianus is of the opinion that anyone who obtains property by force is a more unprincipled thief.

(13) Where a man employs intimidation, it is certain that he is also liable for malice; and Pomponius says the same; and either action is a bar to the other, where an exception *in factum* is pleaded.

(14) Julianus states that fourfold damages represents merely the interest of the plaintiff, and therefore if a man who owed forty *aurei* by reason of a trust, promises under compulsion to pay three hundred, and makes payment; he can recover four times two hundred and sixty *aurei,* for this was the amount with reference to which he suffered duress.

(15) According to this rule, if several persons employ duress, and only one of them is sued, and he voluntarily makes restitution before judgment; all the others are released. But if he does not do this, but pays fourfold the amount after judgment, the better opinion is, that the action based on intimidation is also terminated, so far as the others are concerned:

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

For an action will be granted against the others for the amount which has not been recovered from the party against whom the suit was brought.

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

What we have stated in the case where several employ intimidation, should also apply where the property came into the hands of one, while another was responsible for the duress.

(1) Where slaves employ intimidation, a noxal action will lie with reference to them; but anyone can sue their master into whose possession the property passed; and if, after having been sued, he surrenders the property, or, as has already been stated, he pays fourfold damages, this will also benefit the slaves. If after having been sued in a noxal action he prefers to surrender the slave, he himself can also be sued, if he acquired possession of the property.

(2) This action is granted to the heir, and to other successors, since it includes the right to follow up the property. It is also granted against the heir and other successors, for the amount of what has come into their possession; and this is not unreasonable, for although the penalty does not pass to the heir, still (as is stated in the rescript), whatever has been obtained dishonorably should not enure to the benefit of the heir.

17. *Paulus, Questions, Book I.*

Let us see then, where the heir has acquired possession of something, and has consumed what he obtained, will he cease to be liable, or will the fact that he once had possession of the property be sufficient? And if he should die after having consumed it, will an action absolutely lie against his heir, since he received an indebtedness with the estate; or will no action be granted because the second heir received nothing? It is the better opinion that, in any event, an action will lie against the heir of the heir; for it is sufficient that the property once passed to the original heir, and the right of action becomes perpetual. Otherwise, it must be held that the heir himself, who consumes what had come into his hands, will not be liable.

18. *Julianus, Digest, Book LXIV*.

If the actual property which came into the hands of the person was destroyed, we cannot say that he is enriched, but if it was converted into money, or something else, no further inquiry should be made of what became of it; but the party is held to be enriched, even though he may have afterwards lost what he obtained. For the Emperor Titus Antoninus stated in a Rescript to Claudius Frontinus, with reference to the value of the property of an estate, that suit might be brought against him on account of the estate, for this very reason; because, although the property which was originally included in the estate was not in his possession, still, the price of the property by which he became more wealthy, no matter how often the individual articles had been changed in their character, rendered him liable to the same extent as if the articles themselves had remained in their original form.

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

With reference to the fact that the proconsul promises an action against the heir only to the extent of what has come into his hands, it must be understood that this refers to the granting of a perpetual right of action.

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

In order to ascertain the amount which has come into the hands of the heir, we must go back to the time when issue was joined; provided it is certain that anything did come into his hands. The same rule applies where something passes into the bulk of the estate of the party who employed force, in such a way that it is evident that it will come into the possession of the heir; that is to say, if the debtor is released from liability.

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

Where a freedwoman is guilty of ingratitude against her patron, and is aware that she has been ungrateful; and thus, being in danger of losing her status, gives, or promises something to her patron to prevent her from being reduced to slavery; the Edict does not apply, for the reason that she herself is the one who caused the fear.

(1) Where any act has been performed on account of fear, the prætor will not confirm it on the ground of lapse of time.

(2) Where a party gave possession of land which he did not own, the fourfold damages, or the simple value with the profits which he will recover, is not the value of the land, but that of the possession; for the estimate of what is to be restored is based upon what was lost, and, in this instance, it is the mere possession with the crops; which is also the opinion of Pomponius.

(3) Where a dowry has been promised through intimidation, I do not think that any obligation arises, since it is perfectly certain that such a promise of a dowry is equivalent to none at all.

(4) Where I have been compelled by intimidation to abandon an agreement for purchase, or rent, it must be considered whether the transaction is void or not and the former obligation remains in full force; or whether this resembles a release, because we cannot rely on an obligation based in good faith, as such a one is terminated when it is lost. The better opinion is that the case resembles a kind of release, and therefore a prætorian action will lie.

(5) If, being compelled by fear, I enter upon an estate, I think that I have acted as heir, because although if I had been free I would have been unwilling to do so; still, having been subjected to compulsion, I had the will to act; but I should get an order of restitution from the prætor, that the power to reject the estate may be conferred upon me.

(6) If, having been forced to do so, I reject an estate, the prætor can come to my relief in two ways; either by granting an equitable action as he would to an heir, or by allowing an action on the ground of duress; and I have the right to select whichever way I choose.

22. *Paulus, Sentences, Book I.*

Where anyone has put a person in prison for the purpose of extorting something from him, whatever is done under the circumstances is of no importance.

23. *Ulpianus, Opinions, Book V.*

It is not probable that a person would pay in a city, under compulsion and unjustly, something which he did not owe, if he showed that he was of illustrious rank; since he could invoke the public law, and apply to someone vested with authority who would forbid his being treated with violence. The strongest possible proof of violence must be given in order to overcome this presumption.

(1) Where anyone being justly terrified at the prospect of a judicial examination to which a powerful adversary threatens to send him in chains; sells under compulsion what he had a right to retain, the matter shall be restored to its proper condition by the governor of the province.

(2) Where a money-broker keeps an athlete in confinement contrary to law, and, by preventing him from engaging in contests, compels him to give security for a larger sum of money than he owes; a competent judge will, where this is proved, order the matter to be restored to its proper condition.

(3) Where anyone is compelled, by the intervention of the officers of the governor, by force and without judicial proceedings, to pay money which he does not owe to a party claiming under an assignment; the judge will order what was unlawfully extorted to be restored by him who inflicted the injury. If, however, he paid his debt upon a simple demand, and not as the result of judicial proceedings, even though the party should have acted legally and not have collected the debt in an irregular way, still, it is not in accordance with law to set aside a transaction which brought about the payment of an obligation which was due.

TITLE III.

CONCERNING FRAUDULENT INTENT.

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

In this Edict the prætor gives relief against tricky and deceitful persons, who use artifice to the injury of others, to prevent the former from profiting by their malice, or the latter from being harmed by their simplicity.

(1) The following are the terms of the Edict: "Where anything is said to have been done with fraudulent intent and no other action is applicable in the matter, I will grant an action if there seems to be good ground for it."

(2) Servius defines "fraudulent intent" to be a scheme for the purpose of deceiving another party, where one thing is pretended, and another is done. Labeo, however, states that it is possible for this to be accomplished, without pretence, for the overreaching of another; and it

is possible for one thing to be done without deceit, and another pretended; just as persons act who protect either their own interests or those of others, by the employment of this kind of dissimilation. Thus, he gives a definition of fraudulent intent as being: "An artifice, deception, or machination, employed for the purpose of circumventing, duping, or cheating, another." The definition of Labeo is the correct one.

(3) The prætor *was* not content merely to mention *dolus,* but he added *malus, as* the ancient authorities were accustomed to say *dolus bonus*, and they understood this expression to mean adroitness, especially where anyone used a stratagem against an enemy, or a thief.

(4) The prætor says: "And no other action is applicable in the matter." Thus he reasonably promises this action where no other is available, because an action involving infamy should not rashly be ordered by him if a civil or prætorian one can be brought, just as Pedius states in the Eighth Book; but even where an interdict will lie by means of which a man can bring suit or an exception be pleaded, by which he may be protected, this Edict is not applicable. Pomponius says the same thing in the Twenty-eighth Book, and he adds that, even if a man may be protected by a stipulation, he cannot have an action founded on fraudulent intent; as, for instance, where a stipulation was made with reference to fraudulent intent.

(5) Pomponius also says that where no action can be brought against us, for instance, where the stipulation was so shamefully tainted with fraud that no court would allow an action founded upon it; I should not attempt to obtain an action based on fraudulent intent, since no judge would allow such an action to be brought against me.

(6) Pomponius also says Labeo holds that, even if anyone could obtain complete restitution, he ought not to have the benefit of this action; and if some other right of action is lost by lapse of time, still, this one ought not to be permitted; for he who postpones bringing suit has only himself to blame, unless the fraud was perpetrated for the special purpose of allowing time to elapse.

(7) Where anyone who has some civil or prætorian right of action inserts it into a stipulation, and then annuls it by a release, or by some other means; he cannot institute proceedings based upon fraud, because he has another right of action, unless he was maliciously deceived when he lost his right of action.

(8) For it is only where some other action can be brought against him whose deceit is the subject of investigation.

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

Or where the matter which is the basis of inquiry against him can be secured in some other way.

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

This Edict does not apply; and it also ceases to be available when a third party:

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

Can be sued; or where the property can be secured for me through another.

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

Therefore, if a ward has been circumvented by Titius, and his guardian acted in collusion with him, he is not entitled to an action against Titius, based upon fraud, since he has an action on guardian-ship, by which he can recover what his interest amounts to. If his guardian is insolvent it must undoubtedly be said that an action on the ground of fraud can be granted him:

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

For a person cannot be held to be entitled to any action, when it would be useless on account of the insolvency of his adversary.

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

Pomponius very properly explains the words: "No other action is applicable," to signify its being impossible for the matter in question to be preserved for the party interested in any other way. Nor does this seem to be opposed to the opinion which Julianus stated in the Fourth Book; namely, that where a minor under twenty-five years of age having been misled by the advice of a slave, sold him with his *peculium*, and the purchaser manumitted him; the minor was entitled to an action on the ground of fraud against the manumitted slave; for we must understand that the purchaser is free from fraud, and that he cannot be held liable on account of the purchase, or that the sale is void if the minor was induced to make it through fraudulent representations. The fact that the party is presumed to be a minor does not entitle him to complete restitution, since no complete restitution can be available against a manumitted slave.

(1) In accordance with this, where a man can provide for his own indemnity by means of a penal action, it should be stated that a suit on the ground of fraud will not lie.

(2) Pomponius says, however, that if the action is a popular one, one based on fraud does not apply.

(3) Labeo thinks that an action based on fraud should not be granted, not only where no other right of action exists, but even where it may be doubtful whether another is available, or not; and he adduces the following instance: Where a party owed me a slave on account of a sale, or a stipulation, and gives him poison, and delivers him to me, or where he owes me a tract of land, and, during the delivery, he imposes a servitude upon it; or demolishes buildings, or cuts down, or roots up trees; Labeo says that whether he gave me security against malice or not, an action based upon it should be granted against him; since, if he did give security, it is doubtful whether a right of action founded on the stipulation exists.

The better opinion is, however, that if security was given against malice, an action based upon it will not lie, since an action on the stipulation is available; but where there is no security, then, in case an action on purchase is brought, one based upon fraud will not lie, because one based on purchase does; but where one on the stipulation is brought, an action on the ground of fraud will be necessary.

(4) Where the master of a slave, to the use of whom another party was entitled, kills him; both the action of the *Lex Aquilia*, and that for production will be available, if the master was in possession of the slave when he killed him; and therefore the action founded on fraud will not lie.

(5) Moreover, where an heir, before he enters upon the estate, kills a slave who has been bequeathed; as the latter was destroyed before he became the property of the legatee, the action of the *Lex Aquilia* does not apply, but the action based upon fraud, no matter what time he killed him, does not apply either, because a right of action based upon the will is available.

(6) Where an animal belonging to you does some damage to me through the malice of a third party, the question arises whether I am entitled to an action for malice against him? I agree with the opinion of Labeo, that where the owner of an animal is insolvent, an action based upon malice should be granted; although if there was a surrender of the animal by way of reparation, I do not think it should be granted, even for the excess.

(7) Labeo also asks the following question: "If you release my slave from his shackles in order that he may escape, should an action on the ground of malice be granted?" Quintus in a note on this states that if you did not commit the act through motives of pity, you can be held liable for theft, but where you were influenced by pity, an action *in factum* should be granted.

(8) A slave brings to his master a person who agrees to be responsible for the agreement of the slave relating to his freedom, on the condition that after he is free, the obligation is to be assigned to him; but after having been manumitted, the slave would not consent for the obligation to be assigned. Pomponius says that an action on the ground of malice will lie. But

if the patron is to blame because the obligation was not assigned, it must be held that he will be barred by an exception of the guarantor, if the latter is sued. I am embarrassed by the point, how can an action on the ground of malice be allowed, when another is available? Unless, perhaps, some one might allege that, as the patron can be barred by an exception if he brings suit against the other party, it should be held that an action on the ground of malice should be granted; as one which can be barred by an exception is no action at all. But if the patron then is barred because he is unwilling to accept the manumitted slave instead of the guarantor, it is clear that the party who assumed the obligation instead of the slave should be granted an action on the ground of malice against the latter after he was manumitted; or if the guarantor is insolvent, the right of action should be given to the owner.

(9) If my agent permits my adversary to win his case through malice, so that the latter may be released from liability; it may be asked whether I am entitled to an action on the ground of malice against the party who won the case? I think that I am not entitled to one, where the party is ready to defend the action against this exception, if there is collusion; otherwise, an action on the ground of malice should be granted, provided I cannot bring suit against my agent for the reason that he is not solvent.

(10) Moreover, Pomponius says that the prætor Cæcidianus did not grant an action on the ground of fraud against one who had alleged that a certain person to whom money was to be lent was solvent, which is the proper view of the case; for an action on the ground of fraud should not be granted unless bad faith was flagrant and evident.

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

If, however, you knew that the person had lost his property, and, for the sake of gain, stated to me that he was solvent, and action on the ground of fraud would properly be granted against you; since you falsely recommended another with the intention of deceiving me.

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

Where anyone asserts that an estate is of very little value, and then purchases it from the heir, an action on the ground of fraud will not lie, as the one based on sale is sufficient.

(1) If, however, you persuaded me to reject the estate, under the pretext that it would not pay the creditors, or induced me to choose a certain slave because there was none better in the household; I say that an action on the ground of fraud should be granted, if you did this with malicious intent.

(2) Moreover, if a will was suppressed for a long time, in order to prevent it being declared inofficious, and after the death of a son it was produced; the heirs of the said son can bring suit on the ground of fraud, as well as under the *Lex Cornelia*, against the parties who suppressed it.

(3) Labeo states in the Thirty-seventh Book of the *Posteriora,* that if Titius claims your oil as his, and you deposit the said oil in the hands of Seius for him to sell, and keep the purchase money until the controversy as to which of you the oil belongs is settled, and Titius refuses to join issue; since you can neither bring an action against Seius, either on mandate, or as agent, because the condition of the deposit has not yet been fulfilled; you can sue Titius on the ground of fraud. Pomponius, however, says in the Twenty-seventh Book, that an action can be brought in general terms, on the ground of agency; or if the party is not solvent, it can be brought on the ground of fraud against Titius; which would seem to be the proper distinction.

(4) If at the suggestion of the judge you have surrendered your slave to me to indemnify me for damage which he committed, and in consequence thereof have been released from liability; you can be sued in an action based upon fraud, if it should appear that the said slave was pledged to another. This action based upon fraud is noxal, and therefore Labeo stated in the Thirtieth Book of the Prætor for Foreigners, that the action based on fraud committed with reference to a slave is sometimes *De Peculio* and sometimes noxal. For if the matter with reference to which fraud was committed is one for which an action *De Peculio* would be

granted, then an action upon that ground would be allowed; but if it is one in which the action would be noxal, then it also must be one of the same character.

(5) The prætor with reason inserts the words "proper cause must be shown", for this action ought not to be granted indiscriminately; for instance, in the first place if the amount involved is insignificant,

10. *Paulus, On the Edict, Book XL* That is to say, not over two *aurei*,

11. *Ulpianus, On the Edict, Book XI*. It should not be granted.

(1) The action is not granted to certain persons, for instance, to children or to freedmen against their parents or their patrons; since it implies infamy. Nor should it be granted to a person in humble circumstances against another who is superior in station; for example, to a plebeian against a person of consular rank and acknowledged position, or to a licentious person, or a spendthrift, or anyone who is otherwise contemptible, against a man of blameless life; and Labeo holds the same opinion. What then is to be done? It must be said with respect to such persons that an action *in factum* should be allowed; attention being paid to the phraseology, so that mention of good faith may be made:

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

To prevent the parties from profiting by their own deceit.

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

An action on the ground of fraud should be granted to the heirs of these persons, as well as against the heirs of the other parties.

(1) Labeo says that in the examination for cause, care must be taken that an action on the ground of fraud should not be granted against a ward, unless suit be brought against him as heir. I think that he can be sued on the ground of his own fraud, if he has almost reached the age of puberty, and especially if he became more wealthy by the act.

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

What would be the result if he should gain the consent of the plaintiff's agent for the dismissal of the suit against him; or if he should have obtained money from his guardian by false representations; or if he had committed some other similar fraud which did not require any great duplicity?

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

I think that an action should also be granted against him, if he profited pecuniarily by the fraud of his guardian; just as an exception can be granted.

(1) Doubt exists, however, whether an action on the ground of fraud can be granted against a municipality? It is my opinion that it cannot be granted on the ground of its own fraud, for how can a municipality commit fraud? But I think that it should be granted where any profit accrues to it from the fraud of those who administer its affairs. An action on the ground of fraud will be granted against Decurions as individuals.

(2) Moreover, if any advantage is obtained by a principal through the fraud of his agent, an action will be granted against the former

for the amount which came into his hands; for there is no question that the agent is liable for his own fraudulent conduct.

(3) In this action, it is necessary to point out who committed the fraudulent action, although it is not necessary to allege intimidation.

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

The prætor also requires that a statement should be made of what was fraudulently done, as the plaintiff is entitled to know in what respect he was cheated, so as not to express himself in

a vague manner in an offence of such a serious character.

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

Where several persons commit fraud, and one of them makes restitution, all will be released from liability; and if one of them pays an amount equal to the damage caused, I am of the opinion that the others are released.

(1) This action is granted against the heir and other successors to an estate, but only to the amount which they have obtained.

18. *Paulus, On the Edict, Book XL*

Again, restitution is included in this action according to the discretion of the judge; and unless restitution is made, judgment shall be rendered in proportion to the amount involved. Hence in this action, and in the one based on intimidation, a certain sum is not specified, in order that the defendant, when guilty of contumacy, may have judgment rendered against him for the amount which the plaintiff may swear to in court, although, in both actions, by the interposition of the judge, this may be restrained by the taxation of the amount.

(1) The granting of this action, however, is not always left to the discretion of the judge, where it is evident that restitution cannot be made, as, for instance, where a slave, after having been fraudulently delivered, dies; hence the party ought to immediately be compelled to pay a sum equal to the interest of the plaintiff in the property.

(2) Where the owner of a house, whose usufruct has been bequeathed, burns it; an action on the ground of fraud does not lie, as other actions arise from this act.

(3) Trebatius grants an action on the ground of fraud in a case where a party knowingly lent false weights, with which a vendor might weigh merchandise for a purchaser. If, however, he furnished weights which were too heavy, the vendor can recover the excess of the merchandise by a personal action; and if he furnished weights which were too light, the purchaser can bring an action on sale for the delivery of the remainder of the merchandise; unless it was sold on the condition that it should be weighed with those weights, the party who lent them with the intention to defraud having alleged that they were correct.

(4) Trebatius states that a suit on the ground of fraud should be granted against a person by whose deceit a right of action was lost through lapse of time; not in order that restitution might be made by the judge, but that the plaintiff might recover damages for the interest he had in the right of action not being extinguished; because if other measures were taken the law would be evaded.

(5) If someone kills a slave whom you have promised me, many authorities justly think that an action grounded upon fraud should be granted against him; because you are discharged so far as liability to me is concerned, and therefore an action on the *Lex Aquilia* would be refused you.

19. *Papinianus, Questions, Book LVII*.

Where a surety kills an animal which had been promised before the principal was in default in its delivery; Neratius Priscus and Julianus hold that an action on the ground of fraud ought to be brought against him; since the debtor having been discharged, he himself, in consequence, is released from liability.

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

Your slave who owed you money, and who had no means of making payment, by your advice borrowed money from me, and paid you. Labeo says that an action on the ground of fraud should be granted against you, because I could not avail myself of an action *De Peculio*, as there was no private property; nor does there seem to have been anything expended for the benefit of the master, since he received it in payment of a debt.

(1) If you persuade me that no partnership existed between you and the person of whom I am

the heir; and I, on this account, permit you to be discharged from liability in court; Julianus states that I am entitled to an action on the ground of fraud.

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

If you took an oath through my agency, and you are discharged, and afterwards it is proved that you have committed perjury; Labeo says that an action on the ground of fraud should be granted against you; for Pomponius holds that the act is equivalent to a compromise, and Marcellus also entertains this opinion in the Eighth Book of the Digest, as attention should be paid to the religious character of an oath:

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

For, in this Instance, the penalty for perjury is sufficient.

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

If a legatee, to whom property was bequeathed in addition to what is prescribed by the *Lex Falcidia*, persuades the heir, who is still ignorant of the value of the estate, either by oath, or by some other deception, that the estate is amply sufficient to pay all the legacies, and by this means obtains the payment of his own legacy in full; an action on the ground of fraud will be granted.

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

If it should happen, through the fraudulent act of a party who appears in behalf of a person attempting to gain his freedom; that a

decree in favor of his freedom is rendered when his adversary is not present; an action on the ground of fraud should at once be granted against him, because a decision rendered in favor of freedom cannot be reconsidered.

25. *Paulus, On the Edict, Book XL*

When I bring suit against you for a sum of money, and issue has been joined, and you persuade me falsely that you have paid the money to my slave, or my agent, and on this ground you have secured the dismissal of the case with my consent; we have asked whether an action on the ground of fraud should be granted against you, and it was held that an action of this kind could not be granted, for the reason that I could obtain relief in another way; for I could bring suit over again, and if an exception on the ground of a former judgment was interposed, I could lawfully make use of a reply.

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

A proconsul promises to grant an action against an heir to the amount of what comes into his hands, that is to say, to the amount by which the estate is enriched by the transaction when it passes to him:

27. *Paulus, On the Edict, Book XL*

Or which he would have received, if this had not been prevented by the fraud which he committed.

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

Therefore, if a release fraudulently obtained by you has been given you for a debt, an action can, without doubt, be brought against your heir. But where property has been delivered to you in this way, and you die, if the property is in existence, proceedings can be instituted against your heir; and if it is not in existence, this cannot be done. An action, however, is granted against an heir without reference to time, for the reason that he must not profit by another's loss. In accordance with this, an action *in factum,* without reference to time, should be granted against the party who was guilty of the fraud for the amount to which he became enriched.

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

Sabinus is of the opinion that the heir is sued rather for the correction of an account, than for wrong-doing; and, in any event, the action does not imply infamy, and, therefore, the liability of the party should not be limited by lapse of time.

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

Proper cause need not be shown where proceedings are instituted against an heir.

31. *Proculus, Epistles, Book II*.

Where anyone induces my slave to abandon possession of my property, the possession of the same is not actually lost; but an action on

the ground of fraud will lie against the party in question, if I have suffered any loss.

32. *Scævola, Digest, Book II*.

A son who had received a slave as a preferred legacy having been asked to manumit him after a certain time, provided he had, in the interval, rendered his account to the said heir and to his brothers who were his co-heirs, gave the slave his freedom by manumission before the time had elapsed, and before the account had been rendered. The question arose whether he was liable to his brothers as trustee to render them the account for their shares? I answered that since he had liberated his slave he was not liable to his brothers as trustee, but that if he hastened to manumit him to prevent him from rendering an account to his brothers, then an action could be brought against him on the ground of fraud.

33. *Ulpianus, Opinions, Book IV*.

A certain man was the possessor of an article which he wished to sell, and another brought suit to establish the right of property, and after having deprived him of the opportunity of selling the article to the purchaser, he abandoned the case. It was held that the party in possession was under the circumstances entitled to an action *in factum* for the purpose of indemnification.

34. *The Same, On Sabinus, Book XL1I*.

If you permit me to remove stone from your land, or to dig chalk, or sand, and I have incurred expense in doing so, and you do not allow me to remove it, no other action will lie in my favor against you, except that on the ground of malicious contrivance.

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

If anyone destroys a will left with him after the death of the testator, or mutilates it in any way, the person mentioned therein as heir will be entitled to an action against him on the ground of fraud. The same action should be granted to those to whom legacies have been bequeathed.

36. *Marcianus, Rules, Book II*.

Where two persons have been guilty of fraud, they cannot bring actions against one another on this ground.

37. *Ulpianus, On Sabinus, Book XLIV*.

Where a vendor says something in praise of his merchandise, it should be considered that he has neither said nor promised anything; but where he has made such statements with a view to deceive a purchaser, it is justly held that no right of action arises on account of what he has said or promised, but that an action on the ground of fraud may be brought.

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

A certain debtor caused a letter to be sent to his creditor, which appeared to have been written by Titius, asking that he be discharged

from liability; and the creditor, having been deceived by this letter, discharged the debtor by an Aquilian stipulation and a release. If the letter should afterwards be ascertained to be forged, or worthless, the creditor, if he is over twenty-five years of age, will be entitled to an action on the ground of fraud, and the minor shall obtain complete restitution.

39. *Gaius, On the Provincial Edict, Book XXVII.*

If you offer yourself to Titius with respect to something of which you are not in possession, in order that another may obtain the use of the same; and you give security that the judgment will be complied with, even though you may be released, you will still be liable for fraud; and this was the opinion of Sabinus.

40. *Furius Anthianus, On the Edict, Book XL*

He who deceives anyone in order to induce him to enter upon an estate which is not sufficient to pay its creditors, shall be liable for fraud, unless he himself is the sole creditor; for then it will be sufficient to plead an exception on the ground of fraud against him.

TITLE IV.

CONCERNING PERSONS UNDER TWENTY-FIVE YEARS OF AGE.

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

The prætor proposed the following Edict in compliance with the principles of natural equity, by which he assumes protection of minors; for, as is known to every one, the judgment of persons of this age is weak and indecisive, exposed to many snares, and subject to many disadvantages, and therefore the prætor promised them aid by this Edict and relief from deception.

(1) The prætor says in the Edict: "When any transaction is said to have taken place with a minor under twenty-five years of age, I will examine what was done".

(2) It appears that the prætor promises assistance to minors under twenty-five years of age, for, after that time, manly vigor is held to have been established.

(3) For this reason, minors at present are subjected to the direction of curators until that age; nor should the administration of their own affairs be committed to them before that time, even though they may be capable of transacting them properly.

2. *The Same, On the Lex Julia et Papia, Book XIX.*

Nor will a minor obtain possession of his property from his curators any sooner on account of his having children; for what is provided by the law, namely: that a year is remitted for every child, the Divine Severus states has reference to capacity for public office, and not for the management of property.

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

Finally, the Divine Severus and our Emperor have interpreted the decrees of consuls and governors of this description as dictated by their own interest, for they themselves very rarely indulged minors in the administration of their own affairs, contrary to the established custom; and this is our practice to-day.

(1) Where anyone makes a contract with a minor, and the contract takes effect at some time after he has attained his majority, shall we consider the beginning or the end of the transaction? It is held, and has been established by a constitution that where a party confirms what he did while a minor, there is no ground for restitution. For this reason, Celsus, in the Eleventh Book of the Epistles, and in the Second of the Digest, treats this question in an able manner with reference to a case in which he was consulted by the Prætor Flavius Respectus. A minor under twenty-five years, and who, perhaps, was in his twenty-fourth year, had begun an action on guardianship against the heir of his guardian, and the result was that the said heir of the guardian was released before the trial was terminated; as the plaintiff had already

attained his majority of twenty-five years and therefore complete restitution was applied for. Celsus, accordingly, advised Respectus that the former minor could not readily obtain complete restitution; but if it were proved to him that this had been brought about by the craft of his adversary in order that he should be discharged as soon as the minor attained his majority, restitution could then be granted: "for," he said, "the minor only appeared to have been overreached on the last day of the trial, and the entire affair had evidently been planned so that the guardian might be discharged after the minor had attained his majority". Nevertheless, he admits that where only slight suspicion exists that his adversary had been guilty of deception, he could not obtain complete restitution.

(2) I know, also, that once the following question arose. A minor under twenty-five years of age meddled with the estate of his father, and, having attained his majority, exacted payment from certain of his father's debtors, and then demanded complete restitution in order to enable him to reject the estate. It was argued on the other side that after he became of age he had approved of what he had done while a minor; and it is our opinion that complete restitution should be granted for the reason that the commencement of the transaction should be considered. I am of the opinion that the same rule would apply if he had entered upon the estate of a stranger.

(3) It should also be taken into consideration with reference to the birth of a man twenty-five years of age, whether we should say that he is still a minor on his birthday before the hour at which he was born, so that if he has been deceived he may obtain restitution; and if he has not yet fully attained that age, it must be held that the time should be counted from one moment to another. Hence, if he was born in a bissextile year, Celsus thinks that it makes no difference whether he was born on the earlier or on the later day, but the two days are considered as one, and the latter is intercalated.

(4) In the next place, it must be considered whether relief should be given only to those who are their own masters, or also to those who are under the control of others; and the point which causes doubt is, that if anyone should say that the sons of a family are entitled to relief in matters relating to their *peculium*, the result would be that the benefit would accrue through them to those who are of age, that is to say, to their fathers, which was, at no time, intended by the prætor; for the latter promised assistance to minors and not to those who had attained their majority. I, however, think that the option of those who hold that the son of a family, who is a minor under twenty-five years of age, is entitled to complete restitution only in matters in which he himself has an interest; for example, where he is bound by some contract. Thus, if he is bound by the command of his father, the latter can certainly be sued for the entire amount, and, so far as the son is concerned, (since he himself can be sued to the extent of his solvency whether he is still under the control of his father, or has been emancipated, or disinherited, and, indeed, while he is living under the control of his father, an action to enforce a judgment can be brought against him), he should apply for relief, if he himself is sued. But whether this relief will also benefit his father, as sometimes happens in the case of a surety, is a matter to be considered, and I do not think that it will. Therefore, if suit is brought against the son, he can apply for relief, though if a creditor sues his father, no relief can be obtained except where money is loaned; and also, in this instance, if he borrowed the money by the order of his father no relief can be given him. Hence, if he made a contract without the order of his father, and was overreached, and an action *De Peculio* is brought against the father the son cannot obtain restitution, but if the latter is sued he can obtain it; nor does any difficulty arise on account of the son having an interest in the *peculium*, for the interest of the father is greater than that of the son, although in some cases the *peculium* belongs to the son; for example, where the property of the father is seized by the Treasury on account of a debt; for, in this instance, according to the Constitution of Claudius, the *peculium* of the son is separated from it.

(5) For this reason, where the daughter of a family has been deceived with respect to her dowry, when she gave her consent to the stipulation of her father, entered into subsequently,

that the dowry should be returned, or some one be found who would stipulate for it; I am of the opinion that she should be granted restitution, since the dowry is the personal property of the daughter herself.

(6) Where a minor under twenty-five years of age has given himself to be abrogated, and alleges that he was deceived in the arrogation; for example, that he, being a man of property, was arrogated by a party for the purpose of robbery; I hold that he should be heard if he applies for complete restitution.

(7) Where a legacy, or a trust is bequeathed to the son of a family, to be paid after the death of his father, and he is imposed upon; for instance, where he gave his consent to the agreement of his father that suit should not be brought for the legacy; it may be said that he is entitled to complete restitution, since he has an interest, by reason of his expectation of the legacy to which he is entitled after the death of his father. But where something is bequeathed to him, which relates to him personally, as for instance, a command in the army; it must be held that he is entitled to complete restitution, for it is his interest not to be deceived, since he does not acquire this for his father but is to have it himself.

(8) Where an heir is appointed on condition that he shall be emancipated by his father within a hundred days, he should notify his father at once; and if he did not do so when he was able, and his father would have emancipated him if he had known of it, it must be held that he is entitled to complete restitution, if his father is ready to emancipate him.

(9) Pomponius adds that in those instances in which the son of a family can obtain restitution in a matter in which his *peculium*, is concerned, his father can, as the heir of his son, claim complete restitution after his death.

(10) But where the son of a family has a *castrense peculium,* there is no question that in matters relating to the *castrense peculium* he will be entitled to complete restitution; just as if he had been deceived with respect to his own patrimony.

(11) A slave who has not reached the age of twenty-five years cannot, under any circumstances, obtain restitution, as it is the person of his master which is considered, and he must blame himself where he entrusted anything to a minor. Wherefore, if he makes any contract through a minor who has not reached the age of puberty, the same rule applies; as Marcellus states in the Second Book of the Digest. And if the free administration of his *peculium* should be granted to a slave who is a minor, his master, if he is of age, cannot obtain restitution on this account.

4. *Africanus, Questions, Book VII.*

For, whatever a slave does in a case of this kind, he is understood to do with the consent of his owner; and this will appear more clearly if the question arises with reference to an institorian action, or where a person over twenty-five years of age directed a minor to transact some business, and the latter was deceived while doing so.

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

Where, however, the slave was one who had a right to immediate freedom under a trust, and was imposed upon, as he suffered through default, it can be stated that the prætor will be obliged to grant him relief.

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

Relief is afforded by complete restitution of minors under twenty-five year's of age not only when they sustain some loss of property, but also when they are interested in not being annoyed with lawsuits and expense.

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

The prætor says: "Any transaction which is said to have taken place". We understand the term "transaction" to mean one of any kind whatsoever, whether it is a contract, or whether it is

not.

(1) Thus, if a minor purchases anything, if he sells anything, if he enters a partnership, or borrows money and is cheated, he will have relief.

(2) Also, if he has been paid money by a debtor of his father or by one of his own, and loses it, it must be held that he is entitled to relief; as the business was transacted with him. And, therefore, if a minor brings suit against the debtor, he should have curators present, in order that he may be paid, for otherwise a debtor cannot be compelled to pay him. At present, however, it is customary to deposit the money in a temple (as Pomponius states in the Twenty-eighth Book), so that the debtor may not be oppressed by the payment of excessive interest, or a minor creditor lose his money; or payment be made to the curators, if there are any. It is also allowed a debtor, by an Imperial Constitution, to compel a minor to have curators appointed for himself. But what if the prætor should order the money to be paid to a minor without the intervention of curators, and it should be paid? It may be doubted whether he will be secure. I am of the opinion, however, that if he was compelled to pay after pointing out that the creditor was a minor, he would be free from responsibility; unless someone might hold that he ought to appeal on the ground that he had suffered an injury. I believe, however, that the prætor would not hear a minor if he were to apply for complete restitution in a case of this kind.

(3) Relief is not only granted to a minor under these circumstances, but also where he intervenes in obligations contracted by others; for example, where he binds himself, or encumbers his property as a surety. Pomponius, however, appears to agree with those who make a distinction between a minor where an arbiter has appointed a party for the purpose of approving of sureties, and where his adversary has accepted him. It seems to me that, in all these instances, if the party is a minor, and proves that he has been circumvented, he will be entitled to relief.

(4) Relief is also granted in trials, whether the party who was overreached, brought suit, or was sued.

(5) Where, however, a minor has entered upon an estate, which is not sufficient to pay the creditors, he is given relief that he may be able to reject it; for in this instance also, he is deceived.

The same rule applies in the case of the possession of property or any other succession. Not only the son who meddled with the estate of his father will obtain restitution, but likewise any other minor belonging to the family will also be entitled to it, as for instance, a slave who is appointed heir and granted his freedom; for it must be held that if he meddled with the affairs of the estate, he can be relieved on the ground of his age, so that he may have a separation of his own property. It is evident that if he obtains restitution after entering upon the estate, that he must deliver up any portion of the same which has been mingled with his own property, and has not been lost through the infirmity of his youth.

(6) At the present time, it is the practice for minors to be relieved where they have failed to obtain profit.

(7) Pomponius also stated in the Twenty-eighth Book, that where a person rejects a legacy without anyone being guilty of fraud, or is taken advantage of in making a choice of two legacies, having selected the one of inferior value; or where he promises to give a man one or the other of two things, and gives him the more valuable one, he is entitled to relief, and it should be granted him.

(8) The question arose with respect to the point which states that relief must be granted to minors, even where they do not obtain profit, as where the property of a minor was sold, and someone comes forward who is willing to pay more for it; whether complete restitution should be made, on account of the profit which he failed to obtain? The prætors grant restitution every day under these circumstances, so that new bids may be offered. They do the

same thing with regard to property which ought to be preserved for minors. This, however, should be done with great care, otherwise no one would attend the sales of the property of wards; not even if they were conducted in good faith; and it is a principle to be thoroughly approved, that, with respect to property exposed to accident, no relief should be granted a minor as against the purchaser, unless it is established that there was corruption, or evident partiality of the guardian or curator.

(9) Where a minor has been granted restitution, and interferes with the affairs of an estate, or enters upon one which he had rejected, he can again obtain restitution to enable him to reject it; and this has also been stated in rescripts and opinions.

(10) Papinianus, however, says in the Second Book of Opinions, that where a slave is substituted for a minor as a necessary heir, and the minor rejects the estate, the said slave will become the necessary heir, and, if the minor obtains restitution, he will nevertheless remain free; but if, before the minor enters upon the estate in the first place and afterwards rejects it, the slave who was substituted for him with a grant of freedom, cannot become the heir, or be free; and this is not entirely true. For if the estate is not solvent, and the heir rejects it, the Divine Pius, as well as our Emperor, stated in a Rescript that, in the case of a minor who is a stranger, there will be ground for the substitution of a necessary heir; and where he says that he will remain free, it signifies apparently that he will not also remain the heir, since the minor obtains restitution after having rejected the estate; so that since the minor does not become the heir, but has a right of equitable action, he will undoubtedly continue to be the heir who once appeared as such.

(11) Moreover, if the heir did not appeal within the prescribed time, relief will be given him in order that he may appeal; supposing that he desires to do so.

(12) Moreover, relief is granted him where judgment is taken against him by default. It has, however, been settled that men of every age are entitled to a new trial in case of default, if they can prove that they were absent for some good reason.

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

Even where a minor has lost his case on account of contumacy, he can petition for the relief of complete restitution.

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

If, as the result of a judgment, the pledges of a minor are taken in execution, and sold; and he afterwards obtains restitution in opposition to the decree of the governor, or of the Imperial Procurator, it must be considered whether the property which was sold should not be recovered; for it is certain that money paid on account of the judgment must be refunded to the minor, but it is more to the interest of the latter to recover the property; and I think, in some instances, it should be allowed, that is if the minor would otherwise sustain great loss.

(1) Relief is also granted to a woman in the matter of her dowry, if, having been imposed upon, she gave more than her estate would warrant, or gave her entire patrimony.

(2) It must now be considered whether relief should be granted to minors only where they are imposed upon in contracts, or also where they are guilty of offences; for example, where a minor committed fraud with reference to property deposited, loaned, or subject to some other kind of contract, would he be entitled to relief if nothing came into his hands through the transaction? It is held that no relief should be granted to minors guilty of breaches of the law; and therefore, in this instance, no relief should be allowed, for where a minor commits a theft, or causes damage to property, he will not be entitled to relief. Where, however, after having committed the injury he could have confessed and thereby not be held liable in double damages, but preferred to deny what he had done; he should be granted restitution only that he may be treated as if he had confessed. Therefore, if he was able to make good the loss caused by his theft, rather than be sued for double or quadruple damages, relief will be granted him.

(3) Where a married woman, after being separated from her husband through her own fault, wishes to obtain relief, or her husband does so, I do not think that restitution should be granted, for this is not an ordinary offence, and if the minor has committed adultery relief cannot be granted him.

(4) Papinianus states that if a minor of from twenty to twenty-five years of age permits himself to be reduced to slavery — that is if he shares in the price paid for him — he is not entitled to restitution; and this is reasonable, for the case does not admit of restitution, as the party has changed his condition.

(5) Where a minor is said to have incurred the penalty for nonpayment of taxes, he will be entitled to complete restitution; but it must be understood that no fraud existed on his part, otherwise restitution will not be allowed.

(6) It is also impossible for restitution to be granted by a prætor against the freedom of his slave.

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

Unless where he obtains this favor from the Emperor for some good reason.

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

An action based on fraud, or an equitable action will lie for the amount to which the minor was interested in not having the slave manumitted; hence, whatever he could have had if he had not manumitted the slave must now be delivered to him.

Again, with reference to those articles belonging to his master which the manumitted slave purloined; a right of action exists against him, for their production, or for theft, or for the recovery of what was stolen; because he appropriated them after he had been manumitted; otherwise, where the crime was committed while he was in slavery, his master will not be entitled to an action against him after he has obtained his freedom. This is contained in a Rescript of the Divine Severus.

(1) What if a minor under twenty-five years of age, and over twenty, should sell a slave under this law, in order that he might be manumitted? I refer to one over twenty, as Scævola also mentioned this age in the Fourteenth Book of Questions; and it is the better opinion that the rule set forth in the Constitution of the Divine Marcus addressed to Aufidius Victorinus, does not include this case, that is, the one of a minor over twenty years of age. For this reason it should be considered whether relief can be granted to a minor over twenty years of age, he should be heard if he makes application before the slave obtains his freedom, for if he does so afterwards, he cannot. It also may be asked whether, if the party who makes a purchase under this law is a minor, he is entitled to restitution? If the freedom of the slave has not yet been granted he will be entitled to relief, but if he makes application after the appointed day has arrived, then the will of the vendor, if he has attained his majority, liberates the slave.

(2) Inquiry was made with respect to the following statement of facts. Certain youths, who were not of age, had accepted as curator a man named Salvianus, and he, having administered his trust for a time, obtained a municipal office through the favor of the Emperor, and procured from the prætor his release from the curatorship of the aforesaid minors during their absence. The minors then appeared before the prætor and asked for complete restitution, because the curator had been discharged contrary to the constitution, for it is not customary for parties to relinquish their guardianship unless they are absent beyond sea on public business, or when they are employed in the personal service of the Emperor; as where this was granted in the case of Menander Arrius the Councilor. Salvianus however, had obtained his discharge, and the minors, having been, as it were, imposed upon, petitioned the prætor for complete restitution. Arrius Severus, being in doubt, referred the question to the Emperor Severus, who, in answer to this consultation, stated in a Rescript to his successor, Benidius Quietus, that there was no reason for the intervention of the prætor, because it was not stated that a contract had been made with a minor under twenty-five years of age; but it was the duty

of the prince to interpose, and cause him who had been improperly excused by the prætor to resume the administration of the trust.

(3) It must also be noted that relief cannot be granted to minors indiscriminately, but only where proper cause is shown, and they prove that they have been taken advantage of.

(4) Again, restitution will not be granted where a person who has been conducting his business properly applies for restitution on account of some loss which resulted, not through his own negligence, but through inevitable accident; but it is not the mere occurrence of loss which confers the right of restitution, but the want of reflection which encourages deceit; and this Pomponius stated in the Twenty-eighth Book. Wherefore, Marcellus says in a note on Julianus, that where a minor purchased a slave whom he needed, and the slave soon after died, he was not entitled to restitution; for he was not taken advantage of when he purchased property which was absolutely necessary for him to have, even though it was mortal.

(5) Where anyone becomes the heir of a wealthy man, and the estate is suddenly destroyed; for instance, where lands were ruined by an earthquake, or houses were consumed by fire, or slaves escaped, or died; Julianus speaks in such a way in the Forty-sixth Book as to imply that a minor is entitled to complete restitution, but Marcellus says in a note on Julianus that complete restitution will not be allowed, as the party was not deceived on account of the infirmity of youth, when he entered upon a valuable estate, and that what happened to him through accident, might also happen to the most careful head of a household; but in the following instance, restitution can be granted to a minor, that is to say, where he entered upon an estate to which much property belonged that was liable to destruction; for example, land occupied "by buildings, but heavily encumbered with debt, and he did not foresee that the slaves might die. or the buildings be destroyed, or did not sell the property exposed to so many accidents quickly enough.

(6) The question is also asked, where one minor petitions for restitution against another minor, shall he be heard? Pomponius simply states that restitution should not be granted him; but I think that the prætor should investigate which one of them was imposed upon, and if they were both deceived, for instance, if one minor lent the other money and he lost it; then (according to Pomponius), he who borrowed the money and squandered or lost it, is in the better condition.

(7) It is clear that where a minor entered into a contract with the son of a family who was of age, then, as Julianus states in the Fourth Book of the Digest, and Marcellus in the Second Book of the Digest, he will be entitled to complete restitution; so that the rule relating to age receives more consideration than the Decree of the Senate.

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

Where a woman intervenes in behalf of a third party in the suit of a minor, no action can be granted him against the woman, but he, just like other persons, will be barred by an exception; because under the Common Law he will be entitled to restitution by an action against the original debtor; and this is the case if the original debtor is solvent, otherwise, the woman cannot invoke the aid of the Decree of the Senate.

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

In the investigation of cause, attention must be paid to the fact whether relief is to be granted to the minor alone, or also to those who have bound themselves in his behalf; as, for instance, sureties. Therefore, if I know that the party is a minor and have no faith in him, and you become surety for him, it is not just that the surety should be given relief, to my injury; hence the action on mandate should rather be refused the surety. In a word, it should be carefully weighed by the prætor who is more entitled to relief, the creditor or the surety; for the minor who is taken at a disadvantage will be liable to neither.

It will be more easy to state that no relief should be granted in the case of him who directed the creditor, for he was, so to speak, the adviser and persuader who was responsible for the

contract with the minor. Hence the point may arise whether a minor ought to apply for complete restitution against the creditor, or against the surety? I think the safer way would be to apply for it against both; for proper cause having been shown, and the parties being present — or while absent if they are in default through contumacy — the question as to whether complete restitution should be granted ought to be carefully weighed.

(1) Sometimes the restitution granted to the minor is *in rem;* that is to say, it is against the possessor of his property, although no contract was made with him; as, for example, where you purchased property from a minor and sold it to another party, he can sometimes petition for restitution against the possessor to prevent losing his property, or being deprived of it; and in this instance the case is either heard by the prætor, or the transfer is set aside and an action *in rem* is granted.

Pomponius also states in the Twenty-eighth Book, that Labeo held where a minor under twenty-five years of age sold a tract of land and gave possession, and the purchaser disposed of it; then, if the second purchaser was informed of what has been done, restitution can be granted against him, but if he was ignorant of the facts, and the first purchaser is solvent, this will not be done; but where he is not solvent, it will be more just to grant relief to the minor, even against the purchaser who was uninformed, although he bought the property in good faith.

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

It is evident that so long as he who purchased property from a minor, or the heir of said purchaser, is solvent, no decree should be granted against the party who purchased the property in good faith; and this also is the opinion of Pomponius.

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

But where restitution is granted, the second purchaser can have recourse against his vendor. The same rule applies where the purchase has passed through the hands of several persons.

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

When the case is heard, it also should be taken into consideration whether there is not perhaps some other action available, except the one for complete restitution; for if the party is properly protected by the usual remedy and the ordinary law, extraordinary relief ought not to be granted him; as, for instance, where a contract has been made with a ward without the authority of his guardian, and he does not become more wealthy in consequence.

(1) Moreover, it is stated by Labeo that where a minor has been fraudulently induced to enter a partnership, or even where he does this with a view to making a donation, no partnership exists, even among minors; and hence the prætor has no reason to intervene. Ofilius is of the same opinion, for the minor is sufficiently protected by operation of law.

(2) Pomponius also says in the Twenty-eighth Book, that when an heir was called upon to deliver certain articles to the daughter of his brother, upon the condition that if she were to die without issue, she should restore them to the heir, and the heir having died, she made provision for them to be restored to his heir; whereupon Aristo thought that she was entitled to complete restitution. Pomponius adds, however, that the bond given could be made the basis of a personal action for an uncertain amount of damages even in the case of a person who is of age, for the party is protected not only by the ordinary law, but also by the personal action.

(3) It is generally established that where a contract is not valid, the prætor should not interfere if this is certain.

(4) Pomponius also states with reference to the price in a case of purchase and sale, that the contracting parties are permitted to take advantage of one another in accordance with natural law.

(5) It should now be considered who those are who can grant complete restitution. The Prefect of the City, together with the other magistrates, as far as permitted by their jurisdiction, can grant complete restitution in other cases, as well as in those against their own decisions.

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

Prætorian prefects can also grant complete restitution against their own decisions, although no one can appeal from them. The reason for this distinction is, that an appeal is equivalent to a complaint that the decision is unjust; and complete restitution includes a petition for relief from the party's own error, or an allegation of the fraud of his adversary.

18. *Ulpianus, On the Edict, Book XI*,

An inferior magistrate cannot grant restitution in opposition to a decree of his superior.

(1) If, however, the Emperor has rendered the decision, he very seldom permits restitution, or allows a party to be introduced into his audience-room who alleges that he was imposed upon because of the infirmity of his youth; or says that matters which were favorable to him were not mentioned; or complains that he was betrayed by his advocate. Hence the Divine Severus and the Emperor Antoninus would not hear Glabrio Acilius, who petitioned for restitution against his brother without stating proper cause, after the case had been heard to its termination in their audience-chamber.

(2) The Divine Severus and Antoninus, when Percennius Severus petitioned for complete restitution, and two decisions had already been rendered, permitted them to be examined in their audience-chamber.

(3) The same Emperor stated in a Rescript to Licennius Fronto, that it was unusual for anyone, except the Emperor himself, to grant restitution after a decision had been rendered on an appeal by a magistrate appointed by the Emperor to preside in his place.

(4) But where a judge appointed by the Emperor hears the case, restitution cannot be made by anyone but the Emperor who appointed the judge.

(5) Complete restitution is granted not only to minors, but also to their successors, even though they themselves may be of age.

19. *The Same, On the Edict, Book XIII.*

Sometimes, however, we grant a successor a longer time than a year to begin proceedings, as is stated in the Edict, if his age should give occasion for it; for, after his twenty-fifth year, he will be entitled to the time granted by law; as, in this instance, he is held to have been deceived since he could have obtained restitution within the time allowed with respect to the deceased, but did not make application for it. It is clear that if the deceased had only a small portion of the available time remaining in which to obtain complete restitution, his heir, if a minor, will be granted time to obtain it after the completion of his twenty-fifth year, not the entire term prescribed, but only so much as the minor, who was his heir, was entitled to.

20. *The Same, On the Edict, Book XL*

Papinianus states in the Second Book of Opinions, that the time appointed for complete restitution should not be extended for the benefit of a party returning from exile, for the reason that he was absent, for he could have applied to the prætor through an agent, and did not do so, or could have made application to the governor in the place where he was. But where the same author says that he is not entitled to relief, on account of the punishment imposed upon him; his opinion is not correct, for what is there is common between a criminal offence and an excuse based upon the infirmity of youth?

(1) However, where anyone over twenty-five years of age, having joined issue within the time established by law for restitution, should afterwards abandon the case, the joinder of issue will be of no advantage to him in obtaining complete restitution; as has been very frequently set forth in rescripts.

21. *The Same, On the Edict, Book X.*

He is considered to have abandoned a case, not if he merely postpones it, but where he entirely renounces it.

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

Where complete restitution is demanded against the entry on an estate made by a minor, any expense which has been paid out for legacies, or for the value of slaves who have obtained their freedom by means of his entry, will not have to be refunded by the minor. In the same way, on the other hand, when a minor obtains restitution for the purpose of entering upon an estate, any business which has been transacted by his curator, for the disposition of property under the order of the prætor authorizing the sale of the same according to the form established by law, must be ratified; as Severus and Antoninus stated in a rescript to Calpurnius Flaccus.

23. *Paulus, On the Edict, Book XI.*

Where the son of a family transacts business under the mandate of his father, he cannot claim the benefit of restitution; for if another had given him the mandate he would not be entitled to relief, as, under these circumstances, the party principally interested would be of age, and he would be liable to loss. But if, in the end, the minor suffered loss because he was not able to recover the amount which he had expended from the party whose business he transacted, for the reason that he was not solvent, the prætor undoubtedly will come to his aid. If, however, the principal was a minor, and the agent the party of full age, the principal would not readily be heard, unless the business had been transacted by his order and he cannot be indemnified by his agent. Therefore, if a minor is taken advantage of while in the capacity of agent, the blame must be imputed to the principal who entrusted his business to a person of this description, and this also is the opinion of Marcellus.

24. *Paulus, Sentences, Book I.*

But where a minor voluntarily meddles with the business of a person who is of age, he is entitled to restitution to prevent loss from being incurred by the party who is of age; and if he refuses to do this, and he then is sued on the ground of business transacted, he will not be entitled to restitution against the action; but he may be compelled to surrender his right to complete restitution, in order to constitute the principal an agent in his own behalf, so that, by this means, he may be able to make good the loss which he suffered through the minor.

(1) Business transactions with minors should not, however, always be rescinded, but such matters should be based upon what is good and just, to prevent persons of this age from being subjected to great inconvenience, since, otherwise, no one would contract with them; and, to a certain extent, they would be excluded from commercial affairs. Hence the prætor ought not to interpose his authority unless there is manifest evidence of fraud, or the parties have acted with gross negligence.

(2) Scævola, our master, was accustomed to say that if anyone induced by the frivolity of youth, abandoned or rejected an estate, or the possession of property, and everything remained intact, he should by all means, be heard; but if, after the estate had been sold and the business settled, he should appear and claim the money which had been obtained by a substitute, his application should be denied; and, in a case of this kind, the court should be much more careful in granting restitution to the heir of the minor.

(3) Where a slave, or the son of a family, has deceived a minor, the father or the owner should be ordered to make restitution of whatever has come into his hands, and whatever he did not secure possession of, should be paid out of the *peculium*. If satisfaction cannot be obtained from either of these sources, and the slave was guilty of fraud, he either should be scourged, or surrendered by way of reparation. Where, however, the son of a family committed fraud, judgment should be rendered against him on that ground.

(4) Restitution should be granted so that every one may recover his entire rights. Therefore, where restitution is granted to a party who has been cheated in the sale of land, the prætor must order the purchaser to restore the land with the crops, and receive the price paid for the same; unless when he paid it, he was not ignorant that the vendor would squander it, as where money is lent to a person to be expended. Restitution is not so freely granted in the case of a sale, however, for the reason that the purchaser pays the vendor a debt which he is obliged to pay, as nobody is obliged to loan money; for although the contract in its origin may be of such a character that it ought to be annulled, nevertheless, if the purchase-money is required to be paid, the purchaser should not, by any means, be subjected to loss.

(5) No peculiar action or undertaking arises from this Edict, for all depends upon the examination by the prætor.

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

There is no question about the following, namely, that where a minor pays something which he does not owe, in a matter where demand for restitution is not allowed by the Civil Law, he is entitled to a prætorian action for its recovery; since such a demand is usually granted on proper grounds, even to persons who are over twenty-five years of age.

(1) Where a young man of this kind, who is entitled to restitution applies for it, it should be granted upon his application, or upon that of his agent, who has been expressly directed to ask for it; but where the party only alleges a general mandate for transacting the business of his principal, he should not be heard.

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

Where any doubt arises with reference to a special mandate when restitution is applied for; the matter can be arranged by the introduction of a stipulation that the principal will ratify the transaction.

(1) Where the person who is said to have been imposed upon is absent, his defender should give security that the judgment will be complied with.

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

Restitution should be granted under all circumstances to a father in behalf of his son; even though the latter does not consent to it; for the reason that a risk attaches to the father who is liable to an action *De Peculio*. From which it is evident that other relatives or connections are in a different legal position, and should not be heard, except where they make application with the consent of the minor; or where the life of the minor is such that there is reason for him to be prohibited from having charge of his property.

(1) Where a minor borrows money and squanders it, the Proconsul should refuse to grant his creditor an action against him. Where, however, the minor lends money to a party who is needy, no other proceedings should be taken, except that the minor should be ordered to assign to his creditor those rights of action which he has against him to whom he loaned the money. If he has purchased, with the money, some land for a higher price than he should have been asked, the matter ought to be settled by ordering the vendor to take back the land and return the price, so that the creditor may recover his money from the minor without any loss to another.

From this we learn what should be done where a minor purchases with his own money something for more than it is worth; but in this, as well as in the former instance, the vendor who returns the purchase-money must also return the interest which he obtained, or which he ought to have obtained from the use of said money, and shall receive the profits of the land by which the minor was enriched. Also, on the other hand, where a minor sells property for less than it is worth, the purchaser must be ordered to return to him the land with its profits, and the minor must restore as much of the price as enured to his profit.

(2) Where a minor under twenty-five years of age gives a release to his debtor without good

reason, he is entitled to an action for restitution not only against the debtor, but also against his sureties; as well as an action for any pledges delivered to him; and where he had two principal debtors, and gave one of them a release, he will have a right to an action for restitution against both.

(3) From this we understand that if a minor should make a renewal of a contract to his disadvantage; for instance, if he should, for the purpose of novation, transfer the liability from a solvent debtor to one who is insolvent, he must be granted restitution against the former debtor.

(4) Restitution also must be granted against those who cannot be proceeded against on the ground of fraud, unless they are persons who are excepted by some special law.

28. *Celsus, Digest, Book II*.

Where a minor under twenty-five years of age obtains restitution against a party whom he sued on the grounds of guardianship, the guardian cannot, on this account, have the right to a counter action on guardianship restored to him.

29. *Modestinus, Opinions, Book II*.

Even where it can be established that a minor has been imposed upon by his father, who was also his guardian, and a curator is afterwards appointed for him, the latter cannot be prevented from applying for complete restitution in behalf of the minor.

(1) Where a female ward who had judgment rendered against her in a case based on curatorship, wished to obtain restitution with reference to one part of the decision; and as it appeared that she had succeeded with reference to the other matter in the case, the plaintiff, who was of age, and had at first acquiesced in the decision, claimed that a new trial should be granted. Herennius Modestinus answered to this, that if the point with reference to which the female ward requested complete restitution had no connection with the others, no reason was alleged for which the plaintiff could demand that the entire judgment should be set aside.

(2) Where a minor obtains complete restitution on account of his youth, and by reason of this rejects his father's estate, none of the creditors of the latter being present, or having been summoned by the governor for the purpose of instituting proceedings; the question arises whether restitution should be considered to have been properly granted? Herennius Modestinus gave it as his opinion that since the creditors were not summoned, and the judgment of restitution had been rendered without this, the rights of the creditors were not in the least impaired.

30. *Papinianus, Questions, Book III*.

Where a son, who has been emancipated, fails to appear to demand possession of an estate, but petitions for restitution, and having reached the age of twenty-five years brings suit for a legacy under his father's will; he is held to have abandoned the case, for if the time for obtaining possession of the property has not elapsed, still, having chosen to accept the will of the deceased, he must be considered to have rejected the benefit of the intervention of the prætor.

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

Where a woman, after becoming an heir, obtained complete restitution for the purpose of enabling her to reject the estate; I gave it as my opinion that the slaves belonging to the estate who had been manumitted by her in proper form, under a trust, were entitled to retain their freedom, and that they would not be compelled to pay twenty *aurei* in order to retain it, as they appeared to have obtained it in the most approved manner. For if any of the creditors had recovered their money from her before she had obtained restitution, the claims of others against those who had been paid, with a view to having the money divided among them, would not be allowed.

32. *Paulus, Questions, Book I.*

A minor under twenty-five years of age having applied to the governor convinced him, from his appearance, that he was of age, which was not the case; but his curators, as they knew him to be a minor, continued to conduct his affairs. In the meantime, after his age had been proved, and before he had completed his twenty-fifth year, certain sums of money that were due to the minor were paid to him, which he squandered. I ask who is responsible for the loss; for if the curators had been in error, and thinking that he had attained his majority, had relinquished the administration of his property, and rendered their accounts, would they have to assume the risk for the time which had passed after proof of his age had been established? I answered that those who have paid their debts are released by operation of law, and cannot be sued a second time. It is evident that the curators who, knowing the party to be a minor, persevered in the discharge of their duties, ought not to have allowed him to receive the money which was due; and on this account suit should be brought against them. If, however, they themselves accepted the decision of the governor, and ceased to administer their trust, or even rendered an account; they are in the same legal position as other debtors, and therefore should not be sued.

33. *Aburnius Valens, Trusts, Book VI.*

Where a minor under twenty-five years of age is requested to manumit his slave, who is worth more than the legacy bequeathed in the will to said minor, and he accepts the legacy; he cannot be forced to grant freedom to the slave if he is ready to return the legacy. Julianus was of the opinion that, as minors have the right to decline a legacy if they are unwilling to manumit a slave; so a minor, in this instance, if he returns the legacy, is released from the necessity of manumission.

34. *Paulus, Sentences, Book I.*

Where a minor under twenty-five years of age lends money to the son of a family who is also a minor, the position of the one who spends the money is the better; unless he who receives it was found to be the more wealthy for this reason, at the time when issue was joined.

(1) Where minors have agreed with one another to submit their case to a certain judge, and have, with the consent of their guardian, stipulated to abide by his decision, they can legally ask for complete restitution against an obligation of this kind.

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

Where, in a purchase of property at auction, another party makes a better bid than a minor, if the latter asks for complete restitution, he must be heard, if it is proved that he was interested in the purchase of the property, for instance, because it had belonged to one of his ancestors; but this is only upon condition that he offers to the vendor the amount of the excess bid by the other party.

36. *Paulus, Sentences, Book V.*

A minor under twenty-five years of age who has failed to make some allegation, can do so by the aid of complete restitution.

37. *Tryphoninus, Disputations, Book III.*

The aid granted by complete restitution was not provided for the imposition of penalties; and hence where a minor has once neglected to bring an action for injury, he cannot recover the right to do so.

(1) Where the sixty days have elapsed, during which a man can accuse his wife of adultery by the right of a husband; complete restitution will be refused him, and if he now wishes to recover the right which he failed to exercise, how would this differ from an application to be released from the commission of an offence; that is to say, from the institution of a suit for the purpose of annoyance. Since it is a well established principle of law that the prætor should not

come to the aid of parties who have committed crimes, or have instituted vexatious proceedings; complete restitution will not apply under such circumstances. In a case of crime, a minor under twenty-five years of age is not entitled to complete restitution, at all events, where more serious offences are concerned; unless, when compassion for his youth may sometimes cause the judge to impose a milder penalty. But with reference to the *Lex Julia* which relates to the punishment of adultery, where a minor confesses that he has been guilty of adultery, he cannot escape the penalty for this offence; nor, as I have stated, can he do so where he commits any of these offences which the law punishes as it does adultery; for instance, where he knowingly marries a woman who has been convicted of adultery; or does not dismiss his own wife who was caught in adultery; or where he profits by the adultery of his wife; or accepts a reward for the concealment of unlawful intercourse; or permits his house to be used for the commission of fornication or adultery; for the excuse of youth cannot be pleaded against legal provisions, where a man although he invokes the law himself violates it.

38. *Paulus, Decrees, Book I.*

Æmilius Larianus purchased from Obinius the Rutilian tract of land, subject to the condition of payment on a certain day, and paid down a part of the purchase-money; it being understood that if, within two months from that date, he should not have paid half of the remainder of the price, the sale should be considered void; and also, if he did not pay the remainder within two months more, the sale should also be held to be void. Larianus, having died before the first two months had elapsed, was succeeded as heir by Rutiliana, a minor, whose guardians neglected to make payment within the specified time. The vendor, having served several notices upon the guardians, after a year had elapsed sold the property to Claudius Telemachus; and then the ward applied for complete restitution, and having lost the case before the Prætor, as well as the Prefect of the City, she appealed. I was of the opinion that the decision was correct, because her father, and not herself, made the contract; the Emperor, however, decided that, as the day when the condition was to be fulfilled came during the time when the girl was a ward, this was good cause why the condition of the sale should not be observed. I stated that she was rather to be granted restitution for the reason that the vendor, by notifying her guardians after the time when it was agreed that the sale should be annulled, and by demanding the purchase-money, should be held to have abandoned the condition which was for her benefit, and that I was not influenced by the fact that the time had afterwards elapsed; any more than I would have been had a creditor sold a pledge after the death of a debtor, when the day of payment had passed. Still, because the law of conditional avoidance was displeasing to the Emperor, he decreed that complete restitution should be granted. He was also influenced by the fact that former guardians, who had not applied for restitution, had been declared to be liable to suspicion.

(1) When it is stated that relief is not ordinarily granted to the son of a family after he has been emancipated, if he is still a minor, with reference to matters which he had neglected while under paternal control; this is only held to be the case where he would otherwise acquire property for the benefit of his father.

39. *Scævola, Digest, Book II.*

Where minors appeared before the governor, within the proper time, to obtain relief, and petitioned for complete restitution, and proved their age; and judgment having been granted on account of their minority; their opponents, for the purpose of preventing further proceedings before the governor, appealed to the Emperor, and the governor deferred the other matters which were to be decided in the action until the result of the appeal was ascertained; the question arose whether, when the examination of the appeal was concluded, and the appeal was dismissed, and the parties found to have become of age, they can bring the case to a termination, since it was not their fault that it was not finished? I answered that, considering the question as stated, the case could be tried just as if the parties were still under age.

(1) Lucius Titius purchased a tract of land sold by the curators of a minor, and held it in his possession for nearly six years, and greatly improved the property. I ask whether the minor has the right of complete restitution against Titius, the purchaser, if his curators are solvent? It is my opinion, from all that has been stated, that the minor would hardly be entitled to restitution, unless he preferred to reimburse the *bona-fide* purchaser for all the expense which the latter could prove he had incurred, and especially as he could readily obtain relief, since his guardians were solvent.

40. *Ulpianus, Opinions, Book V*.

A minor under twenty-five years of age obtained a judgment ordering that a legacy, based upon a trust, be paid to him; he gave a release for it, and the debtor furnished him security, just as if he would have done if the money had been borrowed. Under these circumstances, the minor is entitled to complete restitution; for the reason that he had obtained a right to bring an action for money on account of a judgment, and by a new contract he had changed that right for one for the institution of proceedings of another kind.

(1) A minor under twenty-five years of age, without proper deliberation, surrendered land which belonged to his father in settlement of debts shown by the accounts to belong to the guardianship of other minors, whose affairs his father had transacted. Complete restitution was ordered that matters might be equitably restored to their former condition, and the amount of interest which appeared to be due on account of the guardianship was calculated and set off against the amount of the profits received.

41. *Julianus, Digest, Book XLV*.

When a judge orders land to be restored where a minor has been overreached in a sale, and directs him to return the price of the same to the purchaser, and he is unwilling to take advantage of complete restitution, having changed his mind; the minor is entitled to an exception against the party demanding the purchase-money, as in the case of *res judicata;* because every one is permitted to reject what was introduced for his own benefit. Nor can the purchaser complain if he is restored to the same condition in which he was placed by his own act, and which he could not have changed if the minor had not sought the aid of the prætor.

42. *Ulpianus, On the Office of Proconsul, Book II*.

The governor of a province can grant complete restitution to a minor, even against his own decision, or that of his predecessor; because minors can, on account of their age, obtain the same benefit which an appeal confers upon persons who have reached their majority.

43. *Marcellus, On the Office of Governor, Book I*.

The age of a party who states that he is over twenty-five must be proved by investigation, because by this means his complete restitution, as well as other matters, may be prevented.

44. *Ulpianus, Opinions, Book V*.

All the acts of minors under twenty-five years of age are not invalid, but only those of such as, after investigation, are ascertained to have been overreached; as where they were imposed upon by others, or were deceived by their own credulity, or lost something which they formerly had, or failed to obtain some profit which they could have acquired, or subjected themselves to some liability which they ought not to have assumed.

45. *Callistratus, Monitory Edict, Book I*.

Labeo states than an unborn child is entitled to an action for restitution, where he has lost something by usucaption.

(1) The Emperor Titus Antoninus stated in a Rescript that where a minor alleged that his adversary had been discharged through the fraud of his guardian, and wished to begin a new action against him, he could first bring suit against his guardian.

46. *Paulus, Opinions, Book II.*

Where anyone voluntarily undertakes to defend a minor in a trial, and the latter loses his case, suit can be brought against him to enforce the judgment; and the youth of the party whom he defended will be of no benefit to him in obtaining restitution, since he cannot object to the judgment. From this it appears that the minor, on whose account judgment was rendered against him, cannot apply for the aid of restitution against the decision.

47. *Scævola, Opinions, Book I.*

A guardian, being pressed by creditors, made a *bona-fide* sale of the property of his ward, and his mother protested against the sale to the purchasers. I ask, since the property was sold on the demand of the creditors, and nothing could reasonably be alleged concerning the corruption of the guardian, whether the ward was entitled to complete restitution? I answered that inquiry must be made in order to determine this; and therefore, if there was just cause for restitution, it ought not to be refused because the guardian was not guilty of any offence.

(1) A guardian of minors sold certain lands which he held in common with his wards, and of which he had charge. I ask if the minors are entitled to complete restitution by the decree of the prætor, or whether the sale should be rescinded only so far as they had an interest in the common property? I answered that it should be rescinded to that extent; unless where the purchaser desired to have the entire contract rescinded, because he was unwilling to purchase only a share in the land. I also ask whether the purchaser should receive from the wards, Seius and Sempronius, the purchase-money, with interest; or whether he should receive it from the heir of the curator? I answered that the heir of the curator would be liable, but that actions would be granted against Seius and Sempronius for the shares which they owned in the land; at all events, if the money received had come into their hands to that amount.

48. *Paulus, Sentences, Book I.*

Where a minor obtains complete restitution in a matter for which he became surety, or gave a mandate, he does not release the principal debtor.

(1) A minor sold a female slave; if the purchaser manumitted her, the minor could not obtain complete restitution on this account, but he would be entitled to an action against the purchaser to the extent of his interest.

(2) Where the condition of a woman under twenty-five years of age becomes worse on account of an agreement relating to her dowry; and she made such a contract as no woman who had attained her majority would ever make, and for that reason she wished to rescind it, she should be heard.

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

Where property belonging to a minor or a ward which the law does not forbid to be sold, is alienated, the sale is valid. If, however, great loss results to the ward or the minor, even if there is no collusion, the sale may be rescinded by complete restitution.

50. *Pomponius, Letters and Various Passages, Book IX.*

"Julius Diophantus, to his friend Pomponius, Greeting. A minor under twenty-five years of age, with the intention of renewing a contract, intervened in behalf of the party who was liable in an action which would be barred by lapse of time, while ten days of said time still remained, and he afterwards obtained complete restitution. Should the right of restitution be granted to the creditor against the former debtor, for ten days, or for a longer period? I held that so much time should be granted from the day of complete restitution as remained, and I wish that you would write to me what you think about it." I answered, I undoubtedly think that your opinion with respect to the right of action dependent upon the time in which the minor intervened, is the more correct one; and therefore that the pledge which the former gave will still remain encumbered.

TITLE V.

CONCERNING THE CHANGE OF CONDITION.

1. *Gaius, On the Provincial Edict, Book IV. Capitis Minutio* is a change of condition.

2. *Ulpianus, On the Edict, Book XII.*

This Edict has reference to such changes of condition as happen without affecting the rights of citizenship. But where a change of condition takes place either through loss of citizenship or of freedom, the Edict will not apply, and such persons cannot, under any circumstances, be sued, but it is clear that an action will be granted against those into whose hands their property has passed.

(1) The prætor says: "If any man or woman is said to have suffered the loss of civil rights after having performed some act, or made some contract, I will permit an action to be brought against him or her, just as if such change of condition had not occurred."

(2) Those whose condition has been changed remain naturally bound, for the reason which existed before said change took place; but if they arose afterwards, anyone who agrees to pay the said parties money, or enters into a contract with them, will have only himself to blame, so far as relates to the terms of this Edict. Sometimes, however, an action should be granted where a contract is made with them after their change of condition; and, indeed, where the party is arrogated, there is no difficulty, for then he will be liable just like the son of a family.

(3) No one is exempt from the penalty for crime, even though his civil condition be changed.

(4) Where a party has arrogated his debtor, his right of action against him will not be restored after he becomes his own master.

(5) This right of action is perpetual, and is granted both to and against heirs.

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

It is established that children, when they follow their father who has been arrogated, sustain a loss of civil rights, since they come under the control of another, and change their family.

(1) A change of condition evidently takes place where a son or other persons are emancipated, since no one can be emancipated without having been first reduced to a fictitious servile condition. The case is entirely different where a slave is manumitted, as a slave enjoys no civil rights whatever, and therefore he cannot change his condition:

4. *Modestinus, Pandects, Book I.*

For he first begins to have a civil status on the day when he is manumitted.

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

A change of condition takes place by loss of citizenship, as in the case of the interdiction of fire and water.

(1) Those who desert lose their civil rights, and they are said to desert, who abandon the person under whose command they are, and place themselves in the class of enemies; and this applies to persons whom the Senate declares to be enemies, or renders them such by an enactment to the extent that they forfeit their citizenship.

(2) It should now be considered what things are lost by a change of civil status; and in the first place, with reference to that loss of condition which happens when citizenship is retained, and by which it is established that a party is not deprived of his public rights; for it is certain that the rank of magistrate, senator, or judge is preserved.

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

For other public offices are not lost by a person whose status is changed in this way; for a change of status deprives a man of certain private and domestic rights, but it does not deprive

him of those of citizenship.

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

A change of condition does not deprive a person of the rights of guardianship; except in those cases where they are given to parties who are subject to the authority of others; and therefore guardians appointed by will, by law, or by a decree of the Senate will still remain such; but legal guardianships based on the law of the Twelve Tables are abrogated, for the same reason as legitimate inheritances, because they are given to agnates who cease to be such when their families are changed. Both inheritances and guardianships based upon new laws are generally so bestowed that the parties who receive them are designated by their natural relations; as, for instance, where decrees of the Senate confer inheritances on mothers and sons.

(1) Obligations arising from injuries, and actions derived from crimes, follow the individual everywhere.

(2) Where a party is deprived of freedom, he changes his condition in consequence, and no right of restitution can be granted against a slave, because a slave cannot be bound so as to be liable even in an action under prætorian jurisdiction; but an equitable action will be granted against his master, as Julianus asserts, and unless he is defended for the entire amount, an order must be granted me to seize the property which he formerly held.

(3) Likewise, where citizenship is forfeited, there is no justice in admitting restitution against a party who has lost his property, and having left the city, goes into exile stripped of everything.

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

Those obligations which are understood to be fulfilled in accordance with natural law, it is evident cannot be lost by a change of condition, because no civil rule can destroy natural rights; therefore a right of action for dowry which is founded on what is good and equitable, will still remain unimpaired after a change of condition.

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

So that a woman, even after she has been emancipated, may bring suit.

10. *Modestinus, Differences, Book VIII.*

Where a legacy is left to be paid every year, or every month, or a legacy of habitation is bequeathed, it is extinguished by the death of

the legatee; but where there is a change of condition it continues without interruption, for the reason that a legacy of this kind is rather dependent upon fact than upon law.

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

There are three kinds of changes of condition, the greatest, the intermediate, and the least; as there are three conditions, which we may have, namely, those of freedom, citizenship, and family. Therefore, when we lose all of these, that is to say freedom, citizenship, and family, the greatest change of condition ensues; but where we lose citizenship and retain freedom, intermediate loss of condition occurs; and when freedom and citizenship are retained, and only the family position is altered, it is established that the least change of condition takes place.

TITLE VI.

WHAT THE GROUNDS ARE ON WHICH PERSONS OVER TWENTY-FIVE YEARS OF AGE ARE ENTITLED TO COMPLETE RESTITUTION.

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

No one will refuse to acknowledge that the basis of this Edict is perfectly just; for where a man's rights have been impaired during the time when he was in the service of the State, or

where he suffered some misfortune, it affords a remedy; and relief is also granted against such persons, so that whatever occurred will neither benefit nor injure them.

(1) The following are the terms of the Edict: "Where any portion of the property of a party has been injured while he was under duress, or, without the existence of fraud, absent in the service of the State, or in prison, or in slavery, or in the power of the enemy; or has permitted the time to elapse for beginning an action, or where anyone has acquired property by use, or obtained anything and lost it by want of use; or has been released from liability to be sued, because of lapse of time, and he being absent, was not defended; or was in chains; or had made no provision by which he might be sued; or, when it was not lawful for him to be brought into court against his will, no defence was offered for him; or when an appeal was made to a magistrate or to someone acting as magistrate, and his right of action was lost, withany fraud on his part; in all these instances I will grant an action within the year during which the party had the right to apply. Moreover, where any other just cause seems to exist, I will grant complete restitution, when this is authorized by the laws, the plebiscites, the decrees of the Senate, or the edicts and the ordinances of the Emperors."

2. *Callistratus, Monitory Edict, Book II*.

This Edict, so far as it relates to those who are included therein, is not much used at present, as justice is administered in the case of such persons by extraordinary procedure, based upon the decrees of the Senate and the Imperial Constitutions.

(1) Those persons are chiefly relieved under this head who are absent on account of fear; that is to say, where they were not deterred by alarm that had no foundation.

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

Anyone is considered to have been absent on account of fear who remains away through just apprehension of death or corporeal torture, and this must be ascertained from its effect upon him; for it is not sufficient that, influenced by any kind of apprehension, he remained in terror, but the determination of this fact is the duty of the judge.

4. *Callistratus, Monitory Edict, Book II*.

Those who are included who, without fraudulent intent, were absent in the service of the State. The expression "fraudulent intent" must be understood to have reference to a case in which a person who can return, does not do so and is not relieved, in case any wrong has been committed against him during his absence; as, for instance, where he remained away for the purpose of obtaining some substantial advantage for himself while he was absent in the service of the State, he would be deprived of this privilege.

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

The case would be the same where he contrived to be absent or took care to do so, even if he obtained no benefit by it; or if he departed too soon; or where the cause of his absence originated in a lawsuit. The addition of fraudulent intent refers to parties who are absent in the service of the State, and not to those who are absent on account of fear, since there is no fear where fraud is involved.

(1) Parties, however, who are employed in public offices at Rome, are not considered to be absent in the service of the State:

6. *Paulus, On the Edict, Book XII*. As, for example, magistrates.

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

It is evident that soldiers who are stationed at Rome must be considered as absent in the service of the State.

8. *Paulus, Abridgments, Book HI*.

Relief is granted to municipal envoys by a Constitution of the Emperors Marcus and

Commodus.

9. *Callistratus, Monitory Edict, Book II*.

Relief is also granted to anyone who is in prison, which not only refers to those who are in public prisons but also to persons who are kept in confinement by thieves, or robbers, or by the employment of resistless force. The term has a broader signification, for those also are considered to be imprisoned who are confined in stone quarries, because it makes no difference whether they are restrained by walls, or by fetters. Labeo thinks, however, that the term should only be understood to mean legal imprisonment.

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

Those persons are also in the same position who are guarded by soldiers, attendants of the Magistrates, or Municipal Authorities, where it is proved that they are unable to manage their own affairs. We also consider those to be under restraint who are bound to such an extent that they cannot appear in public without disgrace.

11. *Callistratus, Monitory Edict, Book II*.

Relief is also granted to those who are in slavery, whether, being freemen, they served as slaves in good faith, or whether they were simply detained.

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

He also, who is engaged in litigation with reference to his status is not included in this Edict, as soon as the case is brought into court; and therefore he is considered to be in slavery only so long as proceedings of this kind are not instituted.

13. *Paulus, On the Edict, Book XII*.

Labeo very properly says that a party who has been appointed heir, and granted his freedom, is not included in the terms of the Edict before he really becomes the heir; for before that, he cannot hold property, and the prætor speaks of men who are free.

(1) I am of the opinion, however, that the son of a family conies within the terms of this Edict where his *castrense peculium* is involved.

14. *Callistratus, Monitory Edict, Book II*.

Relief is also granted to him who is in the power of the enemy, that is to say who has been captured by him, for it must not be thought that any benefit is accorded to deserters, to whom the right to return is denied. Those, however, who are in the power of the enemy may be considered to be included in that part of the Edict, in which persons who have been in slavery are mentioned.

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

Relief is granted to persons captured by the enemy, where they return under the right of *postliminium*, or where they die; since they cannot appoint an agent, while the others above mentioned can be readily aided by means of one; with the exception of those who are held in slavery. I think, however, that aid can be rendered in behalf of a party who is in the power of the enemy, if a curator is appointed for the management of his property, as is generally the case.

(1) Relief is granted to a child born in the hands of the enemy, if he has the right to return, just as to one who was captured.

(2) Where a man is placed in possession of the house of a soldier for the purpose of preventing threatened injury; and the prætor grants possession to anyone while he is present, he will have no right to demand restitution; but, where the custodian was absent, it must be held that he is entitled to relief.

(3) Where the prætor says in the Edict: "Or afterwards" without anything further, it must be

understood that if a possessor in good faith held the property before the absence of the owner, and the possession terminated on his return, he would have ground to apply for restitution, not at any time, but only where this happened soon after his return; that is to say, during the time required to find a lodging, arrange his baggage, and seek an advocate; for Neratius states that he who defers an application for restitution should not be heard.

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

Relief is not granted to persons who are negligent, but only to those who are hindered by force of circumstances. All this is to be referred to the judgment of the prætor; that is to say, he must only grant restitution where a person could not join issue by reason of want of time, and not where he was guilty of negligence.

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

Julianus stated in the Fourth Book, that relief could not only be granted to a soldier against the party in possession of an estate, but also against those who had purchased from the possessor; so that if the soldier should accept the estate, he can recover the property, but if he does not accept it, prescription would evidently continue to run afterwards.

(1) Where a legacy has been bequeathed in the following terms: "Or for every year, that he shall remain in Italy"; restitution may be granted so that he may receive the amount as if he had been in Italy, as Labeo states; and Julianus in the Fourth Book, and Pomponius in the Thirtieth Book, approved of this opinion; for the right of action is not extinguished through lapse of time where the aid of the prætor becomes necessary, but the case is conditional.

18. *Paulus, On the Edict, Book XII*.

It must be remembered that we grant the aid of restitution when the parties have attained their majority, only where they attempt to recover their property; and not where they desire relief to be given them, for the purpose of gain, or to inflict a penalty or loss on some other person.

19. *Papinianus, Questions, Book III*.

Moreover, if a purchaser, before obtaining a title to property by prescription, is captured by the enemy, it is settled that the possession, which was interrupted, is not restored by the right of *postliminium;* because prescription is not operative without possession, for possession is generally a question of fact, and this does not come under the rule of *postliminium*.

20. *The Same, Questions, Book XIII*.

A prætorian action cannot be granted to the purchaser, since it would be most unjust to deprive an owner of anything where this was not done by use; nor can that be understood to be lost which was not taken away by another.

21. *Ulpianus, On the Edict, Book XII*.

The prætor also says: "Where anyone acquires property by use, or loses it by non-user, or is released from liability because his right of action is barred by lapse of time when the party was absent and no defence was made for him." The prætor inserted this clause so that, just as he comes to the relief of the above mentioned persons, to prevent them from being taken advantage of; so also, he may intervene to prevent them from taking advantage of others.

(1) It should be noted that the prætor expresses himself more fully, where he grants restitution against those who are absent, than where he grants it to them; for, in this instance, he does not enumerate the persons against whom he gives relief, as above, but he adds a clause which includes all who are absent and are not defended.

(2) This restitution is also granted whether those who are absent and are not defended have obtained a title to the property by prescription, either by themselves or through persons under their control, but only where none of them appeared as a defender; for if there was an agent, as you have someone to bring suit the other party should not be disturbed. Moreover, if no defender appeared, it is perfectly just that relief should be granted; and there is the more

reason for this, if any of those who were not defended remain concealed; as the prætor promises in the Edict to grant possession of the property and, if the case requires it, it may be sold; but where the parties do not remain concealed, although no one appears to defend them, he promises merely to give possession of the property.

(3) A party is not considered to be defended where someone voluntarily appears as his representative, but where he is requested by the plaintiff and does not fail to conduct the defence; and a complete defence must be understood to be one where the party does not avoid the trial, and gives security to comply with the judgment.

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

It must, therefore, be remembered that this Edict is only operative where when the friends of the party were asked whether they would defend him, or where there was no one who could be asked to do so; for an absent person is not considered to be defended if the plaintiff of his own accord calls upon him, and no one offers himself to conduct the defence, and thus must be established by evidence.

(1) Therefore, as the prætor is not willing that the parties should suffer loss; so, on the other hand he does not permit them to obtain any advantage.

(2) Labeo states that this Edict also has reference to insane persons, infants, and municipalities.

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

The prætor says: "Or was in prison, and had made no provision by which he could be sued." Persons of this kind are added with good reason, for it could happen that a party might be imprisoned, and still be present, whether he was placed under restraint, by the authorities, or by private individuals; for it is well settled that a person who is imprisoned can acquire property by use so long as he is not in slavery. Restitution will not apply where the party who is in prison has someone to conduct his defence.

(1) A person who is in the power of the enemy cannot acquire property for himself by use, nor can he, as long as he is in captivity, complete possession which had begun to run; nor, if he returns under the right of *postliminium*, can he recover the acquisition of ownership by use.

(2) Moreover, Papinianus states that a person should be granted relief who, during captivity, has lost the possession of land or the quasi possession of the usufruct of the same; and he thinks that it is just that the profits received from the usufruct by another, in the meantime, should be restored to the captive on his return.

(3) It is evident that those who are under the control of the captive can acquire property by use, through their *peculium;* and it will be just that under this clause relief should be granted to those who are present; that is to say, to such as are not in captivity, where anything was acquired by another by usucaption when they were not defended. But where the time for bringing an action against the captive has elapsed, relief will be granted against the party who brings it.

(4) The prætor next adds: "Or makes no provision by which he could be sued"; and if, while he was doing so, the acquisition by use should be completed, or something else above mentioned should happen, restitution should be granted. There is reason in this, for an order of court to place the party in possession of the property is not always sufficient, because sometimes conditions are such that possession of the property of a person who is concealing himself cannot be given; as, for example, where the action is barred by lapse of time, while the party is seeking an advocate, or something else occurs to delay the trial.

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

The Edict also has reference to those who, when sued, attempt to embarrass the plaintiff, and endeavor by delay and artifice to prevent the trial of the case.

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

In like manner, we say that it has reference to a person who conceals himself, not for the purpose of avoiding a suit, but because he is impeded by a press of business.

26. *Ulpianus, On the Edict, Book XII*.

But where the prætor is to blame, restitution will be granted.

(1) Pomponius says that restitution against a man who has been relegated will be granted under the general terms of the Edict; but it will not be granted to him, because he could have appointed an agent. I think, nevertheless, that, where proper cause is shown, he himself would be entitled to relief.

(2) The prætor further says: "Or where it was not lawful for him to be summoned against his will, and no one defended him." This clause has reference to those who, according to the custom of our ancestors, could not with propriety be cited into court; for instance the consul, the prætor, and others who exercise power or authority; this Edict, however, does not apply to those whom the prætor forbids to be summoned without his permission (since application to him might have obtained permission), for example, patrons and parents.

(3) He next adds: "And no one defended him"; which has reference to all the parties above-mentioned, except to one who, while absent, obtained something by usucaption, because this case has already been fully provided for above.

(4) The prætor also says: "Or where his right of action was held to be lost, through the act of the magistrate, without any fraud on his part." What is the object of this? It is that restitution may be granted if a right of action is taken away on account of delays caused by the judge. Again, if there is no magistrate at hand, Labeo says that restitution should be granted. Where the right of action was "lost through the action of the magistrate", we must understand that this was done where he refused to permit the case to be filed; but otherwise, where investigation was made, and he declined to permit the action to be brought, restitution does not apply; and this opinion is held by Servius. Moreover, the magistrate appears to be to blame if he denied the application through favor to the other party, or through corruption; in which instance this section as well as the former one will be operative, namely: "Or made no provision by which he could be sued"; for the litigant did this when he corrupted the judge to avoid being sued.

(5) By the "loss of right of action", it must be understood that the party was no longer able to bring suit.

(6) He also adds, "Without any fraud on his part", for the reason that if he was guilty of fraud, he should not obtain any relief; as the prætor does not aid persons who themselves commit offences. Consequently, if the party wishes to bring suit before the next prætor, and the time for doing so before the present one has elapsed, he will not be entitled to relief. Also, if he did not obey the order of the prætor, he will refuse to hear his case; and Labeo says that restitution should not be granted. The same rule applies where the case was not heard by him for any other good reason.

(7) If any unusual holiday should be appointed, for instance, because of some fortunate event, or in honor of the Emperor, and for this reason the prætor refused to hear the case, Gaius Cassius expressly stated in an Edict that he would grant restitution, because it was held this must have been done by the prætor, for the ordinary holidays ought not to be taken into account, as the plaintiff could and should foresee them, so as not to interfere with them; which is the better opinion, and this Celsus also adopts in the Second Book of the Digest. But when holidays are responsible for lapse of time, restitution ought only to be granted with reference to the said days, and not on account of the entire time; and this Julianus stated in the Fourth Book of the Digest, for he says that where rescission of usucaption takes place, those days must be restored during which the plaintiff was willing to act, but was prevented by the occurrence of the holidays.

(8) Whenever a person by his absence, does not exclude anyone from acting for the entire time; as, for instance, if I had been in possession of your property for less than one day of the term prescribed for acquisition by usucaption, and then I began to be absent in the public service, restitution should be granted against me for only one day.

(9) The prætor also says: "Where any other just cause seems to exist, I will grant complete restitution." This clause is necessarily inserted in the Edict, for many instances may occur which would establish ground for restitution, but which cannot be separately enumerated; so that, as often as justice calls for restitution, resort can be had to this clause. For example, if a party is acting as the envoy of a city, it is only just that he should obtain restitution, though he is not absent in the service of the State; and it has been repeatedly established that he is entitled to relief, whether he had an agent, or not.

I think that the same rule applies where he has been summoned from one province or other to give testimony either in the city, or before the Emperor; for it has very often been stated in rescripts that he should be relieved. Moreover, relief should be granted to those who have been in foreign countries on account of some judicial investigation or appeal. And, generally speaking, as often as a party is absent from necessity, and not voluntarily, it must be said that he is entitled to relief.

27. *Paulus, On the Edict, Book XII.*

And where a person loses something, or fails to obtain a profit, restitution should be granted, even though none of his property was lost.

28. *Ulpianus, On the Edict, Book XII.*

Also, where a person is absent for some reasonable cause, the prætor should consider whether he is entitled to relief; as, for example, where his absence was due to his studies, or because his agent was dead; the intention being that he should not be wronged when his absence was due to some good cause.

(1) Moreover, where a person is not in custody, or in chains, but has furnished security with sureties, and then, on account of this, is unable to go away, and is taken at a disadvantage, he is entitled to restitution; and restitution will also be granted against him.

(2) The prætor also says: "When this is authorized by the laws, the plebiscites, the decrees of the Senate, the Edicts, and the Ordinances of the Emperors." This clause does not promise that restitution will be granted if the laws permit it, but if the laws do not prohibit it.

(3) Where a person has been absent very frequently in the service of the State, Labeo thinks that the time he should be permitted to apply for restitution should be reckoned from his last return. But if all his absences together amount to a year, and each one separately to less than a year, whether we shall grant him an entire year for restitution, or only so much time as his last absence endured, is a matter to be considered, and I am of the opinion that an entire year should be granted.

(4) If, while you have a residence in the province, you also pass some time in the city, does the year run against me because I have the power of bringing suit against you? Labeo says that it does not. I, however, am of the opinion that this is only true where an adversary has the right of demanding that you be sent into your province; otherwise, it should be held that I have the power to bring suit because issue can also be joined at Rome.

(5) An exception is also available for a person who has been absent in the service of the State, just as he is granted a right of action to rescind; for instance, if, having obtained the property, an action should be brought against him for its recovery.

(6) In a rescissory action, which can be brought against a soldier, Pomponius states that it is entirely just, but that the defendant should surrender the profits which he obtained during the time that he was absent and made no defence; and, therefore, on the other hand, the profits should also be surrendered to the soldier, as there is a right of action on both sides.

29. *Africanus, Questions, Book VII*.

The reason for this is that a public duty should not be a source of loss or profit to anyone.

30. *Paulus, On the Edict, Book XII*.

Where a soldier who has acquired a right to property by usucaption dies, and his heir completes the time required for it, it is just that what has been acquired subsequently to his death should be rescinded; and the same rule should be observed in the case of heirs who succeed to the right of usucaption, as the possession of the deceased being, as it were, joined to the estate, should descend to the heir, and very frequently the right becomes complete before the estate has been entered upon.

(1) Where a person who has been absent in the service of the State has obtained property by usucaption, and afterwards alienates it, restitution should be granted; and even though there was no fraud connected with his absence and his acquisition of ownership, he should be prevented from profiting by them. Also, in all other cases, restitution should be granted just as if judgment had been rendered against him.

31. *The Same, On the Edict, Book LIII*.

Where he, whose property was acquired by someone through usucaption while he was absent in the service of the State, obtains possession of the property acquired by him in that way, and he afterwards loses the same; he will be entitled to a perpetual right of action and not to one that is limited by time.

32. *Modestinus, Rules, Book IX*.

A person is considered to be absent in the service of the State as soon as he has left the City, although he may not have yet reached the province; and when he has gone, he is held to be absent until he returns to the city. This is applicable to proconsuls and their deputies, as well as those who preside over provinces, to the Imperial Procurators who occupy positions in the provinces, to military tribunes, prefects, and the attendants of envoys, whose names are inscribed in the books of the Treasury, or in the Imperial registers.

33. *The Same, On Cases Explained*.

Among those who are entitled to relief under the general clause of the Edict is included the Advocate of the Treasury.

(1) Those who record the decisions of the magistrates are certainly not absent in the public service.

(2) Physicians of the soldiers have a right to petition for relief by restitution, as the functions they perform are for the public benefit, and ought not to be a source of injury to them.

34. *Javolenus, On Cassius, Book XV*.

A soldier who is at home on a furlough is not held to be absent in the service of the State.

(1) A person who gives his services for the collection of public taxes which have been farmed out, is not absent in the service of the State.

35. *Paulus, On the Lex Julia et Papia*.

Parties who are sent to conduct soldiers, or bring them back, or have charge of recruiting, are absent in the public service.

(1) This is the case also, where persons are sent for the purpose of congratulating the Emperor.

(2) Likewise, the Imperial Procurator, and not only he to whom is entrusted the affairs of a province, but also one who is charged with the transaction of certain business pertaining thereto, but not of all of it. Therefore, where there are several Imperial Procurators charged with different matters, they are all considered to be absent in the service of the State.

(3) The Prefect of Egypt is also absent in the service of the State; and also whoever, for any other reason, departs from the City on a public errand.

(4) The Divine Pius established the same rule with reference to the garrison of a city.

(5) It has been asked whether a party who is dispatched for the suppression of evil-doers, is absent in the public service, and it has been determined that he is.

(6) The same rule applies where a civilian joined an expedition by the command of an officer of consular rank, and was killed in battle, for relief should be granted his heir.

(7) A person who has repaired to Rome on business for the State, is considered to be absent in the public service. Moreover, if he should leave his own country on business for the Government, even if he has a right to pass through the city, he is absent in the service of the State.

(8) In like manner, where a man who is in a certain province, when he has left his home, or remains in his own province for the purpose of transacting public business, as soon as he begins to discharge his duties he is treated as a party who is absent.

(9) A man going to camp, as well as on his return, is absent in the service of the State; as anyone who is about to serve as a soldier must go to camp and return from it. Vivianus says that it was held by Proculus, that a soldier who is on a furlough is absent in the service of the State, while he is coming home and returning to the army, but when he is at home he is not absent.

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

We only understand those to be absent on public business who are absent not for their own convenience, but from necessity.

37. *Paulus, On the Lex Julia et Papia, Book HI.*

Those who serve as assessors in their own province beyond the time prescribed by the Imperial Constitutions, are not understood to be absent on public business.

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

I am of the opinion that he is absent in the service of the State whom the Emperor, as a special favor, has permitted to act as assessor in his own province; but if he does not so act by his permission, we must hold that, by doing so, he is guilty of an offence, and is not entitled to the privileges of those who are absent in the service of the State.

(1) A party is considered to be absent in the service of the State, as long as he fills some office, but as soon as his term of office is ended, he ceases to be absent on public business. We, however, calculate the time allowed him for his return from the date when he ceased to be absent in the public service, that is to say, as much as he requires to return to the City, and it will be reasonable to grant him the time which the law allows to other returning officials. Wherefore, if he turns aside on account of some affair of his own; there is no doubt that the time so consumed will not be granted him, but will be calculated with reference to the period within which he could have returned; and when this has elapsed we must say that he has ceased to be absent in the service of the State. It is evident that if he is prevented from continuing his journey by illness, humane considerations must prevail; just as is customary in case of bad weather, difficulties of navigation, and other things which accidentally happen.

39. *Paulus, Sentences, Book I.*

He who is about to be absent on public business, and has left an agent by whom he can be defended, and applies for complete restitution, shall not be heard.

40. *Ulpianus, Opinions, Book V.*

Where it is in the power of a soldier to institute criminal proceedings during the time that he is devoting his services to the State, he is not deprived of his right to do so.

(1) Where a person is detained on an island in accordance with the penalty imposed upon him on account of which he obtained restitution, and it is proved that a portion of the property of which he had not been deprived has been appropriated by some one else, it must be restored to him.

41. *Julianus, Digest, Book XXXV.*

Where a person bequeathed a legacy to Titius, provided that, at the time of the testator's death, the former should be in Italy, or he leaves it payable each year, as long as he remains in Italy; and the legatee obtains relief on the ground that he was excluded from the legacy because he was absent on public business, he is compelled to carry out any trust with which he was charged. Marcellus asks in a note, where an estate is restored to a soldier which he had lost because he was absent in the service of the State, whether any one can doubt that the right to legacies and trusts will not be impaired?

42. *Alfenus, Digest, Book V.*

He cannot be said correctly to be absent in the service of the State, who has joined an embassy on account of his own private affairs.

43. *Africanus, Questions, Book VII.*

Where anyone stipulates for a certain sum every year, as long as he, or the party who makes the promise, shall remain in Italy, and one or the other happens to be absent in the service of the State; it is the duty of the prætor to grant an equitable action. We hold that the same rule applies where the stipulation is in the following words: "If a certain man should be at Rome for the next five years"; or "If he should not be at Rome, do you agree to pay a hundred *aurei?*"

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

He who is absent in the service of the State and is injured in any way will not be granted restitution if he suffered the injury under circumstances where he would have sustained loss, even if he had not been absent on public business.

45. *Scævola, Rules, Book I.*

All soldiers who cannot leave their standards without risk to themselves, are considered to be absent in the service of the State.

46. *Marcianus, Rules, Book II.*

A person who is absent in the service of the State is entitled to restitution against one who is also absent on public business, if he has just cause for complaint on account of having sustained some loss.

TITLE VII.

CONCERNING ALIENATIONS MADE FOR THE PURPOSE OF CHANGING THE CONDITIONS OF A TRIAL.

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

The proconsul takes every precaution to prevent any person's legal position from becoming worse through the act of another; and as he understands that the result of a trial sometimes causes us a great deal more hardship when we have a different adversary than we had at the beginning, he provided against this by stating: "That if anyone, by transferring the property in question should substitute another party in his place as an opponent, and he did this purposely with fraudulent intent, he will be liable to an action *in factum* to the extent of the interest which the other party had in not having another adversary."

(1) Therefore, if a litigant opposes a man from another province, or one who is more powerful, to us as an adversary, he will be held liable;

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

Or anyone who will probably annoy the adversary.

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

The reason for this is that if I institute proceedings against some one who belongs to another province, I am compelled to do so in his own province, and we can do nothing on an equal footing where the other party is more powerful.

(1) Moreover, if the man whom we are suing manumits a slave who is claimed in the action, our condition becomes less advantageous, because the prætors favor freedom.

(2) Moreover, if you have erected some structure on a tract of land where you may become liable to an interdict *Quod vi aut clam;* or, in an action granted against a person who diverts rain-water from its natural course, you alienate said piece of property, our condition is understood to be worse; because if I institute proceedings against you, you will be compelled to remove the structure at your own expense, but now I am forced to bring an action against a different party from the one who performed the act, and will be compelled to remove the structure at my own expense; for the reason that he who is in possession of anything of this kind erected by another, is only liable under these proceedings so far as to permit the structure to be removed.

(3) If I give you notice of a new structure, and you then alienate the land, and the purchaser finishes the work; it is held that you will be liable to this action, for the reason that I cannot bring suit against you based on a notice of a new structure, because you have not built anything; nor can I do so against the party to whom you have conveyed the property, because he has not been notified.

(4) From all which it is evident that as the proconsul promises to grant complete restitution, the plaintiff in this action may by order of court obtain damages to the extent of his interest in not having another adversary; as, for instance, if he had incurred some expense, or had suffered some other inconvenience on account of the substitution of another adversary.

(5) What then would happen, if the person against whom a prætorian action can be brought is ready to defend it, just as if he was still in possession of the property? In this instance it is very properly held that the action based upon this Edict will be refused him.

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

The same Edict also applies where the property has been acquired through usucaption by the party to whom it was transferred, so that no suit could be brought to recover it from him.

(1) It can also happen that possession is terminated without bad faith, but that this was done for the purpose of altering the conditions of the trial, and there are numerous other cases of this kind. On the other hand, a party may fraudulently relinquish possession, and he may not have acted for the purpose of changing the conditions of the suit; and then he will not be liable under the terms of this Edict, for he does not alienate property, who merely relinquishes possession.

The prætor, however, does not disapprove the act of a party who was so desirous to give up property to prevent his being constantly engaged in litigation on account of it; and this is, in fact, a very modest determination of one who detests lawsuits, and is not to be blamed; but the prætor only concerns himself with a party who, while desiring to retain the property, transfers his part in the case to another, so that the latter, instead of himself may give his adversary trouble.

(2) Pedius states in the Ninth Book, that this Edict has not only reference to a transfer of ownership, but also a transfer of possession; otherwise, he says that where the plaintiff brings a suit *in rem,* and the defendant relinquishes possession, he will not be liable.

(3) Where, however, anyone through illness, old age, or necessary business, transfers his right

of action to another, this is not a case in which he is liable under this Edict, as mention of fraud is made in the Edict; for, otherwise, it would be forbidden to litigate through agents, as ownership is generally transferred to them where proper cause exists for this to be done.

(4) This Edict also has reference to real servitudes, where their alienation is fraudulently made.

(5) This action has for its object the amount of the plaintiff's interest; and therefore, if the property did not belong to him, or if the slave who was alienated should die without the fault of the party who alienated him, the action will not lie, unless there was some additional interest of the plaintiff.

(6) This action is not a penal one, but it is for the purpose of recovering property by order of court for which reason it is granted to an heir, and also against an heir,

5. *Paulus, On the Edict, Book XL* Or anyone in similar circumstances;

6. *Ulpianus, On the Edict, Book XIII*. Or after a year it is not granted.

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

Because it relates to the recovery of property it still appears to be granted on account of an offence.

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

A person is liable under this Edict, even where he produces the property, if he does not, after notification by the judge, place the case in its original condition.

(1) The prætor says: "Or an alienation made for the purpose of changing the conditions of the trial"; that is to say, the conditions of a future trial and not these of the present one.

(2) To "alienate" is also understood to sell the property of another.

(3) But where a person alienates anything either by appointing an heir, or by making a bequest, the Edict will not apply.

(4) Where anyone alienates property, and takes it back again, he will not be liable under this Edict.

(5) Where a purchaser compels his vendor to take back the property sold, he is not considered to have alienated it for the purpose of changing the conditions of the trial.

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

For the reason that when a slave is returned, everything has a retroactive effect, and, therefore, the party who returns the property is not held to have alienated it, in order to change the conditions of the trial; unless he restores the slave for this very purpose, and otherwise would not have restored him.

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

For if, being in debt, I deliver the property for which you wished to sue me, this Edict will not apply.

(1) Where the guardian of a ward, or the curator of an insane person alienates property, a prætorian action will lie, because one cannot presume that either the ward or the insane person can have the intention of committing fraud.

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

When a soldier applied to bring suit in his own name in order to obtain an estate which he alleged had been presented to him; he was told that if the gift had been made for the purpose of changing the conditions of the trial, the action must be brought by the former owner, so that it might appear that he had transferred the property to the soldier, rather than a lawsuit.

12. *Marcianus, Institutes, Book XIV*.

Where anyone alienates his share in a piece of property for the purpose of avoiding a suit in partition, he is prohibited by the *Lex Licinia* from bringing an action in partition himself, for example, in order that some purchaser who is more powerful may obtain it by a lower bid; and he in this way can recover it. He, however, who has disposed of his share, and wishes afterwards to bring suit in partition, shall not be heard; but if the party who purchased it desires to institute proceedings, he is forbidden to do so under that Section of the Edict by which it is provided that no alienation shall be made for the purpose of changing the conditions of a trial.

TITLE VIII.

CONCERNING MATTERS REFERRED TO OTHERS FOR ARBITRATION AND THOSE WHO ACCEPT THEM FOR THE PURPOSE OF MAKING AN AWARD.

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

Arbitration is conducted in the same manner as a trial in court, and is intended to put an end to litigation.

2. *Ulpianus, On the Edict, Book IV*.

It is established that an exception cannot arise from arbitration, but an action for a penalty imposed can.

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

Labeo says that where an award is given under an arbitration, by which a party is released from an action on guardianship by a minor under twenty-five years of age, it should not be confirmed by the prætor; nor will an action for the recovery of the penalty on account of it be granted.

(1) Although the prætor does not compel anyone to undertake an arbitration (since this is voluntary and depends upon the exercise of the will, and is outside his jurisdiction), nevertheless, where a party has once assumed the duties of the office, the prætor thinks that the matter requires his care and attention; not so much because it is his object that legal controversies should be terminated, but in order that persons should not be disappointed who have selected someone to decide between them who was considered to be a reliable man. For, suppose that after the case had been examined one or more times, and the private concerns of both parties had been made public, and the secrets of the business had been disclosed, the arbiter should refuse to give an award; either for the purpose of showing partiality, or because he had been corrupted by bribery, or for some other reason; could anyone deny that it was not perfectly right that the prætor should intervene in order to compel the arbiter to discharge the duties of the office which he had assumed?

(2) The prætor says: "A party who undertakes arbitration by which submission is made to his award under a pecuniary penalty."

(3) Let us first consider the personality of the arbiters. The prætor can compel an arbiter, no matter what his rank may be, to perform the duties of the office which he has undertaken, even though he be of consular rank, unless he holds some magisterial position, or is invested with other authority; as, for instance, that of consul, or prætor, since he then has no jurisdiction;

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

For magistrates cannot be subject to coercion where they possess higher or equal authority; nor does it make any difference whether they accepted the office of arbiter during the term of their magistracy, or previously. Inferior officials, however, can be subjected to compulsion.

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

The son of a family can also be compelled to act.

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

Moreover, the son of a family can also be appointed arbiter in a matter in which his father is interested; and it is held by many that he can also be a judge.

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

Pedius says in the Ninth Book, and Pomponius in the Thirty-third Book, that it is of little importance whether a party who was appointed arbiter is free born, or a freedman of good reputation, or has been branded with infamy. Labeo says that a slave cannot act as arbiter, and this opinion is correct.

(1) Therefore Julianus states that where a question for arbitration is referred to Titius and a slave, Titius cannot be forced to give an award, because he undertook the arbitration with another; although he states that there is no arbitration by a slave. What then would be the result if Titius should give an award? In this instance the penalty would not be payable, because he did not render the award in compliance with the conditions under which he assumed the office.

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

But where the terms of the arbitration were, "that the award of either party alone should be valid", then force can be brought to bear against Titius.

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

But where a slave had been appointed arbiter and makes an award after he has become free, I am of the opinion that if he does this after obtaining his freedom, and the parties consent, that his act will be valid.

(1) Neither a ward, nor an insane person, nor one who is deaf or dumb, can be appointed an arbiter; as Pomponius asserts in the Thirty-third Book.

(2) Where a party is a judge, he is forbidden by the *Lex Julia* to act as arbiter in the same matter in which he is to decide as judge, or to appoint himself; and if he makes an award, a suit for the penalty shall not be granted.

(3) There are others who cannot be compelled to give an award; for instance, where the corruption or the turpitude of the arbiter is evident.

(4) Julianus says that if the litigants defame the arbiter, the prætor should by no means dismiss him, but only where proper cause is shown. The same jurist says that if the parties treat the authority of the arbiter with contempt, and apply to the court,

10. *Paulus, On the Edict, Book XIII*. Or to some other arbiter;

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

And afterwards the litigants return to the original arbiter, the prætor should not compel him to decide between those who have treated him insultingly, and rejected him in order to have recourse to another.

(1) An arbiter cannot be compelled to give an award, unless arbitration was agreed upon.

(2) Where the prætor says: "Under a pecuniary penalty"; we must understand that a sum of money is not payable on both sides, but that there may be other property promised by way of a penalty, where one of the parties does not abide by the award; and this was the opinion of Pomponius. What, then, if property was deposited with the arbiter under the condition that he should deliver it to the party who gained the case, or should deliver it if one of the parties did not comply with the award; will he be compelled to make an award? I think he will be. The case would be the same where a certain amount is left in his hands for this purpose. Hence, if one party has promised in the stipulation to deliver property, and the other to pay money, the

submission to arbitration is complete, and the arbiter can be forced to make an award.

(3) Sometimes, as Pomponius remarks, submission to arbitration may properly be made by a mere agreement; as, for instance, where both parties are debtors, and agree that if either of them does not comply with the award of the arbiter, he shall not have the right to collect what is owing to him.

(4) Moreover, Julianus states that an arbiter cannot be forced to give an award, where one party makes a promise and the other does not.

(5) He is of the same opinion where the penalty was agreed upon subject to a condition; as, for instance: "If a certain ship should return from Asia so many thousand", for the arbiter cannot be compelled to make an award until the condition has been fulfilled, lest it may be void on account of the failure of the condition; and Pomponius also says the same thing in the Thirty-third Book on the Edict.

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

In this case, perhaps, the only reason for applying to the prætor will be where the time appointed for the hearing can be prolonged, for then it may be done.

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

Pomponius says that if either party is released from the penalty agreed upon, the arbiter should not be forced to give an award.

(1) He also states that if my demands alone are submitted to arbitration, and I have stipulated for a penalty to be paid by you; it must be considered whether or not this is a reference to arbitration. I do not see, however, wherein he finds any difficulty; for, if the understanding of the parties only relates to the claims of one of them, there is no reason in his statement, as it is lawful for one thing to be arbitrated; but if he means that the stipulation is only made on one side, what he says is reasonable. If, however, the party who made the stipulation is the one bringing the action, the submission to arbitration may be said to be more complete, for the reason that the party who is sued is protected; as, for instance, by an exception based upon contract, and if he does not comply with the award, he who brings the suit can have recourse to the stipulation. I do not think, however, that this opinion is correct; for it is not sufficient for the party to have an exception, as the arbiter may be compelled to make an award.

(2) A person is held to have accepted the office of arbiter (as Pedius says in the Ninth Book), when he undertook the duties of a judge, and promised to settle the controversies of the parties by his award. But if, as he says, the arbiter should only proceed so far as to ascertain whether the parties will permit their controversy to be settled by his advice or authority, he is not held to have assumed the duties of arbiter.

(3) An arbiter who has been appointed is not compelled to give an award upon those days on which a judge is not required to render a decision; unless the term fixed by the arbitration is about to expire, and cannot be prolonged.

(4) Thus, if the arbiter is urged by the prætor to render his award, it will be perfectly just that he should have time granted him for the doing so, if he swears that the case is not yet sufficiently clear to him.

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

If the matter is submitted to arbitration without appointing a day for it to be heard, it is absolutely necessary for the arbiter to fix one, of course with the consent of the parties, and the case should then be decided; because if he should fail to do this, he can be compelled to make his award at any time.

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

Even though the prætor should unqualifiedly state in the Edict that he will compel the arbiter to make an award; nevertheless, he should sometimes pay attention to his reasons, and accept

his excuses, where proper cause is shown; as, for instance, where he is defamed by the litigants; or where deadly hostility arises between him and them or one of them; or where age or sickness, with which he was afterwards attacked, releases him from the discharge of his duty; or if he is occupied with his own affairs, or there is urgent necessity for his making a journey; or some public office requires his attention; and this is the opinion of Labeo.

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

Or where the arbiter is subjected to any other inconvenience after he has accepted the office. But in case of illness or other occurrences of this kind, he may be compelled to defer consideration of the matter, where proper cause is shown.

(1) An arbiter should be excused from acting where he is occupied in a case in his own behalf, whether it be either public or private; at all events, where the day of the hearing cannot be postponed; but if it can be, why should not the prætor compel him to defer it as he has the right to do so, since this can sometimes be accomplished without any inconvenience to the arbiter? Where, however, both parties wish him to render an award, even though no bond was given for postponement; still, he cannot do otherwise, if he has an action of his own pending, unless he consents that the case may be submitted to him anew. This, of course, is dependent upon the fact that the time is about to expire.

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

Moreover, where one of the litigants has made an assignment of his property, Julianus states in the Fourth Book of the Digest that the arbiter cannot be compelled to give an award, since the party referred to can neither sue nor be sued.

(1) Where the litigants return to the arbiter a long time afterwards, Labeo states that he is not compelled to give an award.

(2) Where there are several arbiters who have assumed the office, one of them alone cannot be compelled to make an award, but all must do so, or none.

(3) For this reason Pomponius asks in the Thirty-third Book, if, where an arbitration was agreed upon in such a way that whatever Titius decided Seius was to award; which of the two would be subject to compulsion? I am of the opinion that an arbitration of this kind, in which the arbiter has not perfect liberty to render his decision is *not* valid.

(4) But where the terms of the arbitration are that the question shall be decided by either Titius, or Seius; Pomponius says — and we agree with him — that the arbitration is valid; but the arbiter who must be compelled to make the award is the one whom the litigants agree upon.

(5) Where the arbitration is referred to two persons, on the condition that if they disagree they may call upon a third; I think that a reference of this kind is not valid, for they may disagree as to the person applied to, but if the condition is that Sempronius shall be joined as the third party, the arbitration will be valid, since there can be no disagreement in calling upon him.

(6) Let us consider a special case, namely: where a question is submitted to two arbiters, should the prætor compel them to give an award; for, on account of the natural tendency of men to disagree the question might be almost incapable of settlement. Where the number is odd, arbitration for that reason is sustained, not for the reason that it is easy for all of the parties to agree, but because, if they disagree, there is a majority upon whose decision reliance can be placed. It is usual, however, for the controversy to be submitted to two persons, and if they do not agree, the prætor should compel these arbiters to select some third person whose authority may be obeyed.

(7) Celsus states in the Second Book of the Digest, that where the dispute is submitted to three arbiters, it is sufficient if two of them agree, provided the third is present; but if he is absent, even though the remaining two agree, the award will not be valid, because arbitration was submitted to more than two, and the third by his presence might have induced them to accept

his own opinion:

18. *Pomponius, Epistles and Various Passages, Book XVII*. Just as where three judges are appointed, and two of them render a decision by agreement, during the absence of the third, it is void; for the reason that a judgment is only valid where rendered by a majority, when it is evident that all have rendered some decision.

19. *Paulus, On the Edict, Book XIII*.

Labeo says that it does not concern the prætor what kind of an award the arbiter makes, provided he states what his opinion is. Therefore, if the matter was referred to the arbiter to render some certain decision, this would be no arbitration; nor could he be compelled to make an award; as Julianus states in the Fourth Book of the Digest.

(1) We must consider that an arbiter renders a decision, when he does so with the intention that the entire matter in controversy shall be settled. But where arbitration with reference to several matters is involved, unless he disposed of all that are in controversy, he will not be held to have made an award, and he can still be forced by the prætor to act.

(2) For this reason it should be considered whether an arbiter can change his decision; and the question has even been raised where an arbiter orders property to be delivered, and subsequently forbids this to be done, whether what he ordered, or what he forbade should stand. Sabinus thinks that he can change his decision. Cassius sustains the opinion of his master, and says that Sabinus did not have in his mind a decision which put an end to the arbitration, but only one made during the preparation of the case; for example, where he ordered the litigants to appear on the *kalends*, and afterwards on the *ides;* for he had a right to change the day. Thus, if he rendered a decision against the defendant, or in his favor, then, as he would cease to be arbiter, he could not change his decision;

20. *Gaius, On the Provincial Edict, Book V*.

Because one arbiter cannot amend his decision even if he committed an error in rendering it.

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

But, if an arbiter who has been appointed for the settlement of several controversies, which have no connection with one another, gives an award with reference to one of them, but not as to the others, what then? Has he ceased to be arbiter? Therefore, we must consider whether he has a right to change a decision which he has already rendered with reference to the first one. It makes a great deal of difference whether or not he was to decide all the matters submitted to him for arbitration at the same time, for if he was to decide with reference to all of them, he could change his decision, as he had not yet rendered it; but where he was to decide them separately, there were, so to speak, several things to be determined, and so far as that particular matter in controversy was concerned, he has ceased to be arbiter.

(1) Where an arbiter gives the award that Titius does not appear to owe Seius anything, although he does not forbid Seius to bring an action; still, if the latter should do so, he would appear to oppose the award of the arbiter; and both Ofilius and Trebatius are in accord upon this point.

(2) I think that an arbiter cannot appoint a special time for payment, and Trebatius also appears to be of this opinion.

(3) Pomponius says that where an arbiter gives an ambiguous award, it is invalid; for instance: "You must pay him what you owe him"; or, "You must adhere to your division"; or, "You must accept as your share what you have paid to your creditors".

(4) Moreover, where an arbiter forbids an action to be brought for a penalty, in accordance with the terms of the arbitration; I find it stated in the Thirty-third Book of Pomponius that this is void; and he is right, because the conditions of arbitration have no reference to the collection of the penalty.

(5) Papinianus states in the Third Book of Questions, that if the time fixed for the arbitration has expired, the litigants may agree upon a new one, with the same arbiter, but if the latter refuses to act in the second arbitration, he cannot be forced to do so; provided he was not responsible for the delay in performing his duty; as, if he was to blame for the delay, it would be perfectly right that he should be compelled by the prætor to again act as arbiter. This question can only arise where no arrangement was made in the first arbitration to extend the time, but if such provision was made, and he himself extended it, he will continue to act as arbiter.

(6) The term "complete arbitration" is used where settlement is made with reference to the matters in controversy, for it relates to all disputes; but where there happens to be a difference concerning only one thing, although a complete arbitration may have been agreed upon, still, the rights of action in other cases remain unimpaired; for the only matter involved in an arbitration is that which it was agreed upon should be determined. It is, however, the safer way where anyone wishes only some certain matter to be settled by arbitration, to expressly mention the same when it is submitted.

(7) Where an arbiter orders some dishonorable act to be performed, the litigants are not obliged to obey.

(8) Where the parties appear before the arbiter within the time which was designated, and he orders them to appear after the time has elapsed, no penalty can be exacted.

(9) Where either of the parties does not appear, for the reason that he was prevented by illness, or by absence on public business, or by the duties of some magisterial office, or for any other good reason; Proculus and Atilicinus hold that the penalty can be collected; but where he was ready to appoint the same arbiter for a new arbitration, an action will not be permitted against him, or he can protect himself by an exception. This, however, is only true where the arbiter was willing to accept the second arbitration; for Julianus very properly stated in the Fourth Book of the Digest, that he could not be forced to do so if he was unwilling, and in any event, the party is released from the penalty.

(10) Where, for instance, the arbiter orders the parties to appear before him in a province, when it was agreed that the reference should take place at Rome; the question arises can he be disobeyed with impunity? The opinion given by Julianus in the Fourth Book is the better one, namely, that the place contained in the agreement to submit the matter in dispute is the one intended; and therefore, that he may be disobeyed with impunity if he orders the parties to appear elsewhere. What course then should be pursued if it does not appear what place was agreed upon? The better opinion is that that place was intended where the agreement for arbitration was entered into. But what must be done if the arbiter orders them to appear in some place adjoining the City? Pegasus holds that the order would be valid; but I think that this is only true where the arbiter is a man of such authority that he can perform his duties in retired places, and the litigants can readily go to the place designated.

(11) But if the arbiter should order the parties to go to some disreputable locality, as for instance, to a tavern, or a brothel, as Vivianus says, he can doubtless be disobeyed with impunity; and this opinion Celsus also approves in the Second Book of the Digest. With reference to this he very properly raises the question, if the place is of such a character that one of the litigants cannot honorably go there but the other can, and he who could go without forfeiting his self respect did not do so, and the other went in spite of his disgrace, can the penalty agreed upon at the time of the arbitration be collected because the act was not performed? He very justly thinks that it cannot be collected, for it would be absurd if the order should be valid with reference to one party, and void with respect to the other.

(12) It should be considered within what time an action should be brought on the stipulation, provided the party does not comply with the award of the arbiter. Celsus states in the Second Book of the Digest that if no certain time was specified, a reasonable time is understood, and that, when this has elapsed, suit can forthwith be brought for the penalty; nevertheless, he says

if the party complies with the award before issue is joined in the case, the action based on the stipulation cannot proceed:

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

Unless the plaintiff had some interest in the immediate payment of the money.

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

Celsus says that if the arbiter orders payment to be made by the *kalends* of September, and this should not be done, even though it was tendered afterwards, still, the penalty of the arbitration having once become due the right of action is not extinguished, since it is true that the money was not paid before the *kalends*. Where, however, the party accepted payment when it was offered, he cannot bring suit for the penalty, but will be barred by an exception on the ground of fraud. The case is different where he was only ordered to make payment.

(1) Celsus also states, if you order me to pay you and you are prevented from receiving the money by illness, or for some other good reason, that Proculus is of the opinion that the penalty cannot be exacted even if I do not pay you until after the *kalends*, although you may be ready to receive it. He also thinks, very justly, that there are two orders of the arbiter to be considered, one to pay a sum of money, and the other to pay it before the *kalends;* therefore, although the penalty cannot be exacted from you because you did not pay the money before the *kalends*, as you were not to blame, you will still be liable for the part which you did not pay.

(2) He also says that the words "Comply with the award", means nothing else than for the party to do all in his power to obey the decision of the arbiter.

(3) Celsus also says that if an arbiter orders me to pay you a sum of money on a certain day, and you refuse to receive it, the defence can be made that the penalty is not collectible by law:

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

But if he should afterwards be ready to receive it, I can not refuse to pay it with impunity, because I did not pay it before.

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

Labeo states that where it was provided in the submission for arbitration that the arbiter should give his award concerning all matters involved in the case on the same day, and should have authority to extend the time, and he did extend the time after certain matters were decided, while others were not; the extension will be valid, but his award may be disobeyed with impunity. Pomponius approves the opinion of Labeo, which also seems to me to be correct, because the arbiter did not perform his duty in making his award.

(1) This clause also: "He may extend the time for arbitration", does not give the arbiter the right to do anything else than to extend the time, and, therefore, he cannot diminish or make any change in the terms of the original agreement; hence he is always obliged to dispose of the other matters also, and must give an award with respect to everything.

(2) Where the bond of a surety has been furnished in the first agreement for arbitration, Labeo states it should also be offered in the second one. Pomponius, however, doubts whether the same, or other sureties who are solvent should be furnished; for he says what would be the result if the same ones should refuse to act as sureties? I think, however, that if they should refuse to act as sureties, then, others, as good as they, should be given:

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

So that it shall not be in the power of the sureties, who refuse to bind themselves again to cause the penalty to be executed. The same rule applies if they should die.

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

The arbiter can extend the time whether he is present, or whether he does so by a messenger,

or by a letter.

(1) Where mention of the heir or of any other parties interested in the arbitration is not made, the arbitration is terminated by death. We do not accept the opinion of Labeo, who thought that if the arbiter orders a sum of money to be paid, and the party dies before paying it, the penalty could be exacted, even though the heir was ready to tender it.

(2) The award of the arbiter which he makes with reference to the matter in dispute should be complied with, whether it is just or unjust; because the party who accepted the arbitration had only himself to blame, as was stated in a Rescript by the Divine Pius, as follows: "The party must submit to the award with equanimity, even though it may be by no means well founded."

(3) Where there are several arbiters and they have given different awards, a party will not be obliged to abide by them, but if the majority agree their award must stand; otherwise the penalty can be exacted. Hence, we find the question raised by Julianus, where out of three arbiters one gives an award for fifteen *aurei*, another for ten, and another for five, whose decision is to stand? Julianus states that five must be paid, since all of them agreed upon that amount.

(4) Where anyone of the litigants fails to appear, since he did all he could to prevent the matter from being settled, the penalty may be exacted. Thus, a decision rendered when all the litigants were not present will not be valid, unless it was expressly stated in the agreement to submit the matter to arbiters that, whether one or both of them were absent the decision could be rendered, but he who was in default incurs the penalty, because he was responsible for the arbitration not taking place.

(5) He is held to make his award in the presence of the parties when he does so before those who are endowed with intelligence; but he is also not considered to have done this where he made it in the presence of a party who is insane, or demented. In like manner, a decision rendered in the presence of a ward, unless his guardian is present, is not legally made. Julianus makes the same statement with reference to all these matters in the Fourth Book of the Digest.

(6) Again, where either party being present, prevents the arbiter from giving his award, the penalty can be collected.

(7) Where no penalty was mentioned in the proceedings for arbitration, but the party simply promised to comply with the judgment, an action for damages may be brought against him.

28. *Paulus, On the Edict, Book XIII.*

It makes no difference whether the sum agreed upon as penalty is certain or uncertain; as, for example, where it was for, "As much as the property was worth".

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

Where suit is brought against a person whom the arbiter forbade to be sued, this is in violation of his award. What then should be done if suit was brought against his surety, could the penalty be collected? I think that it could, and Sabinus holds the same opinion; for suit is practically brought against the principal. But where the arrangement was made with a surety, to submit the matter to arbitration, and suit is brought against the principal, the penalty cannot be collected; unless it was to the interest of the surety that the action should not be brought.

30. *Paulus, On the Edict, Book XIII.*

When anyone brings a matter into court which it had been agreed to submit to arbitration, some authorities say that the prætor cannot interpose to compel the arbiter to give an award, because now no penalty will be incurred, any more than if the arbitration had been dismissed. If, however, this opinion should be adopted, the result will be that where a party had agreed to arbitration, and changes his mind, he will be able to evade the reference of the case. Therefore, he can be sued for the penalty, and proceedings may be instituted in regular form

before a judge.

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

When anything is done in contravention of a stipulation, suit can be brought for this cause only where the act was committed without fraud on the part of the person who made the agreement; for an action can be brought under the stipulation only on the ground that no one can profit by his own deceit. But if there is added to the agreement for arbitration, "If something is done fraudulently in the matter"; he who was guilty of fraud can be sued on the stipulation; and, therefore, if anyone corrupts an arbiter either with money, or by improper solicitation, or bribes the advocate of the other party, or anyone of those to whom he has entrusted his own case, he can be sued on the clause relating to fraud, as well as where he, through artifice, gets the best of his adversary. And, by all means, if he acts deceitfully in any way during the suit, an action on the stipulation can be brought; therefore, if his adversary desires to bring an action on the ground of fraud, he should not do so, as he is entitled to one based on the stipulation.

Where, however, a clause of this kind is not included in the agreement for arbitration, then, an action on the ground of fraud or an exception will lie. This submission to arbitration is a complete one, because it mentions the clause relating to fraud.

32. *Paulus, On the Edict, Book XIII.*

In matters submitted to arbitration we do not consider whether the stipulated penalty is greater or less than the property involved.

(1) An arbiter is not compelled to make an award where the penalty has been incurred.

(2) Where a woman makes an agreement for arbitration in behalf of a third party, the proceeding for the collection of money will not be Valid on account of her appearance for another.

(3) The conclusion of the matter is: that the Prætor cannot interpose, either where there was no submission for arbitration in the beginning, or if there was, it is uncertain whether it is one for which a penalty may be exacted, or the penalty can no longer be recovered for the reason that the right of arbitration has been extinguished either by lapse of time, by death, by release, by a judicial decision, or by agreement.

(4) Where the arbiter is invested with a sacerdotal office, let us consider whether he can be compelled to make an award; for indulgence should be granted not only to the dignity of persons, but also to the majesty of God, whose ministers should only devote themselves exclusively to sacred affairs. Where, however, he assumed the office subsequently he should, under these circumstances, by all means render a decision.

(5) An arbiter should not be compelled to make an award after the matter in dispute has been compromised, or the slave who was the subject of the arbitration is dead; unless, in the last instance the parties still have some interest in the proceedings.

(6) Julianus stated ambiguously that if, through mistake, recourse was had to arbitration with reference to an offence involving infamy, or some matter which was liable to criminal prosecution, as, for instance, adultery, assassination, and other crimes of this kind; the prætor should forbid an award to be made, and if it was made, should refuse to permit its execution.

(7) Where submission of a question of arbitration involving freedom is made, the arbiter cannot be compelled by law to render a decision; because the favor due to freedom requires that matters relating to it should be decided by judges of the highest rank. The same rule applies where the question involves either freedom of birth, or enfranchisement, and where it is stated that freedom should be conferred on account of a trust. The same must be said with respect to an action having reference to a breach of public order.

(8) Where one of the parties to a reference for arbitration is a slave, Octavenus says that the

arbiter should not be compelled to render an award, and if he does so, that an exception cannot be granted for the penalty in an action *De Peculio*. But if the other party, being a freeman, makes an agreement with him, let us consider whether an exception should be granted against the freeman. The better opinion is that it should not be granted.

(9) Moreover, if anyone agrees to an arbitration at Rome, and, having departed, returns there as the member of an embassy, the arbiter is not compelled to give an award, any more than the party would be obliged to prosecute the case if he had previously joined issue; nor does it matter whether he was attached to an embassy in the first place, or not. But if he now submits the question to arbitration, I think that the arbiter can be compelled to make an award, because if the party voluntarily had joined issue in a suit at law he could be forced to proceed.

Some authorities, however, are undecided with respect to this, but not properly so; as, at all events, they would entertain no doubts if the matter which the party consented to submit to arbitration while on an embassy was a contract which he entered into while under such employment; for the reason that he could be compelled in a matter of this kind to proceed with the trial. The question in the first instance is worthy of consideration, namely: whether if before the envoy agreed to arbitration, the arbiter could be compelled to render a decision if the envoy himself applied for it. And this, according to the first rule laid down, might seem to be unjust, because it was placed under the control of the party himself. This will come under the same rule, however, as if he wished to bring an action at law, which he had a right to do. An arbitration of this kind should be compared to an ordinary suit at law; so where the party is desirous for the arbiter to make an award, he will not be heard unless he sets up a defence.

(10) Where a person who had agreed to arbitration with some one who is dead, contests the succession to the estate, if the arbiter makes an award, the estate will be prejudiced; and therefore, in the meantime, the arbiter is prohibited from doing so.

(11) The time fixed for the arbitration may be extended, not by agreement of the parties, but by order of the arbiter, when it is necessary to extend it that liability for the penalty may not be incurred.

(12) If an arbiter attempts to conceal himself, the prætor should cause him to be searched for, and if he does not appear for a long time, a fine should be imposed upon him.

(13) Where an agreement was made to submit a question to several arbiters, on condition that if any one of them should make an award the parties must abide by it; notwithstanding the other arbiters may be absent, a single arbiter who is present may be compelled to make the award. But where arbitration is agreed upon under the condition that all shall make the award, or that it must be sanctioned by a majority; each one cannot be compelled to render a decision separately, because in a case of this kind the decision of one arbiter will not give rise to liability for the penalty.

(14) Where an arbiter is evidently an enemy to one of the parties for other reasons, and was called upon before witnesses not to give an award and he, nevertheless, insisted on doing so, although no one compelled him; the Emperor Antoninus, to whom application was made, replied to the complaint of the party that he was entitled to an exception on the ground of malicious fraud.

The same Emperor, when his advice was asked by a judge before whom a party had brought suit for a penalty, answered that, although an appeal could not be taken, the suit for the penalty would be barred by an exception on the ground of malicious fraud; therefore, an exception of this kind is a species of appeal, as it affords an opportunity for a rehearing of the award of the arbiter.

(15) In treating of the duties of an arbiter it must be remembered that the entire subject depends upon the terms of the agreement for arbitration, since the arbiter can lawfully perform no other act except what was provided that he should perform; and, therefore, he cannot decide anything he pleases, nor with reference to any matter that he pleases, but only

what was set forth in the agreement for arbitration, and in compliance with the terms of the same.

(16) Inquiry has been made as to making the award, and it has been stated that any kind of an award will not be valid; although with respect to certain matters a difference of opinion exists. I think, in fact, that the penalty cannot be exacted if the arbiter states that the party in a question of this kind should begin a new reference before a judge, or himself, or some other arbiter. Julianus holds that he may be disobeyed with impunity, if he orders the parties to appear before another arbiter; for if they do so, there will be no end to the case; but if he decided as follows, namely: that land should be delivered, or security furnished, with the approval of Publius Mævius, the award should be obeyed.

Pedius, also, adopts this opinion to avoid the continuance of arbitration, and to prevent it from being sometimes transferred to other arbiters who are hostile to the parties; and it is necessary, for the arbiter to render his award in such a way as to put an end to the controversy, for it will not be terminated when arbitration is either postponed or transferred to another arbiter. He also says that the award is partly dependent upon the kind of security furnished, and the character of the sureties; and that this cannot be delegated, unless it was agreed that the arbiter should determine by whose arbitration security should be furnished.

(17) Moreover, if the arbiter orders someone to be associated with him, and this was not included in the agreement for arbitration, it is not held to be an award; for the award ought to have reference to the matter stated in the agreement, but no arrangement of this kind was made.

(18) Where two principals have stipulated with one another, and wish their agents to conduct the proceedings before the arbiter, he can order the principals also to be present.

(19) Where mention is made of an heir in the agreement for arbitration, the arbiter can order the heir also to be present.

(20) It is included in the duty of an arbiter to determine in what way free possession shall be delivered. Can he also order a bond to be furnished that the principal will ratify the acts of his agent? Sextus Pedius thinks that this is not reasonable, for, if the principal does not ratify the act, he can be sued on the stipulation.

(21) An arbiter can do nothing beyond what is stated in the agreement for arbitration; and, therefore, it is necessary to add that he shall have the right to extend the time fixed by the agreement; otherwise, his order may be disobeyed with impunity.

33. *Papinianus, Questions, Book I.*

An arbiter who is selected by an agreement for arbitration with the understanding that he may extend the time, can do so; but if the parties object he cannot defer the proceedings.

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

Where there are two joint debtors, or creditors, and one of them submits a question to arbitration, and the award forbids him to sue, or not to be sued, it should be considered whether a penalty will be incurred if one party sues, or is sued, by the other. The same question arises where there are two bankers who are joint creditors, and perhaps we might place them on the footing of sureties, if they are partners; otherwise, no action can be maintained against you, nor can I bring suit, nor can suit be brought in my name, even if it is brought against you.

(1) I am of the opinion that the arbitration is entirely at an end where the penalty has once been incurred; nor can it be again incurred

unless the parties expressly agreed that liability for it should be incurred as many times as occasion arose.

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

Where a ward makes an agreement for arbitration without the consent of his guardian, the arbiter is not compelled to render a decision, because, if it is rendered, the ward will not be liable for the penalty, unless he has furnished a surety from whom the penalty can be collected by an action; and this was also the opinion of Julianus.

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

When an arbiter makes an award under compulsion by the prætor, upon a holiday, and suit is brought for the penalty on account of the arbitration; it is established that an exception is not available, unless by some law the holiday upon which the award was pronounced is excepted.

37. *Celsus, Digest, Book II.*

Although the arbiter may have forbidden one of the parties to bring suit against the other, and, notwithstanding this, an heir brings an action, he will be liable for the penalty; for recourse is had to arbiters, not for the purpose of postponing litigation, but to absolutely terminate it.

38. *Modestinus, Rules, Book VI.*

When suit is brought for the penalty arising out of an arbitration, he shall be required to pay it who incurred the liability for the same; nor does it make any difference whether or not it was to the interest of the other party for the award of the arbiter to be observed.

39. *Javolenus, On Cassius, Book XL*

It is not in all cases where the decision of the arbiter is not obeyed that liability for the penalty arising from the arbitration is incurred, but only in those which have reference to the payment of money, or the performance of some service. Javolenus also states that an arbiter can punish the contumacy of a litigant by ordering him to pay a sum of money to his adversary; but a party must not be included among contumacious persons where he did not give the names of his witnesses in accordance with the decision of the arbiter.

(1) If an arbiter orders the time fixed for arbitration to be extended, where he is allowed to do this, the default of either party will not allow the penalty to be collected by the other.

40. *Pomponius, Various Extracts, Book XI.*

An arbiter ordered the parties to appear on the *Kalends* of January, but died before that day, and one of the parties failed to be present. In this instance there is no question that the penalty was not incurred, for Aristo says that he heard Cassius state that where an arbiter did not himself appear, there was no ground for the payment of the penalty, and Servius also says that if the stipulator is to blame for not receiving the money, no penalty is incurred.

41. *Callistratus, Monitory Edict, Book I.*

As it is provided by the *Lex Julia* that a minor under twenty years of age cannot be compelled to act as judge; likewise, no one is permitted to select a minor under twenty years of age to serve as judge in an arbitration; and therefore a penalty is not incurred under any circumstances through an award made by him. Many authorities have stated that, where a party is over twenty years of age, and under twenty-five, and he rashly undertakes to hear a case of arbitration, in an instance of this kind relief should be granted.

42. *Papinianus, Opinions, Book II.*

An arbiter ordered certain slaves to be restored within a specified time, and, as they were not restored, he ordered the party to pay a penalty to the Treasury, in compliance with the terms of the agreement for arbitration. No right is acquired by the Treasury by reason of such an award, but there is, nevertheless, liability for the penalty under the stipulation, because the decision of the arbiter was not obeyed.

43. *Scævola, Opinions, Book I.*

Lucius Titius and Mævius Sempronius entered into an agreement to submit all their disputes to arbitration; but, through mistake, some matters were not included by Lucius Titius in his application, nor did the arbiter make any award with reference to them. The question arose whether those things which were omitted could be made the subject of a new application? The answer was that this could be done, and that no penalty was incurred in consequence of the arbitration; but if the party had committed the act maliciously, although indeed, he could makes a new application, he would be liable to the penalty.

44. *The Same, Digest, Book II.*

A controversy arose between Castelliannus and Seius with reference to boundaries, and an arbiter was chosen in order that the matter might be settled by his award; and he rendered his decision in the presence of the parties, and established the boundaries. The question arose whether, if the award was not complied with on the part of Castellianus, liability for the penalty growing out of the arbitration was incurred? I answered that the penalty was incurred where the arbiter was not obeyed in a matter which he decided in the presence of both parties.

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

Where, in an agreement to arbitrate, it is stated that the award shall be made by a certain person, this cannot be extended to others.

46. *Paulus, On Sabinus, Book XII.*

An arbiter can make an award with reference to matters, accounts, and disputes, which in the beginning existed between the parties who submitted their affairs to arbitration, but not with reference to matters which took place subsequently.

47. *Julianus, Digest, Book IV.*

Where an agreement to arbitrate was in the following terms: "That the arbiter should make an award when both parties or their heirs were present"; and one of the litigants died, leaving a minor as his heir, it is held that the award will not be valid, unless the consent of the guardian is granted.

(1) The same rule will apply where one of the parties becomes insane;

48. *Modestinus, Rules, Book IV.*

For, in this instance, an arbiter is not compelled to render a decision.

49. *Julianus, Digest, Book IV.*

And he may even be ordered not to render one, because nothing can be legally done in the presence of an insane person. Where, however, the lunatic has a curator, or one is appointed while the case is pending, the award can be made in the presence of the curator.

(1) An arbiter can order the parties to appear either by a messenger, or by letter.

(2) Where mention is made of an heir only with reference to one of the parties, the arbitration will be abrogated by the death of either of the litigants; as would have been the case if no mention of the heir of either had been made.

50. *Alfenus, Digest, Book VII.*

An arbiter was selected under an agreement for arbitration, and, not having been able to make his award within the period mentioned in the agreement, ordered the time of the hearing to be extended. One of the parties was not willing to obey the order; hence an opinion was asked as to whether an action could be brought against him for the penalty arising from the arbitration? I answered that this could not be done, for the reason that authority had not been granted to the arbiter to extend the time.

51. *Marcianus, Rules, Book II*.

Where anyone has been appointed an arbiter in a matter in which he himself is interested, he cannot make an award, because he would order himself to do something, or forbid himself to bring suit; for no one can command himself to perform an act, or prohibit himself from doing it.

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

Where a party is ordered by an arbiter to pay a sum of money in accordance with the terms of arbitration, and fails to do so, he must pay the penalty in pursuance of the agreement, but if he afterwards makes payment he will be released from the penalty.

TITLE IX.

SAILORS, INNKEEPERS, AND THE PROPRIETORS OF STABLES, MUST RESTORE PROPERTY ENTRUSTED TO THEM.

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

The prætor says: "When sailors, innkeepers, and the proprietors of stables have received property for safe keeping, I will grant an action against them if they do not restore it".

(1) This Edict is extremely useful, for the reason that it is very frequently necessary to place confidence in persons of this kind, and to entrust them with the care of property. No one should think that this Edict imposes any hardship upon them, for they have the choice of refusing to receive anyone; and, unless this rule was established, opportunity would be given for them to cooperate with thieves against those whom they receive as guests; since, even now, they do not abstain from fraudulent acts of this description.

(2) Therefore, let us consider who those are that are liable. The prætor says "Sailors". We must understand a "sailor" to be the person who has charge of the ship, although all are called sailors who are on board the vessel for the purpose of navigating it, but the prætor only has in mind the owner; for Pomponius says that the latter ought not to be liable for the act of an oarsman, or sub-pilot, but only for what he does himself, or for the act of the captain; although if he himself ordered anyone to commit something to the care of a sailor, he would himself undoubtedly be liable.

(3) There are also persons who occupy positions on board ships for the purpose of caring for merchandise such as nanfulaceV, that is to say, marine guards and stewards. Therefore, if any of these should receive anything, I think that an action should be granted against the owner of the ship, because he who appointed persons of this kind to office permits property to be placed in their charge; even though the captain, or master does that which is called ceirembolon that is to say, "taking the property in his hands". But even if he does not do this, the ship-owner will nevertheless be liable for what was received.

(4) No provision is made with reference to those who have charge of rafts or boats, but Labeo says that the same rule applies to them; and this is our practice.

(5) We understand by the terms "innkeepers" and "stablekeepers", those who conduct an inn or a stable, or their agents. Persons, however, who are engaged in menial occupations, are not included; as, for instance, door-keepers, cooks, and others like them.

(6) The prætor says, "Where they have received the property of anyone for safe keeping"; that is to say, any article or any goods whatsoever. Hence, it is stated in Vivianus, that this Edict also has reference to things which do not come under the head of merchandise; as, for instance, clothing which is worn on board ship, and other things such as persons daily make use of.

(7) Moreover, Pomponius says in the Thirty-fourth Book, that it makes a little difference whether we bring in our own property or that of others, if we have an interest in having it kept safely, for the property should be returned to us rather than to those to whom it belonged; and,

therefore, if I accept merchandise as a pledge for money loaned on a maritime risk, the owner of the vessel will be liable to me rather than to the debtor, if he had previously received the property from me. (8) Does he "receive the property for safe-keeping", only where having been placed on board the ship it was entrusted to him, or if it is not thus entrusted, is he still considered to have received it for this purpose, if it was merely placed on board the ship? I think that he always receives property for safe-keeping when it is placed on board, and that he not only should be liable for the acts of the sailors, but also for those of the passengers:

2. *Gaius, On the Provincial Edict, Book V*.

Just as an innkeeper is liable for the acts of travellers.

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

Pomponius says, in the Thirty-fourth Book, the same thing with reference to the acts of passengers. He also asks that where the property has not yet been placed on board a ship, but has been lost on land, it is at the risk of the owner of the vessel who at first took charge of it.

(1) The prætor says: Unless they restore it, I will grant an action against them. The action arising from this Edict is one *in factum.* Let us consider, however, whether this is necessary, as the case is one in which a party can proceed by a civil action; that is to say, where any compensation is involved, an action based on leasing or hiring will lie. But where the entire ship was hired, the party who did so can bring suit on that ground, even for articles that are missing; but if the master contracted to transport the goods, an action on the ground of hiring can be brought against him; and if he received the goods gratis, Pomponius says that an action on deposit will lie. He, therefore, is surprised that a prætorian action was introduced, since civil actions are applicable; unless, as he states, it was for the purpose of making it known that the prætor was desirous of checking the dishonesty of persons of this kind, and because in cases of leasing and hiring, a person is responsible for negligence, but in cases of deposit, only for fraud; but, under this Edict, the party who received the property is absolutely liable, even though the goods were lost, or damage resulted without his fault, unless something occurred to cause inevitable injury. Hence, Labeo holds that, where anything is lost through shipwreck, or by the violence of pirates, it is not improper to grant the owner an exception. The same must be said where irresistible force is used in a stable, or an inn.

(2) Inn-keepers and the proprietors of stables are also liable, if, in the transaction of their business, they take charge of property; but they are not liable if they do so outside of their business.

(3) Where the son of a family, or a slave receives property for safe-keeping, and the consent of the father or master is granted, an action may be brought against him for the entire amount. Moreover, if a slave of the owner of the vessel stole the property or injured it, a noxal action will not lie, for the reason that the owner can be sued directly, on account of his having received the goods; but if the son of the family, or the slave acted without the consent of his superiors, an action *De Peculio* will be granted.

(4) This action, as Pomponius states, has for its object the recovery of property; and therefore is granted perpetually, and against an

heir.

(5) Finally, let us consider whether proceedings by a prætorian action on the ground of property received, and also on that of theft, can be instituted for the same property. Pomponius is in doubt as to whether it can, but the better opinion is that the party ought to be content with one or the other of the two proceedings; that is, either application to the court, or an exception on the ground of fraud.

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

But the captain of the ship himself who assumed the risk, has a right of action on the ground of theft, unless he himself stole the property, and afterwards it was stolen from him, or

someone else stole it, where the captain is not solvent.

(1) Where the captain of a ship received for safe-keeping the property of another captain; or the proprietor of a stable, that of another proprietor; or an inn-keeper that of another inn-keeper; they are all equally liable.

(2) Vivianus states that this Edict also has reference to such property as has been on board after the merchandise whose carriage was agreed upon has been loaded, even though nothing is due for its transportation, as for instance, clothing, or provisions for daily consumption; for the reason that these things are included as additions to those for which compensation has been paid.

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

The owner of a ship, an inn-keeper, and the proprietor of a stable, receive pay, but not for the safe-keeping of property; the ship-owner receives it for the transportation of passengers; the inn-keeper for permitting the travellers to remain in his inn; the proprietor of a stable for allowing beasts of burden to be housed in his barn; nevertheless, they are all liable for the safe-keeping of property. A fuller, or a shoemaker receives pay, not for the safe-keeping of property, but for their labor; and they are also liable to an action of hiring for safe custody.

(1) What we have said with reference to theft should be understood to be equally applicable to damage, for it cannot be doubted that a party who receives property for safe-keeping is considered to do so in order to protect it from theft, as well as from injury.

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

Although you may be transported in a ship without charge, or be entertained gratuitously in an inn, still, an action *in factum* will not be refused you if your property is unlawfully damaged.

(1) If my slave is attending you on board a ship, or in an inn, and he injures my property, or steals it; although I will be entitled to actions on the ground of theft, or damage to property, yet in this instance, the action, because it is *in factum* can be brought against you, even on account of the act of my slave. The same rule applies if the slave is our common property; still, whatever you pay me on account of what he may have done, whether you were liable in an action for partition, or in an action on partnership, or where you hired only a share in said slave, or all of him, you can hold me liable on the contract also.

(2) But where some injury has been committed against the said slave by someone else, on the same ship, or in the inn, whose acts the prætor is accustomed to investigate, Pomponius does not think that this action can be brought on account of the slave.

(3) An inn-keeper is also liable to the action *in factum*, on account of those who have lodgings in the inn, but this rule does not apply to a party who is entertained as a transient guest, as, for instance, a traveller.

(4) We can also have recourse to an action of theft, or for damages against sailors, if we can prove the act of any particular person; but we should be content with one action, and if we proceed against the owner of the vessel, we must assign to him our right of action; although an action based upon hiring will lie in his favor against the other party.

Where, however, the owner is discharged from liability in this action, and the party injured then brings suit against the sailor: an exception will be granted the latter, in order to prevent frequent trials being held on account of the conduct of the same man. On the other hand, if proceedings are instituted on account of the conduct of one man, and afterwards an action *in factum* is brought against the owner, an exception will be granted.

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

The owner of a vessel shall be responsible for the acts of all his sailors, whether they are freemen, or slaves, and not without reason, for he himself employed them at his own risk. But he is not responsible, except where the damage has been committed on board the vessel; for

where it happens off the vessel, even though it was committed by the sailors, he will not be liable. Moreover, if he gives warning that every passenger must be responsible for his own property, and that he will not be liable for damage, and the passengers agree to the terms of the warning, he cannot be sued.

(1) This action *in factum* is for double damages.

(2) Where any of the sailors cause damage to the property of one another, this does not affect the owner of the ship. But where anyone is both sailor and merchant, he will be responsible, and where the party injured is one of those commonly called nanlepibatae that is to say one who works his passage the owner will be liable to him also; and he will be responsible for the acts of a person of this kind since he also is a sailor.

(3) Where the slave of a sailor causes damage, even though he himself is not a sailor, it is perfectly just to grant a prætorian action against the owner of the vessel.

(4) The ship-owner is liable in his own name in this action that is to say, he himself is to blame for employing persons of this description; and therefore, even if he should die, he will not be released from liability. Where, however, he becomes liable through the conduct of his own slave, only a noxal action can be brought; for where he employs the slaves of others, he must ascertain whether they are faithful and trustworthy, but he is excusable on account of his own slaves, no matter what kind of slaves he employed for the purpose of manning his ship.

(5) Where there are several owners of a ship, any one of them can be sued to the amount of the interest which he has in the same.

(6) These actions, although they are honorary, are still perpetual, but they are not granted against an heir; hence, if a slave has control of a ship, and dies, an action *De Peculio* will not be granted against his master, even within a year; but where a slave or a son manages a ship with the consent of his father or his master, or has charge of an inn or a stable; I am of the opinion that they will be compelled to defend the suit for the entire amount of damages, on the supposition that they assumed complete responsibility for everything which might happen.

THE DIGEST OR PANDECTS.

BOOK V.

TITLE I.

CONCERNING TRIALS AND WHERE ANYONE OUGHT TO BRING SUIT, OR BE SUED.

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

Where persons voluntarily agree to submit to the jurisdiction of some court, then this case can be heard by any judge who presides over said court, or has jurisdiction therein, so far as the consenting parties are concerned.

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

To "agree" is considered to mean that parties who are aware that they are not subject to the jurisdiction of a certain judge, nevertheless consent that he shall preside. If, however, they think that he has jurisdiction, he will not, merely for that reason, have it; for, (as Julianus says in the First Book of the Digest) the mistake of litigants does not constitute an agreement; or, where they think that a person is a prætor who is not one, this error does not also confer jurisdiction, nor does any jurisdiction exist where one of the litigants refuses to comply with the decision of the prætor and is forcibly compelled to do so.

(1) Is it sufficient for private parties to agree with one another, or is the consent of the prætor also necessary? The *Lex Julia* on Trials says, "In order to prevent private persons from coming to an agreement". Hence, if private persons do agree, and the prætor is not aware that they have done so, and he thinks that he has jurisdiction, should it not be considered whether the requirements of the law have been complied with, or not? And I think it may be held that he has jurisdiction.

(2) Where anyone is appointed judge for a certain time, and all the litigants agree that the time which he ordered to hear the case may be extended, this may be done; unless an extension of time was especially prohibited by order of the Emperor.

(3) The right is granted deputies to have a case transferred to the place of their residence, where some contract was entered into by them before they were appointed; and similar privileges are conceded to those who were summoned to give evidence, or have been sent for or appointed to go to some province to preside as judges. Where a party has himself appealed, he is not required to answer in proceedings instituted by others during the time of his appeal at Rome, or elsewhere; for Celsus states that, in this instance, the case may be transferred to the place of his residence, since he came to Rome for some other purpose. This opinion of Celsus is a reasonable one. For the Divine Pius stated in a Rescript to Plotius Celsianus, that a party whom he had summoned to Rome for the purpose of rendering the account of a guardianship could not be compelled to join issue in a case involving another guardianship in which he had not been summoned. He also stated in the Rescript to Claudius Flavianus that a minor under twenty-five years of age who petitioned for complete restitution against one Asinianus who had come to Rome on some other business, had no right to be heard there.

(4) All these persons can have their cases transferred to the places of their own domicile, if they did not contract where suit was brought against them. If, however, they made the contract there, they have not the right of removal; except envoys who, although they may have contracted at Rome, provided they did so before their mission, are not compelled to defend themselves in that city, so long as they remain there as envoys. This Julianus also held, and the Divine Pius stated in a Rescript. It is evident that if they remained at Rome after their mission was concluded, then, as the Divine Pius stated in a Rescript, suit can be brought against them there.

(5) Moreover, if they entered into a contract outside of their own province, but not in Italy, the question arises, can they be sued at Rome? Marcellus states that they can only use the privilege of having a case transferred to the place of their residence, when they entered into the contract in their own city, or, at all events, in their own province; which is true. But if they themselves bring an action, they must defend themselves against all others; but not, however, where they bring suit for injury done to them, or for theft, or for damages which they have sustained during their absence from home; otherwise, as Julianus very properly says, they would have to endure insult and loss without being able to obtain redress; or anyone, by attacking them would have the power to subject them to jurisdiction as soon as they claim reparation.

(6) If, however, any doubt should arise whether anyone in a case of this kind can have it transferred to the place of his residence or not, the prætor should decide the question after investigation. If he should determine that the party had a right to have the case transferred to the place of his residence, the latter must make arrangements to appear in court for trial, after the prætor has fixed the day of his appearance. Marcellus doubts whether he should merely execute a mere undertaking to appear, or give security to do so, and it seems to me that his promise alone would be sufficient, and this Mela also stated; otherwise, he would be compelled to join issue instead of finding persons to give security for him.

(7) In all cases in which time is extended, this should be done without causing any loss to creditors by lapse of time.

(8) The right of imposing a fine is conferred upon those who hold the position of public judges, and to no others, unless this is specially granted to them.

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

A person is not presumed to conceal himself for the purpose of avoiding a suit, if, even while he was present, he could not be compelled to join issue.

4. *Gaius, On the Provincial Edict, Book I.*

We have no legal right to bring an action against a person who is under our control, unless with reference to *castrense peculium*.

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

Where a party is summoned before the prætor from another jurisdiction, he must appear, as is stated by Pomponius and Vindius; as it is the duty of the prætor to decide whether he has jurisdiction, and those who are summoned should not treat the "authority of the prætor with contempt; for envoys and other persons who have the right to have their cases transferred to the places where they reside, are in such a position that they must appear, after having been summoned, in order to state their privileges.

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

A blind man can perform the duties of a judge.

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

Where anyone has become a soldier, or subject to some other jurisdiction after he has been summoned to appear in court, he will not have the right to have his cause transferred, because he has been, as it were, anticipated.

8. *Gaius, On the Provincial Edict, Book II.*

Where anyone, during his mission, agrees to make payment of an obligation which he contracted before becoming an envoy, he cannot be compelled to defend himself in the place where he made the promise.

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

The islands belonging to Italy are a part of Italy, and the adjacent islands are a part of each province.

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

A party is understood to "desist", not when he defers the case, but where he abandons it altogether; for to desist means to relinquish any proceeding which he had begun for the purpose of annoyance.

(1) It is evident that if anyone, after he has ascertained the facts in the case, gives it up, being unwilling to persevere in an action which is unjust, and which he did not institute for the purpose of causing annoyance, he is not held to have desisted.

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

If anyone is arrogated by me who had previously joined issue in a suit which he had brought against me, or which I had brought against him, Marcellus says in the Third Book of the Digest that the case is terminated, because no suit could have existed between us in the beginning.

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

Where the prætor forbids one of several persons to preside as judge, he is held to have allowed the others to do so.

(1) Those authorities can appoint a judge to whom this right is granted by a law, or by a constitution, or by a decree of the Senate. By a law; for example, this right may be conferred upon a proconsul. He also can appoint a judge to whom jurisdiction has been delegated, as, for instance, the deputies of proconsuls. Moreover, those can do so to whom it has been permitted by custom, on account of the Imperial authority which they enjoy, for instance, the Prefect of the City, and other magistrates at Rome.

(2) Those who have the right to appoint judges cannot appoint them indiscriminately; for some persons are prevented by law from becoming judges; others are prevented by nature; and others, still, by custom. By nature; as persons who are deaf, dumb, and such as are incurably insane, as well as boys who are minors, because they are deficient in judgment. A party is prevented by law, who has been expelled from the Senate. Women and slaves are prevented by custom, not because they are deficient in judgment, but because it has been established that they cannot perform the duties belonging to civil employments.

(3) When persons are eligible as judges, it makes no difference whether they are under the control of another, or are their own masters.

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

In the three following actions, namely: those for partition of an estate, the division of property held in common, and the establishment of boundaries, the question arises who shall be considered as plaintiff, because the condition of all the parties seems to be the same? It is the better opinion that he should be considered the plaintiff who makes application to the court.

14. *Ulpianus, Disputations, Book II.*

Where, however, both parties apply to the court, it is customary to determine the question by lot.

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

Where the son of a family is a judge, and makes the case his own, he is liable for a sum equal in value to his *peculium* when he rendered his decision.

(1) A judge is understood to make the case his own when he maliciously renders a decision in violation of law. He is held to do this maliciously, where it is clearly proved that either favor,

enmity, or even corruption, influenced him; and, under these circumstances, he can be forced to pay the true amount of the matter in controversy.

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

Julianus thinks that where a judge makes a case his own, an action can be brought against his heir; but this opinion is not correct, and has been rejected by many authorities.

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

Julianus says: That if one of the parties makes a judge his heir to either the whole or a portion of his estate, recourse must be had to another judge; because it is unjust for anyone to be made the judge of his own cause.

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

If a long time must elapse until the judge who has been appointed can hear the case, the prætor orders him to be changed; and this happens, for example, where some business occupies the judge and prevents him from giving his attention to the trial; for instance, where he is attacked by disease, or is compelled to go on a journey, or where his private property is in danger.

(1) Where the son of a family wishes to institute proceedings for reparation for an injury on account of which his father has a right of action, we only permit him to bring suit where there is no one who can do so in behalf of his father; for it is the opinion of Julianus that if the son of a family is absent on an embassy, or for the purpose of pursuing his studies, and suffers theft, or unlawful damage to his property, he is entitled to bring a prætorian action; since, if he waited for his father to bring suit, the malicious act would go unpunished, because his father might not come, or the party who committed the wrong might absent himself before he arrived. Wherefore, I have always held the opinion that where the cause of action did not arise from a malicious act, but from a contract, the son ought to bring a prætorian action; as, for instance, where he wishes to recover a deposit, or sue on a mandate, or for money which he had loaned; and, in that case, if his father was in the province, and he happened to be at Rome, for the purpose of prosecuting his studies or for some other good reason, and we did not grant him the action, he would, in consequence, be defrauded with impunity, and live at Rome in want, because he did not obtain the property which his father intended for his expenses. And suppose that the son of a family in question is a Senator, and has a father in the province; would not the equity of this be increased by his rank?

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

When the heir is absent, he must make his defence in the place where the deceased contracted the debt, and he must be sued there if he can be found; and he cannot allege any peculiar privilege by way of exemption.

(1) Where anyone has been managing a guardianship or a curatorship, or some business, or banking, or anything else from which obligations arise, in any particular place, he must defend himself there, even if that is not his residence; and if he does not make a defence and has no home there, he must permit possession to be taken of his property.

(2) In like manner, if he sold merchandise in any particular place, or otherwise disposed of it, or purchased it; it is held that he must defend himself there, unless it had been agreed upon that he should do so elsewhere. Shall we say then that a party who has made purchases from a merchant who is a stranger, or sold goods to someone whom he knew was about to depart immediately, has no right to obtain possession of his property, but must follow the latter to the place where he resides; while if anyone makes a purchase from a person who has rented a shop, or a warehouse, in some particular place, is he in such a position that he can be sued there? This conclusion is the more reasonable one, for when a party comes to a place with the expectation of soon leaving it, you can make a purchase from him just as you could from a

traveller, or from one who is making a journey either by land or sea; and it would be a great hardship that no matter where a man travelled either by sea or land he could be sued, and be compelled to defend himself. But if he remains anywhere, I do not mean by way of residence, but because he rented a small shop, or booth, or granary, or warehouse, or office, and sells merchandise there, he will then be compelled to defend himself in that place.

(3) The question is raised by Labeo, if a man belonging to a province has a slave acting as his agent for the purpose of selling merchandise at Rome, any contract entered into with said slave must be considered as if it was made with his master; and therefore, the party must defend himself at Rome.

(4) It should be remembered that a person who is bound to make payment in Italy, if his residence is in a province, can be sued in either place; and this opinion is adopted also by Julianus and many others.

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

It must be held that every obligation should be considered as based upon a contract, so that, wherever anyone binds himself, he is held to have made a contract, even though the transaction was not one of indebtedness arising out of a loan.

21. *Ulpianus, On the Edict, Book LXX.*

Where I wish to institute proceedings against a debtor, the approved course is that, if he admits that he owes the money and states that he is ready to pay it, he must be heard, and time must be granted him for making payment under a sufficient bond; for no great injury can result from delay for a reasonable time.

(1) By a "reasonable time" must be understood that which is granted defendants for payment, after judgment has been rendered against them.

22. *Paulus, On Plautius, Book III.*

Where a party is not compelled to defend an action in a certain place; if he himself brings suit there, he can be compelled to defend suits also, and to appear before the same judge.

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

Anything which comes up after issue has been joined cannot be considered as before the court; and therefore it will be necessary to make a new application.

24. *The Same, On Plautius, Book XVII.*

No action will lie at Rome against persons whom the Emperor has summoned there, except where they make a contract during the time they remain.

(1) Envoys are compelled to answer in suits at Rome on account of offences committed while there in that capacity, whether they themselves commit them or their slaves.

(2) Where an action *in rem* is asked for against an envoy, and the said action is founded on present possession, shall it be granted? Cassius stated that the rule to be observed is that, if the action would cause the envoy to be deprived of all his slaves, it should not be granted; but if it only related to one slave out of several, it ought not to be refused. Julianus says, without making any distinction, that the action should be denied, and this is reasonable, since the action is not granted lest the party be turned aside from the duties of the office which he has undertaken.

25. *Julianus, Digest, Book I.*

Where a man, while on a mission, purchases a slave, or any other property, or, for any other reason comes into possession of the same, he is not unjustly required to join issue in a suit having reference to said property; otherwise, power will be given to envoys under this pretext

to carry away to their own homes the property of others.

26. *Paulus, On Plautius, Book XVII.*

Cassius states with reference to an envoy who entered upon an estate, that, even where he enters upon it at Rome, an action cannot be brought against him, lest his mission might be interfered with; and this is true. An action is not even granted to legatees against him, but they can be put in possession of property belonging to the estate, unless he gives security, which rule also applies to creditors of the estate.

27. *Julianus, Digest, Book I.*

For what will prevent an envoy from performing the duties of his office while there is an agent in possession of the property of the estate for the purpose of taking care of it?

28. *Paulus, On Plautius, Book XVII.*

But where an estate is delivered to him under the Trebellian Decree, an action against him will not be granted, whether the heir entered

upon the estate voluntarily, or under compulsion; for it is certainly more convenient for the estate to be delivered to him; hence it should be considered as if he himself had entered upon the estate.

(1) On the other hand, if an envoy, during the time of his mission, enters upon an estate and delivers it, an action will be granted against the beneficiary of the trust; nor will an exception under the Trebellian law be available, on account of the position of the envoy; as this is for the personal benefit of the latter.

(2) In those instances where an envoy is not forced to join issue in an action, he cannot be compelled to make oath that he is not obliged to pay, for the reason that his oath takes the place of a joinder of issue.

(3) An envoy must promise reparation for threatened injury, or permit his neighbor to take possession of the building.

(4) Where the time for bringing an action is about to expire, the prætor shall permit it to be brought against the envoy, if proper cause is shown, in order that issue may be joined, and the case transferred to the envoy's place of residence.

(5) Where the head of a family dies and leaves a son, and his widow is pregnant, the son cannot legally collect from the debtors half the money loaned to them, although afterwards one son should be born; because several more might have been born, since, in the nature of things, it was certain that one child would be born. Sabinus and Cassius, however, are of the opinion that a fourth part of the debts might be collected, for the reason that it is uncertain whether three would not be born, and that we need not pay any attention to the nature of things where all are certain, as whatever is going to occur does occur; but we should consider our own ignorance.

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

The party who first makes application is the plaintiff.

30. *Marcellus, Digest, Book I.*

Wherever issue is joined, the case should also be terminated there.

31. *Celsus, Digest, Book XXVII.*

Where a plaintiff dies and leaves several heirs, and one of them institutes proceedings, it is not true that everything involved in the case up to that time is in Court; for no one can conduct a suit in court which has already been begun by another, if his co-heir does not consent.

32. *Ulpianus, On the Office of Proconsul, Book I.*

Where the judge appointed to render a decision within a certain time dies, and another is appointed in his stead, we understand that the same time is fixed with respect to the latter, although the magistrate did not expressly mention this when making the appointment; provided that the term prescribed by law is not exceeded.

33. *Modestinus, Rules, Book III.*

A party is not held to have accepted a certain judge who asks his adversary to state the nature of his case before that judge.

34. *Javolenus, On Cassius, Book XV.*

When a party dies after having joined issue at Rome, his heir, even though he resides beyond sea, must defend the case at Rome, because he succeeds to the place of him by whom he was appointed heir.

35. *The Same, Epistles, Book X.*

It is not true that, as the obligation of a surety can be left dependent upon circumstances or contracted for at some future time, so also a suit may be contingent, or in such terms that an obligation may be subsequently incurred; for I do not think that anyone would doubt that a surety can be accepted before the obligation of the principal debtor is incurred, but issue cannot be joined before some indebtedness arises.

36. *Callistratus, Inquiries, Book I.*

Sometimes hearings are postponed for good reasons and on account of certain parties; as, for instance, where documents relating to a case are said to be in possession of persons who will be absent on public business. Therefore the Divine Brothers stated the following in a Rescript: "Humanity demands that postponement should be granted on account of accidental misfortunes; for example, where a father who was a party to the case has lost his son, or his daughter; or a wife her husband; or a son his parent; and in similar cases the hearing should be postponed for a reasonable time."

(1) Where a senator voluntarily undertakes to attend to the affairs of another in a province, he can not refuse to defend an action on the ground of business transacted; and Julianus says that he must defend the action, since he voluntarily assumed this obligation.

37. *The Same, Inquiries, Book V.*

Where inquiry is made concerning violence and the existence of possession, investigation must be made of the violence before the ownership of the property is considered; in accordance with a Rescript of the Divine Hadrian in the Greek language directed to the Commonwealth of Thessaly.

38. *Licinnius Rufinus, Rules, Book IV.*

Where property is bequeathed by a legacy, and suit is brought to recover it by an action *in personam*, it must be delivered where it is, unless it has been maliciously removed by the heir; and then it shall be surrendered where suit is brought for it. Again, a legacy consisting of articles which may be weighed, counted, or measured, must be delivered where suit is brought for it; unless the following words were added, "A hundred measures of corn from such-and-such a granary", or "so many *amphoræ* from such-and-such a cask". Where, however, suit is brought for a legacy by an action *in rem,* it must also be brought where the property is. If the latter is movable, an action for its production will lie against the heir to compel him to produce it, for then suit can be brought by the legatee for its recovery.

39. *Papinianus, Questions, Book III.*

Where an insane person is appointed judge, the trial will not be prevented because he cannot

preside at that time; so that, when he renders a decision after having recovered the use of his faculties, it may stand. In the appointment of a judge neither his presence nor his knowledge is necessary.

(1) Where a party comes to Rome on a mission, he can become a surety in any case; since he cannot make use of his privilege when he enters into a contract in Italy.

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

It is not every act which can be performed by the authority of a judge which is subjected to the restraints of the law.

(1) If a judge, in the performance of his functions, should maliciously omit something which is contrary to the rules of law, he is guilty of an offence against the law.

41. *The Same, Questions, Book XI.*

In all *bona-fide* actions, when the day of payment of money has not arrived, and anyone makes application for the execution of a bond, it will be allowed where proper cause is shown.

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

Where the wife of an envoy is divorced at Rome, it has been held that her husband must make his defence at Rome, when the recovery of her dowry is involved.

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

Where a person stipulates that a house shall be built for him at Capua within a certain time; it is established that when the time has elapsed, he can bring an action for damages for the amount of his interest, anywhere.

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

The functions of a judge are not interfered with by the fact that, after a suit has been begun against all the guardians, some of them have been absent on public business; since the administration of those who are present can be distinguished and investigated separately from that of those who are not defended.

(1) Where a person in whose behalf an action has been brought by an agent is afterwards ascertained to be a slave, the debtor should be discharged; but the principal will not be barred for this reason, if he should subsequently decide to bring the action himself.

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

A banker must be sued where the contract was made with him, and, in such a case, a postponement will not be granted except for good cause; as, for instance, to permit his books to be brought from a province. The same rule applies to an action on guardianship.

(1) Where the guardians of a female ward have a decision rendered against them in a province, the curators of the ward may be comoelled to comply with the decree at Rome, where the mother of the ward borrowed the money, and her daughter was her heir.

46. *Paulus, Questions, Book II.*

Where a judge has been appointed, he remains in office even though he becomes insane, because he was properly appointed judge in the beginning; but a serious illness excuses him from presiding, and therefore some one should be appointed in his stead.

47. *Callistratus, Questions, Book I.*

Care must be exercised that a person be not appointed judge, whom either side expressly petitions for; as the Divine Hadrian stated in a Rescript that this would offer a bad precedent unless it should be especially allowed by the Emperor through respect for him whose appointment was requested.

48. *Paulus, Opinions, Book II.*

The following is a portion of a letter of the Divine Hadrian, "Magistrates, during the year of their office, cannot institute any legal proceedings of their own either as plaintiffs or as defendants; nor can they act officially in any matter in which they are interested on the ground of either guardianship or curatorship. But as soon as the term of their magistracy has expired, it will be just and proper for actions to be brought both for and against them".

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

A vendor who was called upon by a purchaser to defend him in a suit brought by a party who claimed the property as owner, stated that he had the right to have his own judge. The question arose whether he could remove the case from the tribunal of the judge before whom proceedings had been begun between the plaintiff and the purchaser to that of his own judge. Paulus answered that it is customary for the vendor to appear before the judge of the purchaser.

50. *Ulpianus, Trusts, Book VI.*

Where an action for the execution of a trust is brought by anyone, and the defendant alleges that the greater portion of the estate is situated elsewhere, he cannot be forced to execute the trust; and it is provided by many constitutions that where an action is brought to enforce compliance with a trust, this must be done where the greater portion of the estate is situated; unless it is proved that the testator wished the trust to be executed where suit was brought.

(1) The question has been raised with respect to borrowed money; whether when the greater part of the indebtedness was in the province where suit is brought to enforce a trust, could the action be transferred to some other place, because the bulk of the estate was elsewhere? It was, however, established in this instance that the fact of the indebtedness is of no importance, as it is not dependent on the place, but on the entire assets of the estate; for a debt is a diminution of the entire estate, and not of the assets in any particular locality. But what if this part of the estate were charged with some burden, as, for instance, to furnish support which the testator ordered to be done at Rome, or with taxes; or with any other unavoidable burdens; in these instances would the party be entitled to have the case transferred? I think that it may be said with great justice that he would.

(2) It has, however, been stated in a rescript that suit should be brought to enforce a trust in the place where the heir resides. But whenever anyone begins to make payment in compliance with the terms of the trust, he cannot subsequently avail himself of this resource:

51. *Marcianus, Institutes, Book VIII.*

Even though the estate should have descended to a man who has his domicile in a province. The Divine Severus and Antoninus, however, stated in a Rescript that if the party should consent to discharge the trust elsewhere, he is bound to do so in the place agreed upon.

52. *Ulpianus, Trusts, Book VI.*

But if the heir appears in an action on the trust and makes use of other defences, but neglects this one, he cannot afterwards have recourse to it, even before a decision is rendered.

(1) Where a testator directs in his will that tickets for grain should be purchased for his freedmen; then, although the greater portion of the estate is in a province, still, the trust must be carried out at Rome; which is the proper opinion, since it is evident that it was the intention of the testator that this should be done, on account of the nature of the purchase.

(2) Moreover, if you should suggest the following case, namely: that a certain amount of silver or gold was bequeathed to such-and-such illustrious persons, and there is enough of the estate at Rome to execute the trust, even though the greater portion of the estate is situated in a province; it should be held that the trust must be discharged at Rome; for it is not very

probable that a testator who intended to show honor to those to whom he bequeathed such moderate legacies under the trust, should have desired them to be paid in the province.

(3) Where the property left under a trust is at hand, it must be held that anyone who brings suit for it cannot be barred by an exception on the ground that the greater portion of the estate is elsewhere.

(4) Where, however, the property which is the subject of the trust is not to be sued for where it is situated, but security for the execution of the trust is to be given; it must be considered whether an exception can be pleaded (and I do not think that it can) and, indeed, even if there is no property there, still the party must be required to furnish security. For what is there to fear, since, if he does not give security, his adversary will be placed in possession in order to protect the trust?

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

There are only a few cases in which slaves are permitted to appear against their masters; and one of them is where they state that a certain will, by which they allege they were bequeathed their freedom, has been suppressed. Slaves are also permitted to give information against their masters where the latter have withheld deliveries of grain belonging to the Roman people, as well as returns of property for taxation, and also for counterfeiting. Moreover, they can institute proceedings to obtain their freedom left to them by a trust, and also where they allege that they have been purchased with their own money, and not manumitted, in violation of the good faith of the agreement. Also, where a slave has been declared to be free by will when he renders his accounts, he can legally demand an arbiter as against his master, for the purpose of examining his accounts. Where anyone has relied upon the good faith of another, with the understanding that he should be purchased with the money of the former, and be manumitted when he had repaid it, and the party says that he is unwilling to receive the money when it is tendered, power is granted to the slave to disclose the terms of the agreement.

54. *Paulus, Opinions, Book I.*

A matter of greater importance should not be prejudiced by one of inferior moment; for the more important question attracts that which is of lesser weight.

55. *The Same, On the Office of Assessors*.

A summons issued by a former judge should be regarded as one of the three prescribed. It is evident even if the entire number has been completed by the said judge, that custom requires his successor to issue another.

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

Although it is true that a genuine agent can bring anything before a court, still, where a party who is not an agent joins issue, and his principal afterwards confirms what he has done; it is held that by retroactive effect, the matter has been properly presented to the court.

57. *The Same, On Sabinus, Book XLI.*

An action can be brought against the son of a family with reference to both contracts and offences, but where a son dies after joinder of issue, the right of action will be transferred to his father; only, however, with reference to his *peculium* or any advantage which he may have obtained. It is evident that if the son of a family undertakes a defence as the agent of another, then, if he dies, the right of action will be transferred to the party whom he defended.

58. *Paulus, On Sabinus, Book XIII*.

A suit is terminated where the party who applied for it to be heard forbids it to proceed; or, indeed, anyone does so who has superior authority in the same jurisdiction; or even where the judge himself is vested with authority equal to that of him who appointed him.

59. *Ulpianus, On Sabinus, Book LI.*

If, in the appointment of a judge, the place in which he is to discharge his duties is not mentioned, he is held to be appointed to act in that place where he can do so without inconvenience to the litigants.

60. *Paulus, On Sabinus, Book XIV.*

When a judge dies, he who succeeds him must follow the same course which was laid down for his predecessor.

61. *Ulpianus, On the Edict, Book XXVI.*

We are usually accustomed to say that the matter before the court is that which was agreed upon by the litigants; but Celsus states that it is dangerous to apply to the defendant for information on this point, because he will always say that no agreement was made, in order to avoid losing his case. What then shall be done? It is better to hold that the subject of the trial is not what the parties agreed upon; but that is not the subject of the trial which it was expressly agreed that it should not be.

(1) A judge who has jurisdiction in cases of robbery cannot hear and decide actions in which money is involved.

62. *The Same, On the Edict, Book LIX.*

An action cannot proceed between two litigants unless where one of them is the claimant and the other the possessor of the property; for there must be someone to bear the burden of the plaintiff, and another who enjoys the advantage of possession.

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

A legitimate defence is one where the party joins issue, either himself or by another, but always furnishing security; and no one is considered to make a legal defence who does not pay what he is ordered by the court.

64. *The Same, Disputations, Book I.*

An estimate of damages for fraud is not made by the judge with reference to the interest of the party who brings the suit, but is based upon what he swears to in court; and there is no doubt that even a thief has a right of action on the ground of deposit or loan for use.

(1) Where anyone is about to bring a suit of one kind and accepts security that the judgment will be complied with, and then brings another kind of a suit; an action cannot be brought on the stipulation, because it seems to have been made with reference to something else.

65. *The Same, On the Edict, Book XXXIV.*

A woman must bring an action for her dowry where her husband has his residence, and not where the dotal contract was entered into; for this is not such a contract that it is necessary to take into consideration the locality where the said instrument was executed, so much as the place to which the woman herself, in accordance with the condition of marriage, would always have returned as to her home.

66. *The Same, Disputations, Book II.*

Where anyone makes use of ambiguous language, or his intention is doubtful, he must be understood in the sense which is most favorable to himself.

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

Where a slave states that he has been purchased with his own money, and proves it, he will be free from the time when he was purchased; because the Imperial Constitution does not direct that he shall be declared free, but orders that his freedom shall be restored to him, hence his

master can be required to manumit a slave who purchases himself with his own money; but if the master conceals himself, the precedents derived from decrees of the Senate relative to grants of freedom under a trust must be followed.

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

In the case of a peremptory citation the following rule must be observed; the party bringing the action may apply for one summons if his adversary is absent, and subsequently for a second:

69. *The Same, On All Tribunals, Book IV*. After an interval of not less than ten days;

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

And then a third; and these having been issued, he can afterwards obtain a peremptory citation. This term is employed because it puts an end to the controversy; that is to say, it does not permit the adversary to longer delay.

71. *The Same, On All Tribunals, Book IV*.

In the peremptory citation the magistrate who issues it gives notice that he will hear and decide the case even should the other party be absent.

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

This citation is sometimes granted after the three others have preceded it, sometimes after only one, or two, have been issued, and sometimes it is granted at once, and is designated "one for all". The course to be pursued shall be determined by him who exercises jurisdiction, and he must arrange the order of the citations, or regulate them according to the circumstances of the case, or of the person, or of the time.

73. *The Same, On All Tribunals, Book IV*.

After a peremptory citation has been obtained, and as soon as the day mentioned therein arrives, the absent party must be called; and whether he answers, or not, the case must proceed and decision be rendered, but not always in favor of the party who is present; for sometimes the absent party may prevail if he has a good case.

(1) But if the party who obtained the peremptory citation is absent on the day appointed for the hearing, and he against whom it was obtained is present, the peremptory citation must be annulled, and the cause shall not be heard, nor shall a decision be rendered in favor of the party who is present.

(2) If the citation is annulled, let us consider whether the defendant can be sued again, and whether the right of action still remains, or whether merely the proceeding relating to this citation is annulled? The better opinion is, that it only is annulled, and that the parties can litigate again.

(3) It should be borne in mind that where an absent party has a judgment rendered against him on account of a peremptory citation, and appeals, he shall not be heard; that is, if he was absent through contumacy; but if he was not, he should be heard.

74. *Julianus, Digest, Book V*.

A judge can be compelled to render a decision with reference to any matter of which he has taken cognizance.

(1) A judge appointed to render a decision for some particular amount can also decide with reference to a greater one, as this is agreed upon by the litigants.

(2) Where I once consented to defend an absent party, and joined issue when the defendant was already dead, and I was defeated, and paid the damages; the question arose whether the heir was released, and also what kind of an action I was entitled to against him? I answered

that the decision was not valid, as the debtor was already dead when issue was joined, and therefore the heir was not released; but if the party conducting the defence had made payment in accordance with the judgment, while he could not recover the money, still, an action would lie in his favor against the heir on the ground of business transacted; and certainly the heir could protect himself by an exception based on bad faith, if suit was brought against him by the plaintiff.

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

Where the prætor has ordered a party against whom an action is brought for a debt, to appear; and the number of citations is exhausted; and he decides that the absent party owes the debt, and suit is brought to enforce the judgment; the judge who hears the case cannot examine the decree of the prætor, otherwise citations of this kind and the decrees of the prætors would be illusory.

Marcellus says in a note: "Where the plaintiff knowingly and falsely states anything with malicious intent, and it is clearly established that in this way he obtained a judgment in his favor from the prætor; I think that the judge should admit the complaint of the defendant." Paulus says in a note, that if the defendant was unable to be present because he was prevented by illness, or was employed in some business for the State, it is his opinion that in this case an action to enforce the judgment against him should be refused, or the prætor ought not to permit execution to be issued.

76. *Alfenus, Digest, Book VI.*

The following case was suggested. Certain judges were appointed to hear the same action, some of them having been excused after it was tried, others were appointed in their stead; and the question arose whether the change of some individual judges left the case in the same condition, or placed it in a different one? I answered that not only one or two might be changed, but all of them as well, and that the action would continue to be the same that it was previously, and in fact this was not the only case in which it happened that though the parts were changed, still the thing itself was considered to be the same, but this occurred in many other instances. For a legion is considered to be the same, even though many of those belonging to it may have been killed, and others put in their places; and the people are deemed to be the same now as they were a hundred years ago, although not one of them may at present be living; and also, where a ship has been so frequently repaired that not even a single plank remains which is not new, she is still considered to be the same ship. And if anyone should think that if its parts are changed, an article would become a different thing, the result would be that, according to this rule, we ourselves would not be the same persons that we were a year ago, because, as the philosophers inform us, the very smallest particles of which we consist are daily detached from our bodies, and others from outside are being substituted for them. Therefore, where the outward appearance of anything remains unaltered, the thing itself is considered to be the same.

77. *Africanus, Questions, Book III.*

In private business, a father may act as judge where his son is interested, and *vice versa:*

78. *Paulus, On Plautius, Book XVI.* Since judging is a public employment.

79. *Ulpianus, On the Office of Proconsul, Book V.*

Where a party is proved to have summoned his adversary to court without a good cause, he will be obliged to refund him his traveling expenses, as well as the costs of the suit.

(1) Where judges are perplexed with reference to the law, it is customary for the governors to state their opinions, but where the latter are consulted on a question of fact, they are not compelled to do so, and they must order the judges to render a decision, as their consciences may dictate; as, where opinions are given under such circumstances, it sometimes causes

scandal, and furnishes an opportunity for partiality or corrupt solicitation.

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

Where a mistake is made in the name or surname of a judge, it was the opinion of Servius that if the judge was appointed by an agreement of the litigants, he must act as judge whom both litigants had in view.

81. *Ulpianus, Opinions, Book V.*

Anyone who is not invested with jurisdiction, or is not granted authority by the Emperor, nor appointed by an official who has the right to appoint judges, or not selected by agreement for arbitration, or not confirmed by some law, cannot act as judge.

82. *The Same, On the Office of Proconsul, Book I.*

Sometimes the magistrates of the Roman people are accustomed to expressly appoint court attendants arbiters, which should be done very rarely, and only where the case is urgent.

TITLE II.

CONCERNING INOFFICIOUS TESTAMENTS.

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

It must be borne in mind that complaints are frequently made with reference to inofficious testaments, as it is lawful for all persons, whether they be parents or children, to attack an inofficious testament. Those relatives who are beyond the degree of brothers will do better, however, not to trouble themselves by incurring useless expense, since they have no hope of success.

2. *Marcianus, Institutes, Book IV.*

Proceedings are instituted in the case of an inofficious testament on the ground that the testator was not of sound mind when he made his will. It is not understood by this that he was actually insane, or demented, when he executed his will, but that he made it according to law, yet not in compliance with the dictates of paternal or filial affection; for if he were actually insane or demented, his will would be void.

3. *Marcellus, Digest, Book HI.*

To say that a will is inofficious means to allege that the party should not have been disinherited or passed over; because it generally happens that where parents are improperly influenced to disinherit or pass over their children, this is due to false representations.

4. *Gaius, On the Lex Glitia.*

Parents should not be allowed to wrong their children by their wills, since for the most part they do so because they are maliciously prejudiced against their own blood by the flattery and instigation of stepmothers.

5. *Marcellus, Digest, Book III.*

Those, also, who are not descended from the testator in the male line, have the right to institute proceedings, as they can do so in case of the testament of a mother; and they very frequently succeed. The force of the term "inofficious" is, (as I have already stated), to show that the party was undeservedly and therefore improperly passed over, or even excluded by disinheritance, and the allegation is made in court that the testator does not appear to have been of sound mind when he executed an unjust will.

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

A posthumous son can allege that a will is inofficious where the testator was one to whom he might have been a proper or lawful heir, if he was unborn at the time of the death of the

former. He has also a right to attack the wills of cognates, since, in this instance, he would be able to obtain possession of the property in case of intestacy. What then? Should the testator be blamed for not dying intestate? But no one could obtain assent from a judge where such a proposition was advanced; for parties of this kind are not prohibited from making wills. This, however, he can clearly be charged with, namely: not appointing the party his heir, for an heir who has been appointed can be placed in possession in accordance with the clause by which possession can be granted to the mother of an unborn child; and if it was born, it would be entitled to possession in accordance with the provisions of the will. I hold that, in like manner, the complaint can be brought by a party who, after the will of his mother was made, was removed from her womb by the Cæsarean operation.

(1) Where a person has no right to succession by intestacy institutes proceedings on the ground that the will is inofficious, and no one contests his right to do so, and he happens to succeed, his success will be of no benefit to him, but will only be of advantage to those who are entitled to the succession on intestacy, for he makes the former head of the family intestate.

(2) Where anyone dies after having instituted proceedings on the ground of inofficiousness, does he transfer his right of complaint to his heir? Papinianus answered (and this is also stated in several rescripts) , that if the party should die after he has already obtained possession of the property of the estate, the right of proceeding with the action passes to the heir; and where the possession of the property is not demanded, but the controversy has already begun or is in course of preparation, or if the party should die after having arrived for the purpose of filing a complaint on the ground of inofficiousness; I think that the right passes to his heir.

7. *Paulus, On the Jurisdiction of the Septemvirs*.

Let us consider in what way a party may be held to have prepared his case, so that he can transmit the right of action. Let us suppose that he was under the control of the testator, so that the possession of the estate would not be necessary for him, and entrance upon the es-

tate would be superfluous; and if he merely gave notice that he intends to make such a charge, and proceeds to serve notice, or to file the petition, he will transmit the right to prosecute the case to his heir; and this the Divine Pius stated in a Rescript with reference to the service of the papers and the notice. What course should be pursued where the party was not under the control of the deceased? Would the right of action be transmitted to his heir? If he did the things which we have mentioned above, he would seem to have properly prepared his case.

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

Papinianus very properly says in the Fifth Book of Questions, that a father cannot institute proceedings on the ground of inofficiousness in behalf of his son, if the latter is unwilling; for the wrong was committed against the son. He states immediately afterwards that if his son should die after having obtained possession of the estate, with a view to proceeding regularly with the case, the complaint for inofficiousness is terminated; for it was not granted to the father himself, but on account of his son.

(1) Where a party abandons the case after having instituted proceedings on the ground of inofficiousness, he shall not afterwards be heard.

(2) It has very frequently been stated in rescripts that when the Emperor is appointed an heir, the testament can be declared inofficious.

(3) Papinianus, in the Second Book of Opinions, says that a complaint for an inofficious testament can be brought against the head of a family who is a veteran, even though the only property which he owns is what he obtained in military service.

(4) Where a soldier makes a will while in the army, and dies a year after he is discharged, I doubt whether a complaint for inofficiousness will be allowed, because his will is valid up to

this time, in accordance with military law, and it may be said that a complaint on the ground of inofficiousness is not available.

(5) A mother cannot claim that the will of her son who is under age is inofficious, because his father made it for him; and Papinianus gave this opinion; nor can his father's brother do so, because it is the will of the son; therefore, the brother of the minor cannot do so either, if he did not object to his own father's testament. Where, however, the testament of the father is attacked successfully, that of his son will be void, unless it was broken only with reference to his father, for then the pupillary part will remain valid.

(6) Where anyone makes a donation *mortis causa* to his son of the fourth part of what he would have been entitled to if the testator had died intestate, I am of the opinion that his will is secure.

(7) Where a man provided a substitute for his son, who is a minor, by making a secondary bequest, we cannot, for this reason permit the minor himself to file a complaint for inofficiousness.

(8) Since the fourth part of the share which is due is sufficient to exclude the complaint, it should be considered whether a disinherited child, who does not object, should be included, as, for example, where there are two sons who are disinherited; and no doubt he should be included, as Papinian states; and if the other should say that the will is inofficious, he cannot claim the entire estate, but only half of the same. Thus, for the same reason, where there are grandchildren, the issue of two sons, for instance, three by one of them, and only one by the other; the son who is alone will be excluded from the complaint by obtaining three-twenty-fourths of the estate, and any one of the others by obtaining one twenty-fourth of the same.

(9) This fourth part will, of course, be estimated after the debts and funeral expenses have been deducted; but it must be considered whether testamentary grants of freedom will diminish the fourth part, and do they diminish it? For if anyone is appointed sole heir, he cannot claim that the will is inofficious, because he has received the Falcidian portion; but the *Lex Falcidia* does not apply to testamentary manumissions, and it may be held that the fourth part is to be entered on after deducting what is lost by manumission; therefore, as it is established that the fourth part is reduced by manumission, the result will be that, where a person's estate consists of slaves, by emancipating them he bars a complaint for an inofficious testament; unless, perhaps, his son, if he was not under his control after being appointed the heir of his father, may properly reject the estate, and having transmitted it to the substitute, may begin proceedings for inofficiousness, so as to obtain the estate on the ground of intestacy without being liable to the penalty prescribed by the Edict.

(10) Where a testator directed his heir to fulfill some condition having reference to his son, or to some other person who had a right to bring the same complaint, and he knowingly agreed to this, it should be considered whether he is prevented from making a complaint for inofficiousness, since he accepted the will of the deceased.

The case is the same where the party who gave him the donation was a legatee, or a *statuliber;* and it may be said that the son is prevented, and especially where the testator ordered the heir to make the gift; but if it was a legatee, may it not be true that where the right to file a complaint for inofficiousness has once vested, the tender by the legatee will not abrogate it? For why did we absolutely establish this principle in the case of the heir? It was because no right to file a complaint arises before he had entered upon the estate. I think that, in this instance, the event must be followed, so that if what was left was tendered to the son before proceedings were instituted by him, then it appears that he has all that he is entitled to, as the donation was offered in accordance with the wishes of the testator.

(11) Wherefore, if anyone has been appointed heir, for instance to one half the estate, when a sixth would have been coming to him from the testator's property if he had died intestate, and

he is asked to surrender the estate after a certain time; it can reasonably be held that he cannot bring an action, since he could have the share which was due to him, and the profits of the same, for it is well established that the profits are usually included in the Falcidian portion. Therefore, where, in the beginning, an heir was appointed to half the estate, and afterwards is asked to relinquish his inheritance after the expiration of ten years; there is no ground on which to make complaint, since he could during that time, easily have collected the share that was due to him together with the profits of the same.

(12) Where a party alleges that a will is void, defective, and inofficious, the choice should be given him as to which claim he wished to make first.

(13) Where a son who has been disinherited is in possession of the estate, and the party who has been appointed heir brings suit to recover it; the son can file the complaint by way of cross action, just as he would do if he were not in possession but was bringing an action for recovery.

(14) It must be remembered that where a party improperly alleges that a testament is inofficious, and loses his case, he will also lose what was left him by the testament, and it can be recovered in a suit by the Treasury as property of which he was deprived because he was unworthy of it. He is, however, only deprived of what was bequeathed to him by the will, where he, without any ground, continued to prosecute the case until judgment was rendered. Where, however, he desisted or died before judgment, he will not be deprived of what was left him. Hence, if while he was absent, a decision was pronounced in favor of the other party, who was present, it may be said that he can hold what was left him. A party, however, can only lose anything where the enjoyment of it belongs to him; and if he is asked to surrender it to another, no injury should be done. Wherefore, Papinianus not incorrectly states in the Second Book of Opinions, that where a party is appointed an heir and is asked to surrender the estate, and then, after bringing complaint for inofficiousness, does not succeed, he only loses what he could have obtained under the *Lex Falcidia*.

(15) Where a minor has been arrogated, and is one of those persons who can make complaint of an inofficious testament without depending upon adoption or emancipation to do so; I think that he will be barred, since he is entitled to a fourth part of the estate, according to the Constitution of the Divine Pius. If, however, he brings suit, and does not obtain a judgment, will he lose this fourth part? I am of the opinion that he should not be permitted to contest the will on the ground of inofficiousness, or if he should be permitted, even if he does not gain the suit, to have the fourth part granted him as a debt which is due to him.

(16) Where a judge investigates a case based on an inofficious testament and renders a decree against the testament, and no appeal is taken, the testament is rescinded by operation of law; and the party who succeeds will become the direct heir, or the possessor of the property in accordance with the terms of the decree; testamentary grants of freedom will become void by operation of law; legacies will not be due; and if they have been paid they can be recovered either by him who paid them or by the successful litigant (by means of a prætorian action). Generally, however, where they have been paid before proceedings were instituted, the successful litigant should bring suit for their recovery; as the Divine Hadrian and the Divine Pius stated in a Rescript.

(17) It is certain that if the claim of inofficiousness is alleged for some very just cause after five years, manumissions which have already taken place, or which could be demanded, cannot be revoked; but twenty *aurei* should be paid by each liberated slave to the party who gained the suit.

9. *Modestinus, On Inofficious Testaments*.

Where anyone institutes proceedings within five years, manumission will not stand. Paulus says, however, that where freedom is granted under a trust it will be allowed; and, of course,

in this instance twenty *aurei* must be paid by each individual.

10. *Marcellus, Digest, Book III.*

Where, in the case of an inofficious testament, part of the judges rendered a decision against it, and part in favor of it, which is sometimes done; it will be more humane to adopt the opinion of those who favored the testament, unless where it is clearly apparent that they rendered an unjust decision in favor of the party who was appointed heir.

(1) It is a well known fact that anyone who accepts a legacy cannot properly allege that the will is inofficious, unless he transferred the entire legacy to another person.

11. *Modestinus, Opinions, Book HI.*

I stated as my opinion that even where a party succeeds on the ground that a testament is inofficious, any donations which the testator, while living, seems to have made in favor of the appointed heir, are not for that reason annulled; nor will an action lie to recover part of what was given to him by way of dowry.

12. *The Same, On Prescriptions, Book XII.*

It makes no difference whether a son who is disinherited accepts a legacy bequeathed to him, or obtains it through his son or slave, to whom it was left; in either instance he will be barred by an exception. Again if his slave is appointed heir, and the son manumits him before he directs him to enter upon the estate, so that he may do so of his own free will, and the son does this with a fraudulent design, he will be prevented from proceeding with his action.

(1) Where a son who has been disinherited makes a demand upon a *statuliber* for money due him, he is held to have accepted his father's will.

(2) Where a son brings suit to obtain a legacy which was revoked, and, having failed, has recourse to a complaint for inofficiousness, he will not be barred by an exception; although by the mere fact of his bringing suit he approved of the will, still, some blame should be attributed to the testator, so that the claim of the son cannot reasonably be rejected.

(3) Where the son of a testator, along with Titius, was a debtor for a certain sum of money, and Titius was released by the terms of the will, the son will not be discharged from liability on account of the release of Titius; nor will his right to bring an action of inofficious testament be barred.

13. *Scævola, Opinions, Book HI.*

Titia appointed her daughter heir, left her son a legacy, and provided by the same will that: "All those things which I have above directed to be given or done, I wish to be given and done by any person who will become my heir, or the possessor of my estate, even on intestacy. Also, whatever I may direct hereafter to be given or done, I leave in trust to the said person to see that it is given and done." The question arose whether, if a sister gained a case in the Centumviral Court, the trust must be executed in compliance with the preceding clause? My answer to the inquiry whether a party can lawfully impose a trust on those whom he thinks will succeed him on intestacy, either as heirs, or as possessors of his estate, was that he could do so. Paulus states in a note that he approves the opinion that trusts imposed by a party who dies intestate need not be executed, as they would seem to have been ordered by a person of unsound mind.

14. *Papinianus, Questions, Book V.*

A father emancipated his son, and retained his grandson under his control; the son subsequently had another son, and then died, after having disinherited both sons, and omitted any mention of his own father in his will. In an inquiry as to whether the will was inofficious or not, the interest of the sons must take precedence, and the intentions of the father of the deceased remains for consideration; but if judgment is rendered against the sons, then the

complaint of the father can be examined, and he can institute proceedings.

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

For although parents have no right to succeed to the estate of their children, still, on account of the wishes of the parents and their natural affection for their children, when the regular order of mortality is disturbed, an estate ought to be left on the ground of affection no less to parents than to children.

(1) Where a party after having brought suit to declare a will inofficious changes his mind, and then dies, a complaint on the ground of inofficiousness will not be granted his heir, as it is not sufficient for proceedings to be instituted if the plaintiff does not continue to carry them on.

(2) Where a son brings suit on the ground of an inofficious will against two heirs, and obtains different decisions from the judges defeating one heir and being defeated by the other, he can sue the debtors of the estate, and he himself may be sued by the creditors to the extent of his share in the same, and he can recover property and divide the estate; for it is true that he is entitled to an action for partition, as we think that he becomes an heir at law for a share of the inheritance, and therefore a portion of it remains subject to the terms of the will, and it does not seem absurd that the testator should be considered to have died partly intestate.

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

Where a son has already instituted proceedings on the ground of inofficiousness of his mother's will, against his brother who was appointed heir to a portion of the estate, and gains his case; a daughter who did not bring suit, or did not succeed, cannot lawfully share in the inheritance with her brother.

(1) A father obtained possession of the estate of his son by the right of manumission, in opposition to the provisions of the will, and look possession of the property; and afterwards a daughter of the deceased, whom he had disinherited, very properly prosecuted an action on the ground that the will was inofficious, and then the possession which the father obtained was annulled; for, in the former proceedings, the question to be determined was the legal position of the father, and not the legality of the will; and hence it was necessary for the entire estate to be restored to the daughter together with the profits of the same.

17. *Paulus, Questions, Book II.*

Where anyone with the intention of rejecting the estate does not attack a will as inofficious, the share to which he is entitled to does not stand in the way of any others who may wish to institute proceedings for that purpose. Wherefore, when one of two children who have been disinherited institutes proceedings to have the will of their father declared inofficious — for if the will is set aside, the other son will have a right to the succession on the ground of intestacy, and therefore cannot legally bring suit to recover the entire estate — if he should gain his case, he can avail himself of the authority of *res judicata*, since the *Centumviri*, when they declared the maker of the will intestate would have believed that this is the only son living.

(1) When judgment is rendered against a testament on the ground of inofficiousness, the deceased is considered not to have been compe-

tent to make a will. This opinion is not to be approved where a decision is rendered in favor of the plaintiff and the heir does not defend the case; as, in this instance, it is not understood that the law is established by the decree of the Court, and therefore manumissions are sustained and actions can be brought for legacies.

18. *The Same, On Inofficious Testaments*.

A Constitution of the Divine Brothers on this subject is extant, which recognizes a distinction of this kind.

19. *The Same, Questions, Book II.*

A mother, when about to die, appointed a stranger heir to three-fourths of her estate, and one daughter an heir to one fourth of the same, and passed over another daughter; whereupon the latter brought suit to declare the will inofficious, and gained her case. I ask to what relief the daughter who was appointed heir is entitled? I answered that the daughter who was passed over should bring an action to recover whatever she would have received if her mother had died intestate. Therefore, it may be said that she who was passed over, even if she brings suit for the entire estate on intestacy and succeeds, will be entitled to the exclusive succession, just as if the other daughter had renounced her lawful share. It should not be admitted, however, that the former may be heard against her sister if she institutes proceedings on the ground of inofficiousness.

(1) Moreover, it must be said that the sister who entered upon the estate in compliance with the provisions of the will, is not in the same position as the one who was passed over, and therefore the latter must bring suit to recover half of the estate from a stranger; and it may be held that in this way she can recover half, because the entire half belongs to her. According to this, the entire will is not set aside, but the testatrix is rendered intestate to a certain extent, even if the Court declares the will void as having been executed by a person who was insane.

(2) But if anyone should think that where a daughter gains her case the entire will be rendered void, it must be held that the sister who was appointed heir on intestacy can enter upon the estate, for since she enters in compliance with the terms of the will, which she thought was valid, she cannot be considered to have rejected her lawful share of the estate, to which, indeed, she did not know that she was entitled; for when persons are aware of their rights they do not lose them, if they select a course which they believe they can pursue. This happens where a patron, induced by an incorrect opinion, accepts the will of a deceased freedman; for he is not held to have rejected the possession of the estate in contravention of the will. From this it is evident that the daughter who was passed over cannot legally bring suit to recover the entire estate, since, if the will were set aside, the right of the one appointed heir to enter upon the estate remains unimpaired.

20. *Scævola, Questions, Book II.*

Where anyone wishes to have a will declared inofficious, although it may be denied that he is the son of the deceased, he is not entitled to the Carbonian possession of property, for this is only permitted where, if the party were actually the son he would be the heir, or the legal possessor of the estate; so that if, in the meantime, he should obtain possession, and be supported, his rights would not be prejudiced by any actions which might be brought by him. Where a party makes a claim of inofficiousness, he cannot bring any actions except one to obtain the estate, and he has no right to support. This is done to prevent him from being in a better position than if his adversary had acknowledged him to be the son of the testator.

21. *Paulus, Opinions, Book HI.*

Where a party who instituted proceedings on the ground that a will was inofficious, abandons the action, on account of fraudulent assertion of the appointed heir, who alleges that he is tacitly bound to give him a third part of the estate; he is not held to have renounced his right of action, and therefore he cannot be prohibited from resuming the suit which he began.

(1) Inquiry has also been made whether an heir should be heard, when he asks that what he has paid out before the action to declare the will inofficious was brought, ought to be refunded to him? The answer was that he who, being aware of the facts, paid out money in pursuance of a trust with which he had no concern, will not, on this account, be entitled to an action to recover it.

(2) The same jurist gave it as his opinion that where the party who was appointed heir is deprived of the estate by a suit to declare a will inofficious, everything should proceed just as

if the estate had not been entered on; and therefore the appointed heir would have a complete right of action against the party who gained the case, to collect any debt, as well as a right of set-off against all indebtedness.

22. *Tryphoninus, Disputations, Book XVII.*

A son is not prevented from attacking the testament of his mother as inofficious, where his father has received a legacy by the will of the mother, or has entered upon the estate, even though the said son was still under his father's control; and I have stated that the father is not forbidden to attack the will in behalf of his son, for the indignity is inflicted upon the latter.

(1) It was also asked if the son failed in his attack on the will, whether what was left to the father would be forfeited to the State? For, as he would not be benefited by his success, and in this instance the duty of the father was not in any way concerned, but everything depended upon the merit of the son, we must incline to the opinion that the father does not lose what was left to him, if a decision is rendered in favor of the will.

(2) Much more is this the fact where a testator left me a legacy, and his son, after instituting proceedings on the ground that the will was inofficious, died, leaving me his heir, and I still proceed with the action against the estate, and I am defeated, I do not lose what was left me by the will; if, of course, the deceased had already begun suit. (3) Moreover, if I adopt a person after he has already brought an action to declare the will inofficious, by which will a legacy had been bequeathed to me, and I conduct the case in behalf of my adopted son, and do not succeed; I should not lose my legacy because I have been guilty of anything for which I ought to be deprived by the Treasury of what was bequeathed to me; for I did not bring the suit in my own name, but on account of a certain kind of legal succession.

23. *Paulus, On Inofficious Testaments*.

If you suppose the case of an emancipated son who has been passed over and his grandson who continued under the control of the testator, and is appointed heir; the son can institute proceedings against his own son, who is the grandson of the testator, for the possession of the estate, but he cannot bring an action on the ground that the will is inofficious. If, however, the emancipated son was disinherited, he can bring the action, and can then be joined with his son, and will obtain the estate along with him.

(1) Where disinherited children have purchased an estate or any property belonging to it from the persons who were appointed heirs, knowing them to be such, or have rented land from them, or done anything else like this, or have paid the heir debts which they owed the testator, they are held to have accepted the will of the deceased, and are excluded from bringing suit.

(2) Where two sons are disinherited, and both bring suit on the ground that the will is inofficious, and one of them afterwards concludes not to proceed, his share will belong to the other by accretion. The same rule applies where he is barred by lapse of time.

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

It frequently occurs with reference to suits for inofficiousness that different decisions are rendered in one and the same case. For what if the brother who institutes proceedings and the appointed heirs are persons occupying different legal positions? If this should be the case, the deceased is held to have died partly testate and partly intestate.

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

Where a donation is made not *mortis causa*, but *intervivos,* and at all events with the understanding that it shall be included in the fourth, it may be said that suit cannot be brought on the ground of inofficiousness, if the party receives the fourth in the donation; or, if he receives less, the amount lacking, shall be made up according to the arbitration of some good citizen; or, under any circumstances, what has been donated must be placed in the common

fund.

(1) Where a person who has no right to bring suit on the ground of an inofficious will, is permitted to do so, and attempts to have the will partially set aside, and selects some particular heir against whom to bring the action; it must be said that as the will is partly valid, and the parties who were entitled to preference over the plaintiff are excluded, the latter has properly brought the suit.

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

Where an heir has been appointed on a condition, for instance if he should manumit Stichus, and he does manumit him, and afterwards the will should be declared inofficious or unjust; it is but right in order that he may obtain relief, that is to say, he should recover the value of the slave from him after his manumission, to avoid his losing him altogether.

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

If after a testament has been attacked as inofficious an agreement was made by the parties to compromise the case, and the terms of the compromise are not complied with by the heir, it is established that the suit brought on the ground of inofficiousness still remains unaltered.

(1) Where anyone alleges that he is the son of the testator who denied this to be true in his will, and, nevertheless, disinherited him, ground for an action for an inofficious will still remains.

(2) A soldier cannot state that the will of another soldier is inofficious.

(3) Where a grandson instituted proceedings on the ground that a certain part of a will was inofficious, against his paternal uncle or some other person who was appointed heir, and gained the case, but the testamentary heir appealed; it was decided, in the meantime, that on account of the poverty of the minor, he should be granted an allowance for maintenance in proportion to the assets of the estate, (for part of which suit was brought by him in the attack on the will as inofficious) and that his adversary would be required to supply him with necessaries until the case was terminated.

(4) A complaint can be filed on the ground of inofficiousness in the case of the will of a mother who, thinking that her son was dead, had appointed another heir.

28. *Paulus, On the Jurisdiction of the Septemvirs*.

Where a mother has heard a false report that her son, who was a soldier, was dead, and appointed other heirs by her will, the Divine Hadrian decreed that the estate should belong to the son on the ground that testamentary grants of freedom and bequests should be maintained. What was added with reference to grants of freedom and bequests should carefully be noted, for where a testament is decided to be inofficious, nothing it contains is valid.

29. *Ulpianus, Opinions, Book V*.

Where it is suspected by the legatees that collusion exists between the appointed heirs and the person who is bringing suit against the will as inofficious, it has been established that the legatees have a right to appear and defend the will of the deceased, and they are also permitted to appeal, if a judgment is rendered against the will.

(1) Illegitimate children also can likewise object to the will of their mother on the ground of inofficiousness.

(2) When an attack on account of inofficiousness is made against a will, although the case may be settled by compromise, the will still remains in full force and effect; and therefore any testamentary grants of freedom and bequests contained therein still continue to be valid to the extent permitted by the *Lex Falcidia*.

(3) Since a woman can never adopt a son without the consent of the Emperor, no man can

institute proceedings on the ground of inofficiousness against the will of the woman whom he erroneously thought to be his adoptive mother.

(4) Proceedings on the ground that a will is inofficious must be instituted in the province in which the testamentary heirs have their residence.

30. *Marcianus, Institutes, Book IV*.

A natural father can lawfully institute proceedings against the will of his son who has been given in adoption, on the ground that said will is inofficious.

(1) The Divine Severus and Antoninus stated in a Rescript that guardians were permitted, in behalf of their wards, to institute proceedings on the ground that a will was inofficious or forged, without any risk of losing what was bequeathed to them by the will.

31. *Paulus, On the Jurisdiction of the Septemvirs*.

Where a person who has a right to attack a will is unwilling, or cannot do so, it is a matter for consideration whether he who is next in succession shall be allowed to institute proceedings for that purpose; and it has been established that he can, as succession is involved.

(1) With reference to the action for inofficiousness brought by children or parents, it makes no difference who may be appointed heir, whether one of the children, a stranger, or a resident of the same town.

(2) If I should become the heir of a party who himself was appointed heir by the will which I wish to prove to be inofficious, this fact will not bar me, especially if I do not have possession of the portion of the estate in dispute, or only hold it in my own right.

(3) We say that the case is different where a party left me the property which he himself had received under the will; for if I accept it I am excluded from attacking the will.

(4) What must be said then if I should accept the will of the testator in some other way; for example, if, after the death of my father, I write on the will that I consent to it? In this instance I am prevented from attacking it.

32. *The Same, On Inofficious Testaments*.

Where a disinherited son acts as advocate, or assumes the duty of agent for a party who brings an action for a legacy under the will, he

will not be permitted to attack the will; for he who approves of any bequests of the deceased is held to have accepted his will.

(1) Where a disinherited son becomes the heir of a legatee, and brings an action for the legacy, let us consider whether he is not barred from attacking the testament for the testament of the deceased is certain, and, on the other hand, it is true that nothing has been left him by the testament. He will be safer, however, if he abstains from bringing an action for the legacy.[1]

TITLE III.

CONCERNING THE ACTION FOR THE RECOVERY OF AN ESTATE.

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

An estate may belong to us either by the ancient or by the recent law; by the ancient law in accordance with the provisions of the Twelve Tables, or by a testament legally executed:

2. *Ulpianus, On the Edict, Book XV*.

Whether we become heirs directly by our own acts, or by those of others;

3. *Gaius, On the Provincial Edict, Book VI.*

For instance, if we order some person who is under our control to accept an estate to which he

has been appointed heir. Where a person becomes the heir of Titius, and he himself is the heir of Seius, it may be said that, as he is the heir of Seius, so also he can claim the estate of Titius. A party can become an heir on intestacy, as, for instance, where he is the direct heir of the deceased, or an agnate, or where he manumitted the deceased, or his father manumitted him.

Persons become heirs under the new law when they have a right to an inheritance derived from decrees of the Senate, or from the Constitutions of the Emperors.

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

If I bring an action for the recovery of an estate against a party who has possession of only that part of the same which is the subject of controversy, he will be required to surrender everything of which he subsequently obtains possession.

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

The Divine Pius stated in a Rescript that the possessor of an estate which was in dispute should be forbidden to dispose of any portion of it before proceedings are instituted; unless he prefers to furnish security for the entire amount of the estate, or for the restitution of the property belonging thereto. The prætor, however, stated in an edict that: "Where proper cause was shown he would permit a part of the property to be alienated, even where such security was not given, but only the customary undertaking after proceedings had been instituted; lest, if the disposal of any of the property of an estate were prevented, it might hinder, in some way or other, other advantageous measures from being taken; as, for instance, if something was needed for funeral expenses; (for he allows a diminution of the estate on account of funeral expenses), and he will also do this when a pledge is to be sold if a sum of money is not paid within a certain time.

A diminution of property belonging to an estate likewise becomes necessary to provide food for the family, and the prætor must also permit the sale of perishable articles which in a short time would be destroyed.

(1) The Divine Hadrian stated in a Rescript to Trebius Sergianus that Ælius Asiaticus ought to give security for an estate, to recover; which suit had been brought against him, and then he can allege that the will is forged. This is done for the reason that the proceedings for recovery may remain in abeyance while investigation of the allegation of forgery is being made.

(2) The authority of the action brought for the recovery of estates is such that no other legal proceedings shall be permitted to prejudice it.

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

Where a testament is alleged to be forged, and suit is brought for a legacy under it, it must be paid after a bond has been filed, or an inquiry must be instituted to determine whether it is due. Where the testament is alleged to be forged, no legacy should be paid to the party who attacks it on this ground, if the matter has been brought into court.

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

Where anyone states that he is entitled to his freedom under the terms of a will, the judge should not decide the question of his freedom, lest he may prejudice some decree rendered with reference to the will; and this law was passed by the Senate. The Divine Trajan stated in a Rescript that the trial to determine his freedom must be postponed until the suit on the ground of inofficiousness was either dismissed or concluded.

(1) Trials relating to freedom are, however, only stayed where joinder of issue has taken place in a suit for inofficious testament, but if this has not been done, the trial of the question of freedom shall not be postponed. This the Divine Pius stated in a Rescript, for when a certain Licinnianus had been brought into court to ascertain his status, and, to prevent a too early decision as to what it was, he refused to appear at the trial where the question of his freedom

was to be heard, saying that he would join issue on the inofficiousness of the testament, and then bring an action to recover the estate; because he alleged that both freedom and the estate were conferred upon him by the testament.

The Divine Pius said that if Licinnianus had been in possession of the estate, he would have a better right to be heard, since he could then have joined issue in behalf of the estate, and it was in the discretion of the party claiming to be his master to proceed on the ground that the testament was inofficious; but Licinnianus should not remain in slavery for five years under the pretext of the inofficiousness of the will on which point he himself had not joined issue.

In the end, the Emperor permitted the judge to determine generally whether the trial with reference to the will was demanded in good faith, and if he ascertained that it was, that a reasonable time should be granted; and if issue had not been joined before it elapsed, the judge should be ordered to perform his duties in the trial involving the question of freedom.

(2) The Divine Pius stated in a Rescript that whenever anyone is compelled to defend a case which involves his own freedom, and the inheritance of an estate, but where he does not allege that he was made free under the will, but in some other manner — as for instance, that he had been manumitted by the testator in his lifetime — then the case involving the question of freedom should not be delayed, even though it was anticipated that an action would be brought with reference to the will. He added plainly in the Rescript: "Provided the judge who was to decide the question of freedom had been notified not to hear any statements in favor of freedom which were based upon the testament".

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

A person is not prohibited from bringing suit for the recovery of a legal estate, because he carried out the intention of the deceased at a time when he was ignorant whether the will was valid or not.

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

It should be laid down as a regular rule that, "The only person liable to an action for the recovery of an estate is he who has a right either as heir or as possessor to a portion of the same."

10. *Gaius, On the Provincial Edict, Book VI.* No matter how small it may be.

(1) Therefore, where a party is the heir to an entire estate or to a portion of the same, he alleges that the estate is his either wholly or in part, but that only is delivered to him by order of court which his adversary had possession of; that is the whole of it, if he is the heir at all, or the share of the same to which he is entitled as heir.

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

A person is in possession "as an heir" when he thinks himself to be the heir. But, it may be asked, how is it with him who knows that he is not the heir, and yet holds possession in that capacity? Arrianus, in the Second Book On Interdicts, is of the opinion that he is liable; and Proculus states that this is our practice, for it is held that a possessor of the property of an estate is held to possess the same in the capacity of heir.

(1) A depredator, in fact, holds the estate "as possessor",

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

Who, when he is asked why he is entitled to possession will answer, "Because I am"; and will not contend that he is an heir, even by way of false representation:

13. *The Same, On the Edict, Book XV.*

Or anyone who cannot allege any right to possession; and therefore thieves and robbers are liable to an action for the recovery of an estate.

(1) Again, this title "as possessor" is attached and, as it were, joined to all other Titles. Hence it may be attached to the title of "as purchaser"; for if I purchase from an insane person, knowing him to be such, I hold the property "as possessor". Also with reference to the title "as donee", the question arises whether the party holds as possessor, for example, a wife or a husband; and we adopt the opinion of Julianus that either of them holds the property in the capacity of possessor, therefore he or she would be liable in a suit for the recovery of the estate. Again, title "by right of dower" takes the form of possession; as for instance, where I marry a girl under twenty years of age and accept property as dowry, being aware of her age. Moreover, if a legacy is paid to me on grounds which I know to be false, it is certain that I hold the property "as possessor".

(2) But he who delivers an estate under a trust cannot be held liable in a suit for the recovery of the same, unless he acted fraudulently; that is to say, if he knew that it ought not to be delivered, and, nevertheless, surrendered it; for even fraud previously committed is to be considered in a suit for the recovery of an estate, since the party fraudulently relinquished possession.

(3) Neratius, in the Sixth Book of Parchments, says that a suit for the recovery of an estate can be brought against an heir, even where he did not know that the deceased held the estate in the capacity of either heir or possessor. He states in the Seventh Book that the same rule applies even where the heir thought that the property claimed belonged to some estate to which he was entitled.

(4) How would it be if a person had purchased an estate? Should a prætorian action for the recovery of the estate be granted against him to prevent him being annoyed by separate suits? It is certain that the vendor is liable. But suppose no vendor appears, or he disposes of the property for a small amount of money, and was a *bona-fide* possessor; can recourse be had to the purchaser? Gaius Cassius thinks that a prætorian action should be granted.

(5) The same rule must be considered to apply where an heir, having been directed to sell the estate for a small sum, disposed of it to Titius. Papinianus thinks that it should be held that an action could be granted against the beneficiary of the trust, as it is not expedient for suit to be brought against the heir where he has received an insignificant sum.

(6) The same rule will apply where the heir was asked to surrender the estate after retaining a certain amount. It is evident that if, after having received a certain amount, he was asked to surrender the remainder, that suit for recovery cannot be brought against him; (and this is the opinion held by Papinianus) since what the heir received in order to fulfill a condition is not possessed by him. Sabinus, however, holds differently in the case of a slave who is to be free conditionally, and this is the better opinion, because the money belongs to the estate.

(7) This rule is applicable where a party only retains the profits of the estate, and he also is liable to an action for recovery of the estate.

(8) Where anyone knowingly purchases an estate which belongs to another, he holds the same as possessor, some authorities think that an action for recovery may be brought against him; but I do not believe that this opinion is correct, for no one is a depredator who pays a price, still, being a purchaser of the entire estate, he is liable to a prætorian action.

(9) Moreover, where anyone purchases an estate from the Treasury with the understanding that it has no owner; it is perfectly right that a prætorian action should be granted against him.

(10) It is stated by Marcellus in the Fourth Book of the Digest, that where a woman gives an estate by way of dowry, the husband is in possession of the same by right of dowry, but is liable to a prætorian action for its recovery. Marcellus, however, says that the woman herself is liable to a direct action, especially if a divorce has already taken place.

(11) It is also established that the heir to property which the deceased possessed as purchaser

is liable to an action for the recovery of the same, for the reason that the heir holds possession "as heir", although he is also liable to a suit for property which the deceased possessed, either in the capacity of heir or in that of possessor.

(12) Where anyone is in possession of an estate in behalf of a person who is absent, and it is uncertain whether the latter will ratify his acts or not; I think that suit for recovery can be brought in behalf of the party who is absent, but certainly not on his own account; because a man is not deemed to be in possession "as heir", or merely "as possessor", who holds property as the representative of another; unless someone should say that, as the principal did not ratify his acts, the agent is, to a certain extent, a depredator, for then he can be held liable on his own account.

(13) The action for the recovery of an estate can be brought not only against the person who possesses property which belongs to the estate, but even if he possesses nothing; and it should be considered if where he possesses nothing, and offers to defend the suit himself, whether he does not render himself liable. Celsus states in the Fourth Book of the Digest, that he is liable on the ground of fraud; for anyone who, himself, offers to defend a suit of this kind acts fraudulently. This opinion is generally approved by Marcellus in his comments on Julianus, for he says that every one who volunteers to defend a suit for the recovery of an estate is liable just as if he were in possession of the same.

(14) Moreover, when anyone is guilty of fraud to avoid being in possession, he will be liable to an action for the recovery of an estate. Where, however, I lose possession through fraud, and another obtains it and is ready to defend an action, Marcellus in the Fourth Book of the Digest discusses the point as to whether the right to damages is not extinguished as against a party who has ceased to be in possession; and he also says that it is extinguished unless the plaintiff has an interest in a contrary decision. He states positively that if the party is prepared to surrender the property, the right of action for damages is undoubtedly extinguished; but if he who relinquishes possession fraudulently is sued before the other, the possessor will not be released from liability.

(15) The action for the recovery of an estate can also be brought against a debtor to the same, on the principle that he is the possessor of a right; and it is established that suit can be brought for the recovery of an estate against the possessor of a right.

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

It makes no difference whether the person is a debtor on account of some offence which he has committed, or by reason of a contract. The term "debtor to an estate" is understood to include a person who incurred some liability to a slave belonging to the estate, or one who did some damage to it before it was entered upon,

15. *Gaius, On the Provincial Edict, Book VI.* Or someone who stole something from the estate.

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

Where, however, the person against whom suit is brought for recovery of the estate is a debtor for a sum to be paid within a certain time, and under some condition, judgment should not be rendered against him. It is clear that the time when judgment is rendered should be considered by the court in determining whether the day for payment has arrived, according to the opinion of Octavenus as stated by Pomponius; which would also be the case in a conditional stipulation. If, however, the day of payment has not arrived, the defendant should by order of the judge make provision for the payment of the debt at the proper time, or when the condition is fulfilled.

(1) He also who is in possession of the price of property belonging to the estate, or who has collected a claim from a debtor to the estate, is liable in an action for the recovery of the

estate.

(2) Wherefore, Julianus states in the Sixth Book of the Digest, an action for the recovery of an estate can be brought against a party who also claims it, and who has collected damages in a suit.

(3) An action for the recovery of an estate can be brought not only against a debtor of the deceased, but also against a debtor to the estate. It is held by both Celsus and Julianus that it can be brought by anyone who transacted the business of the estate; but where the party transacted business for the heir, this cannot be done, for no action for the recovery of an estate can be brought by anyone indebted to the heir.

(4) Julianus states that if a person who is in possession as heir is forcibly ejected, suit can be brought by him as the possessor of a right against the estate; for the reason that he is entitled to the interdict *Unde vi*, which he must assign if he is defeated; but the party who ejected him is also liable to a suit for recovery, because he is in possession "as possessor" of the property belonging to the estate.

(5) Julianus further says that where anyone sells property belonging to an estate, whether he is in possession, or whether he has received the purchase money or not, or has a right to bring suit for the same, he is, in this case also, required to assign his rights of action.

(6) He also says that a patron cannot bring suit for an estate against a party to whom his freedman fraudulently made a transfer, because he is liable to the Calvisian Action, at the instance of the said patron, as he is the debtor of the latter, and not the debtor of the estate. Therefore, no suit for the recovery of an estate will lie against one to whom a donation was made *mortis causa*.

(7) Julianus always says that where anyone transfers an estate, or delivers certain articles belonging to the same, in compliance with a trust, suit can be brought against him for recovery; because he has a right to bring a personal action to recover property transferred for that reason, and he is, as it were, the possessor of a right. He also states that where he has paid out the purchase-money of articles which he sold in pursuance of the trust, suit for recovery of the estate can be brought against him, because he himself can recover the money. In such instances, however, the heir must only assign his rights of action; since the property is in existence, and the claimant can also recover it by an action *in rem*.

17. *Gaius, On the Provincial Edict, Book VI.*

If the possessor of an estate should pay legacies with his own money, for the reason that he thought that he was the heir under the will, and anyone deprives him of the estate on the ground of intestacy — although it may be held that the possessor is damaged, because he did not provide for himself by making a stipulation that if the estate was acquired by some other person, the legacies should be returned to him — still, as it might happen that he paid the legacies at a time when there was no controversy as to the ownership of the estate, and for that reason he failed to obtain security, it is established in a case of this kind that if he loses the estate, an action for the recovery of what he paid should be granted him.

But where no security was given, and such an action is granted, there is danger that he cannot recover anything on account of the poverty of the party to whom the legacy was paid; and, therefore, according to a decree of the Senate, he is entitled to relief, and can pay himself by retaining property belonging to the estate; but he must assign his rights of action to the plaintiff so that he may institute proceedings at his own risk.

18. *Ulpianus, On the Edict, Book XV.*

It should also be considered, when the possessor of an estate makes a sale through a broker, and the latter loses the money, whether he is liable to a suit for recovery, since he has nothing and can obtain nothing? Labeo thinks that he is liable, becauses he injudiciously trusted the

broker at his own risk. Octavenus, however, says that he must assign nothing but his rights of action, for he is liable to a suit to recover these rights. It seems to me that the opinion of Labeo is correct in the case of a party who holds possession in bad faith, but that that of Octavenus is the one to be adopted where the possessor is a *bona-fide* one.

(1) Where an action is brought against a party for the recovery of an estate, who is not at the time the possessor of either the property, or of any right, but who subsequently obtained possession of either, can he be held liable to such an action? Celsus, in the Fourth Book of the Digest, states very properly that a decision should be rendered against him, even though in the beginning he had nothing in his possession.

(2) Now let us consider what things are included in the suit for the recovery of an estate. It is held that a suit of this kind includes all the assets belonging to an estate, whether they consist of rights or tangible property.

19. *Paulus, On the Edict, Book XX.*

And, indeed, it embraces not only tangible property belonging to the estate, but also such as does not form part of it, but which is nevertheless at the risk of the heir; as for instance, articles given in pledge to the deceased, or loaned to him, or deposited with him. In fact, as to articles left in pledge, there is a special action for their recovery, even though they are included in the suit for the estate, like those articles which are the object of the Publician Action. But although an action cannot readily be brought with reference to articles which have been loaned or deposited, it is still just that they should be restored, because parties are subject to risk on their account.

(1) But where the term requisite to acquire ownership by usucaption, as purchaser, has been completed by the heir, that is to say, the plaintiff, the property will not be included in the suit for recovery of the estate, nor will any exception be granted the possessor.

(2) Those articles also are included in the suit for recovery of an estate which the possessor has a right to retain, though not the right of action to recover them; for example, where the deceased had sworn that the property did not belong to the plaintiff, and then died, this must also be restored. Nay more, where the possessor of property lost it through his own fault, he will be liable on this account. The same rule will apply to the case of a depredator, although he is not liable on the ground of negligence, because he ought not to retain the property.

(3) I have stated that servitudes are not included in the restitution of property belonging to an estate, since there is nothing to be restored under that head, as in the case of material things and their profits; but if the owner of the land does not permit the other party to pass through without hindrance, a suitable action can be brought against him.

20. *Ulpianus, On the Edict, Book XV.*

Those things also which were acquired on account of the estate are also embraced in a suit for its recovery; as for instance, slaves, cattle, and anything else which was necessarily obtained for the benefit of the estate. Where, indeed, these were purchased with money belonging to the estate, they are undoubtedly included therein. But if the money was not a part of the estate, it should be considered whether this is the case; and I think that they ought to be included if they were of great advantage to the estate, and the heir must by all means return the price paid for them.

(1) Everything purchased with money belonging to an estate is not, however, to be included in an action for its recovery. For Julianus says in the Sixth Book of the Digest, that if the possessor purchased a slave with money belonging to the estate, and suit is brought against him for its recovery, the slave will only be included in the assets of the estate if it was to the interest of the same that he should be purchased; but if the possessor bought him for his own use, then the price paid for him must be included.

(2) In like manner, if the possessor sold land belonging to the estate without any good reason, not only the land, but its crops as well, shall be included in a suit to recover the estate; but if he did this for the purpose of paying a debt due from the estate, nothing else shall be included but the price which was paid.

(3) Again, not only the property which was in existence at the time of death, but also that which was afterwards added to the estate, are to be included in the action for its recovery; for an estate admits of both the increase and diminution of its assets. I am of the opinion that whatever is added to an estate after it has been entered upon, — if, in fact, it is derived from the estate itself — should form part of the same; but if it is derived from some other source it does not, because such property belonged to the possessor in person. All crops also constitute an increase of the estate, whether they have been obtained before, or after entry upon the same, and the offspring of female slaves unquestionably increases the amount of an estate.

(4) As we have previously mentioned that all rights of action belonging to an estate can be included in a suit brought for its recovery, the question arises whether they bring their proper character with them or not; for example, where the amount of damages in an action is increased by the denial of the defendant, does such an action include the said increase, or is it only brought for simple damages, as under the *Lex Aquilia*? Julianus says in the Sixth Book of the Digest, that liability exists only for simple damages.

(5) The same authority very properly holds that where the possessor has had judgment rendered against him in a noxal action in favor of the deceased, he cannot be released by a surrender of whatever caused the damage; because a defendant only has the right of surrendering the property for that purpose, until suit has been brought against him to enforce the judgment; but after it has been brought, he cannot liberate himself by a surrender of this kind; and, indeed, such a proceeding has been brought against him in this instance by filing a petition for the recovery of the estate.

(6) In addition to these points, we find many others discussed with reference to suits for the recovery of estates; to the sale of property belonging to deceased persons; to fraud which has been committed; and to profits. As, however, a rule was established by a decree of the Senate, the best course will be to give the contents of the decree itself in its own words and then interpret it: "On the day before the *Ides* of March Quintus Julius Balbus and Publius Juventius Celsus, Titius Aufidius and Oenus Severianus, being Consuls, made statements with reference to those questions which the Emperor Cæsar, the son of Trajanus Parthicus, grandson of the Divine Nerva, Hadrianus Augustus, the greatest of sovereigns, proposed and included in a written communication on the fifth day of the Nones of March what he wished to be done, and thereupon they passed the following resolutions: Whereas, before suit was brought by the Treasury for a certain part of the property of Rusticus forfeited to the State, those who thinking that they were heirs of said estate sold the same; We decree that interest ought not to be charged on the price of the property sold, and the same rule must be observed in similar cases. Moreover, We decree that where judgment is rendered against parties who have been sued for the recovery of an estate, the price of any property belonging to said estate must be refunded by them, even if such property was destroyed or depreciated in value before the action for recovery was brought. Moreover, if any parties have taken possession of the property of an estate when they knew that it did not belong to them, even though this was done before issue was joined, in order to avoid being in possession of the same, judgment shall be rendered against them just as if they had been in possession of said property; but where they had good reason to believe that they were entitled to the said property, they shall only be liable to the extent to which they profited by their act.

"It was the opinion of the Senate that the action for recovery of the estate must be considered to have been brought by the Treasury as soon as the party knew that he had been sued; that is to say, as soon as he was notified or summoned either by a letter or by a citation."

We must now give the proper interpretation of the separate terms of the decree of the Senate.

(7) The Senate says, "Before suit was brought by the Treasury for a certain part of the property forfeited to the State". What occurred was that the Treasury brought suit for a certain forfeited portion of an estate, but if the whole of it had been claimed, the Decree of the Senate would likewise be applicable; and where an action was brought by the Treasury for unclaimed property or goods to which it was entitled for any other good reason, the same rule would apply.

(8) The same decree of the Senate will apply where an action is brought by a municipality.

(9) Where a private party brings an action, no one doubts that the decree of the Senate will also apply, although it is made on account of a public matter.

(10) Not only do we make use of this decree of the Senate in questions relating to estates, but also in those having reference to the *peculium castrense*, or any other aggregate of property.

(11) With reference to the clause, "The action for the recovery of the estate must be considered to have been brought as soon as," etc., this signifies as soon as the party knows that the estate is demanded of him, because as soon as he learns of this he immediately becomes a possessor in bad faith, that is "As soon as he was notified". What would be the case, however, if he was aware of the fact, and still nobody notified him? Will he become liable to refund the interest on money received for the sale of property? I think that he will, for he then becomes a possessor in bad faith. But let us suppose that he has been notified, but was not aware of it, because the notice was served, not on himself but on his agent? The Senate requires that he himself should be notified; and therefore he will not be affected unless the party to whom notice was given informs him; but where the agent was able to do so, and did not, he will not be liable. The Senate did not state by whom the party must be notified, and therefore whoever does it will render him whom he notified liable.

(12) These things have reference to *bona-fide* possessors, for the Senate mentioned those, "Who, thinking that they were heirs"; but where a party sells an estate which he knows does not belong to him, then, beyond question, not only the purchase-money of the property but also the property itself and the profits of the same, are included in the suit for recovery. However, the Emperor Severus in an Epistle to Celer seems to have applied this rule to possessors in bad faith also; although the Senate only mentioned those who thought themselves to be heirs; unless we refer the words to such articles as it was expedient to sell because they were a burden, rather than a benefit to the estate, so that it might be in the discretion of the plaintiff to select what account he could render against the possessor in bad faith; whether he would demand of him the property and the profits thereof, or the purchase-money and interest, after proceedings had been instituted.

(13) Although the Senate mentions those who think that they are heirs, still, if they consider themselves to be the possessors of the property or any other lawful possessors, or the estate has been delivered to them, they will occupy the same position.

(14) Papinianus states in the Third Book of Questions, that if the possessor of an estate does not handle money found among the assets of the same, a suit for interest can, under no circumstances, be brought against him.

(15) The decree of the Senate says, "On the purchase money received for the property sold". We must understand by "purchase-money received", not only that which was already obtained, but also that which might have been obtained, but was not.

(16) What must be done if the possessor sold property after a suit for recovery of the estate had been brought? Then the property itself and the profits of the same will be included. If, however, the property should be of such a nature as to be unproductive, or liable to be destroyed by lapse of time, and it was sold at its true value, perhaps the plaintiff may choose

to have the purchase-money and the interest of the same.

(17) The Senate says it is decreed that, "Where suit is brought against any persons for the recovery of an estate, and judgment is rendered against them, the purchase-money which they received for the sale of property belonging to said estate must be surrendered by them; even though such property may have been destroyed, or diminished in value before the suit was brought". Where a *bona-fide* possessor sells the property of an estate, whether he received the purchase-money or not, he must return the price, because he has a right of action; but where he has a right of action, it will be sufficient if he assigns that right.

(18) But where he sold property, and paid over what he received for it to the true owner on a judgment for the same, it is not held to have come into his hands; even if it might be said that, in the beginning, the purchase-money was not included in the suit, because what was sold did not form part of the estate. But although the Senate made mention not of property which belonged to the estate but of articles included in it, he will not be compelled to make restitution, since nothing remains in his hands. Julianus states in the Sixth Book of the Digest, that a party will not be required to make restitution of what he collected which he actually does not owe; nor will he be entitled to credit for money which he paid which was not due.

(19) But where property has been returned, then it is certainly a part of the estate, and the price of the same which was refunded will not be included in a suit for recovery of the estate.

(20) Where the possessor of an estate is liable to the purchaser by reason of the sale, it must be held that he is protected by the security.

(21) The possessor must pay over the purchase-money, whether the property is destroyed, or diminished in value. But, is he bound to refund it without distinction, if he is the possessor in good faith, or even in bad faith? If the property is still in existence and in the possession of the purchaser, and is not destroyed or deteriorated; then, undoubtedly a possessor in bad faith must deliver the actual property, or, if he is absolutely unable to recover it from the purchaser, he must pay as much as the property is sworn to be worth in court. Where, however, the property is lost or deteriorated, the real value must be paid, because if the plaintiff had secured the property, he might have sold it, and could not have lost its real value.

21. *Gaius, On the Provincial Edict, Book VI.*

Property is understood to be destroyed, when it has ceased to exist; and lost, when the title to it has been acquired by usucaption, and, on this account, it has been removed from the assets of the estate.

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

Where a *bona-fide* possessor has obtained both the property and the purchase-money for the same; for example, because he purchased the identical thing, should he be heard if he prefers to surrender the property and not the purchase-money? We hold that in the case of a depredator, the plaintiff should have his choice; but, in this instance, the possessor has a better right to be heard, if he wishes to deliver the property itself, even though it may be deteriorated; but if the plaintiff wishes to have the purchase-money, he should not be heard, because a desire of this kind is an impudent one; or shall we consider that, since the purchaser has been enriched by property included in the estate, he should surrender it with the excess of the purchase-money over and above its present value? In an Address of the Divine Hadrian the following appears: "Conscript Fathers examine whether it is more equitable that the possessor should not obtain a profit, but should surrender the purchase money which he received for the sale of property belonging to another, as it may be decided that the purchase-money takes the place of the property of the estate which was sold, and, to a certain extent, becomes a portion of the assets of said estate".

Therefore the possessor is required to surrender to the plaintiff not only the property itself but also the profit which he obtained by the sale of the same.

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

It should be considered whether a *bona-fide* possessor is required to surrender all the purchase-money, or whether he must do so only in cases where he was enriched by it; suppose, for example, that after having received it he either lost it, expended it, or gave it away. The clause, "Came into his hands", is one of doubtful significance, whether it only applies to what there was in the beginning, or to what remains; and I think that the next clause in the decree of the Senate is also ambiguous, and that no claim can be made except where the party is pecuniarily benefited.

(1) Hence, if what comes into his hands is not only the purchase-money, but also a penalty incurred on account of delayed payment; it may be held that this also was included, because the party was enriched to that entire amount, although the Senate only mentioned the purchase-money.

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

Where the possessor is forcibly ejected, he is not obliged to give up a penalty incurred, because the plaintiff has no right to the same. Neither is he required to surrender a penalty which his adversary promised him if he should not be present at the trial.

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

Moreover, if he sold part of the estate under a conditional agreement it must be stated that the same rule applies, and he must surrender the profit which he obtained under such conditions.

(1) Again, if he sold property and bought other property with the purchase-money, the latter will be included in a suit for the recovery of the estate; but not the property which he added to his own possessions. But, where the property purchased was of less value than what is paid for it, he will be considered to have become enriched to the amount only of the value of said property, just as, if he had used it up, he would not be considered to have been enriched to its full value.

(2) When the Senate says: "Where parties have taken possession of property which they know does not belong to them, even though they did this before issue was joined, in order to avoid being in possession of the same; judgment shall be rendered against them, just as if they were in possession"; this is to be understood to mean that fraud which has been committed, as well as negligence, may be alleged in the action for the recovery of the estate; and therefore suit can be brought against a party who did not collect a debt of the estate from another, or even from himself, if he was released by lapse of time, that is, if he was able to collect the debt.

(3) As to what the Senate says, namely, "Where they have taken possession of property", reference is here made to plunderers, that is to say, those who know that the estate does not belong to them and appropriate its assets; at all events, where they have no good reason for taking possession of the same.

(4) So far as profits are concerned, however, the Decree states that they will have to surrender not only what they obtained, but also what they ought to have obtained.

(5) In this instance the Senate refers to a party who has appropriated property belonging to an estate for the purpose of plundering it. Where, however, in the beginning, he had good cause for taking possession, and afterwards having become aware that none of the estate belonged to him, acted in a predatory manner, the Senate does not seem to refer to him; still, I am of the opinion that the intention of the Decree also has reference to him; for it makes little difference whether a man conducted himself fraudulently in connection with an estate in the beginning, or began to do so subsequently.

(6) With regard to the clause, "Who knows that the property does not belong to them"; shall this be considered to apply to one who is aware of the facts, or to one who made a mistake with reference to the law? For he may have thought that a will was properly executed, when it was void; or that he was entitled to the estate rather than some other agnate who had preceded him. I do not think that anyone should be classed as a plunderer who lacks fraudulent intent, even though he may be mistaken with reference to the law.

(7) The Decree says, "Even though they should do this before issue was joined"; and this has been added for the reason that, after issue has been joined, all possessors are held to be liable for bad faith; and, indeed, this is the case after proceedings have been instituted. Although mention is made of joinder of issue in the Decree of the Senate, still, as soon as proceedings have been begun, all possessors are on the same footing, and are liable as plunderers, and we make use of this rule at the present time. Hence, as soon as the party is called to account, he becomes aware that the property of which he is in possession does not belong to him; and, indeed, where a man is a plunderer, he will be held liable on the ground of fraud before issue is joined, for this would be a species of fraud which has already been committed.

(8) "Therefore", it is further stated in the Decree, "judgment should be rendered against them just as if they were in possession". This is reasonable, for a party who acts fraudulently in order to avoid being in possession should have judgment rendered against him, just as if he were the actual possessor; which is to be understood to mean whether he fraudulently relinquishes possession, or with fraudulent intent refuses to take possession. This clause will apply whether the property is in possession of another or has absolutely ceased to exist; wherefore, if some one else is the possessor, suit for the recovery of the estate can be brought against either party, and where possession has passed through several persons all of them will be liable.

(9) Shall he alone who is in possession be liable for the profits, or will he also be liable who acted fraudulently to avoid being in possession? It must be said, after the Decree of the Senate, that both are liable.

(10) These words of the Decree permit an oath to be administered, even against the party who is not in possession; as he who acted fraudulently to avoid being in possession may swear to the amount in court, just as the defendant can do who is in possession.

(11) The Senate attempted to favor *bona-fide* possessors, in order to prevent them from being subjected to loss of the full amount, and only to be held liable to the extent to which they became enriched; therefore, whatever expense they caused the estate, either by wasting or losing any of the property, if they thought that they were squandering what belonged to themselves, they will not be compelled to make restitution; nor where they have given anything away, will they be considered to have become more wealthy, although they may have placed some one under a natural obligation to remunerate them. It is clear that if they have accepted any recompense in return, it must be

held that they are enriched to the amount of what they received; as this would be a certain kind of exchange.

(12) Where anyone makes use of his property in a more lavish manner on account of his being entitled to an estate, Marcellus thinks, in the Fifth Book of the Digest, that he will not be entitled to any deduction from the estate if he has not used any of it.

(13) In like manner, if he borrowed money as though he were rich and deceived himself, the same principle will apply.

(14) Where, however, he pledged some of the assets of the estate, should it be considered whether he has used any of said assets? This is a difficult question to answer, as he himself is liable.

(15) To such an extent is it true that a person is not held liable who is not enriched, that if anyone, being under the impression that he is the sole heir, wastes half of an estate without fraudulent intent, Marcellus, in treating this point in the Fourth Book of the Digest, asks whether he is liable; since what he appropriated was derived from property that did not belong to him, but to his co-heirs; for if a man who is not an heir wastes everything under his control, he will undoubtedly not be liable, since he was not enriched.

In the question proposed, however, there are three opinions involved; one the first mentioned; next, the second, namely, that it might be said that he is obliged to surrender all the assets that remain, since he had squandered his own share; and third, that what was wasted should be charged to both; and he says that something should certainly be given up, but he doubts whether restitution for all or only a part should be made. It is my opinion, however, that the entire balance should not be given up, but only half of the same.

(16) Where anyone has expended part of an estate must it lose all, or will a proportion of the loss be taken out of his patrimony? As, for example, where he drank up the entire supply of wine belonging to the estate; must the estate bear all the expense, or will some of it be charged to his patrimony? This would be on the supposition that he Was deemed to be more wealthy to the amount that he was in the habit of expending for wine before he received the inheritance; so that, if he was more lavish in his expenditure on account of the inheritance, he would not be considered to become more wealthy to the amount of the excess, but he would be held to have become enriched so far as his regular outlay was concerned; since, if that were true, he would not have incurred such great expense; nevertheless, he would have spent something for his daily subsistence.

The Divine Marcus, in the case of a certain Pythodorus, who had been asked to give up as much of the estate as remained under his control, decreed that what had been alienated without the intention of diminishing the trust, and the price of which had not increased the private property of Pythodorus, should be returned, and should be charged to the private property of Pythodorus and the estate, and not the estate alone. Therefore, it must be considered whether, in accordance with the Rescript of the Divine Marcus, the ordinary expenses should be taken out of the estate, or out of the private property of the aforesaid party; and the better opinion is that the expenses which he would have incurred, if he had not been the heir, must be paid out of his own estate.

(17) Moreover, if the *bona-fide* possessor sold property of the estate and did not become more wealthy by the purchase-money, has the plaintiff a right to recover certain articles from the purchaser, if he has not yet acquired the title to them through usucaption? And, if he brings suit for their recovery, may he not be barred by this exception; ("As the estate should not be prejudiced by any question arising between the plaintiff and the party who made the sale, on the ground that the price of said property is not held to be included in the action brought for the recovery of an estate"), and even if the purchaser loses his case, has he a right for reimbursement from the party who made the sale? I am of the opinion that the property can be recovered, unless the purchaser can have recourse to the *bona-fide* possessor. But what if the party who made the sale is prepared to set up a defence, in order to permit himself to be sued, just as if he were in possession? In this instance an exception would apply on the part of the purchaser. It is certain that if the property was sold for a low price and the plaintiff recovers it, no matter what the amount was, then much more may it be said that he will be barred by an exception. For if the possessor collects anything from the debtors of the estate, and pays the money to the plaintiff, Julianus says in the Fourth Book of the Digest, that the said debtors are released from liability, whether the party who collected the debts from them was a *bona-fide* possessor or a plunderer, and that they are discharged by operation of law.

(18) A suit for the recovery of an estate, although it is in an action *in rem*, still includes some personal obligations; as, for example, the payment of funds received from debtors, as well as

the purchase money of property which has been sold.

(19) This Decree of the Senate though it was passed to facilitate proceedings for the recovery of an estate, it is well settled also applies to a suit in partition; otherwise, the absurd principle would be established that an action might be brought for the recovery of property, but not for the purpose of its division.

(20) The young of flocks and cattle form part of the increase of an estate.

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

And if lambs are born, and afterwards others are born of these, the latter must also be given up as an increase of the estate.

27. *Ulpianus, On the Edict, Book XV.*

The issue of female slaves and the offspring of their female children are not considered to be profits, because it is not customary for female slaves to be acquired for breeding purposes; their offspring are, nevertheless, an increase of the estate; and since all these form part of the estate, there is no doubt that the possessor should surrender them, whether he is the actual possessor, or, after suit was brought, he acted fraudulently to avoid being in possession.

(1) Moreover, rents which have been collected from persons who leased buildings, are included in the action; even though they may have been collected from a brothel, for brothels are kept on the premises of many reputable persons.

28. *Paulus, On the Edict, Book XX.*

For, according to the Decree of the Senate, it must be held that every species of profit should be included, whether it is obtained from a *bona-fide* possessor or from a depredator.

29. *Ulpianus, On the Edict, Book XV.*

It is evident that any payments received from testaments are to be considered as profits. Compensation for the labor of slaves is in the same class as rents, as well as payment made for transportation by ships and beasts of burden.

30. *Paulus, On the Edict, Book XX.*

Julianus states that a plaintiff ought to elect whether he will demand merely the principal or the interest as well, taking an assignment of the rights of action at his own risk. But, according to this, we shall not observe what the Senate intended should occur, which was that a *bona-fide* possessor should be liable to the amount by which he was enriched; and what would be the case if the plaintiff should elect to take money which the defendant had been unable to retain? It must be said therefore with reference to a *bona-fide* possessor, that he is only obliged to pay either the principal and interest on the same, if he received any, or assign his right of action for whatever is still due to him under it; but of course, at the risk of the plaintiff.

31. *Ulpianus, On the Edict, Book XV.*

If the possessor has paid any creditors, he will have a right to include these payments, even though he did not actually release the party who brought the action for recovery; for where anyone makes a payment in his own name, and not in behalf of the debtor, he does not release the debtor. Hence, Julianus says in the Sixth Book of the Digest, that the possessor can, under such circumstances, only be credited where he gives security that he will defend the plaintiff against the creditors. But whether a *bona-fide* possessor is obliged to give security that the plaintiff shall be defended, should be considered, because he does not seem to have been enriched by the payments which he made; unless he may have had a right of action to recover them, and in this respect he appears to be enriched, because he can bring suit to recover the money; for example, where he thinks that he is the heir, and paid what was due on his own

account. Julianus appears to me to have been thinking only of a plunderer who ought to give security, and not of a *bona-fide* possessor; the latter, however, must assign his right of action. Where the plaintiff is sued by the creditors, he should make use of an exception.

(1) Where anything was owing to the plunderer himself, he should not deduct it; especially if it was a debt due through a natural obligation. But what if the plaintiff was benefited by the debt being paid, because it was incurred with a penalty, or for some other reason? In this instance it may be stated that he has paid himself, or should have done so.

(2) A lawful possessor undoubtedly ought to deduct what is due to him.

(3) Just as he can deduct expenses which he has incurred, so, if he ought to have incurred expenses and did not do so, he must answer for his negligence, unless he is a *bona-fide* possessor; and then as he neglected his own business, as it were, no suit can be brought against him before that for the recovery of the estate; but after that time he himself is a plunderer.

(4) It is evident that a plunderer cannot be called to account for permitting debtors to be released from liability, or to become poor, instead of suing them immediately, since he had no right of action.

(5) Let us see whether a possessor is required to refund what has been paid him. Whether he was a *bona-fide* possessor or not, it is established that he must make restitution, and if he does do so, (as Cassius states, and Julianus also in the Sixth Book) the debtors are released by operation of law.

32. *Paulus, On the Edict, Book XX.*

Property which is acquired through a slave must be delivered to the heir. This rule applies also to the estate of a freeman, and where proceedings are instituted on the ground of an inofficious testament, when, for the time being, the slave is included in the property of the heir:

33. *Ulpianus, On the Edict, Book XV.*

Unless the slave entered into a stipulation based on the property of said heir.

(1) Julianus says that where a possessor sold a slave, if the latter was not required by the estate, he can be asked in the action for recovery to pay over the purchase-money, as he would have been charged with it if he had not sold him; but where the slave was required by the estate, he himself must be delivered, if he is living, but if he is dead, perhaps not even the price paid for him should be surrendered; but he says that the judge who has jurisdiction of the case will not permit the possessor to appropriate the purchase-money, and this is the better opinion.

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

I am of the opinion that where the estate of the son of a family, who is a soldier, is left to anyone by will, an action to recover the same can be brought.

(1) Where a slave, or the son of a family has possession of property belonging to an estate, suit can be brought for the estate by either the father or the master, if the party has the power to give up the property. It is evident, if the master has obtained the purchase-money of property belonging to the estate, as a portion of the slave's *peculium*, that then, as Julianus holds, the suit for recovery can be brought against the master as the possessor of a right.

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

Julianus likewise says that "A suit for the recovery of an estate can be brought against the master, as the possessor of a right, even where the slave has not yet received the purchase-money of the property, for the reason that he has a right of action by which he can recover the

money; which right of action may be acquired by any one even if he is not aware of the fact".

36. *Paulus, On the Edict, Book XX.*

Where suit for the recovery of an estate is brought against the owner of a slave or a father, who has the purchase money, should proceedings be instituted within a year after the death of the son or the slave, or after the slave has been manumitted, or the son emancipated? Julianus states that the better opinion is (and in this Proculus also concurs), that a perpetual action should be granted and that it is not necessary for the party's own debt to be deducted, because the proceedings do not relate to *peculium*, but suit is brought for the recovery of an estate. This is correct where the slave or the son has the purchase-money; but if the suit is brought against the owner of the slave, because the debtor himself is a slave, action should be taken as if the *peculium* was involved in the case. Mauricianus says that the same rule applies, even if the slave or the son squanders the money obtained as the price, but it can be made good in some other way out of his *peculium*.

(1) There is, however, no doubt that a suit for the recovery of an estate can be brought against the son of a family, because he has the power to deliver it; just as he has to produce it in court. With much more reason can we say that an action for recovery can be brought against the son of a family who, when he was the head of a household and in possession of the estate, permitted himself to be arrogated.

(2) If the possessor should kill a slave belonging to the estate, this also can be included in the action for its recovery; but Pomponius says that the plaintiff must elect whether he desires judgment to be rendered in his favor against the possessor; provided he gives security that he will not proceed under the *Lex Aquilia*, or whether he prefers that his right of action under the *Lex Aquilia* should remain unimpaired, and not have an appraisement of the property made by the court. This right of election applies where the slave was killed before the estate was entered upon; for, if this were done subsequently, then the right of action becomes his own, and cannot be included in the suit to recover the estate.

(3) Where a plunderer fraudulently relinquishes possession, and the property is destroyed in the same way that it would have been destroyed if he had remained in possession under the same circumstances; then, considering the words of the Decree of the Senate, the position of the plunderer is preferable to that of the *bona-fide* possessor; because the former, if he fraudulently relinquished possession, can have judgment rendered against him just as if he was still in possession, and it is not added in the decree: "If the property should be destroyed". There is no question, however, that the position of the plunderer ought not to be better than that of the *bona-fide* possessor. Therefore, if the property brought more than it was worth, the plaintiff should have the right to choose whether or not he will take the purchase-money; otherwise, the plunderer will profit to a certain extent.

(4) Some doubt is expressed as to the time when a *bona-fide* possessor became enriched; but the better opinion is that the time when the case was decided should be considered in this instance.

(5) With reference to profits, it is understood that the expenses incurred in the production, collection, and preservation of the profits themselves should be deducted, and this is not only positively demanded on the ground of natural justice in the case of *bona-fide* possessors, but also in that of plunderers, as was also held by Sabinus.

37. *Ulpianus, On the Edict, Book XV.*

Where a person has incurred expense and realized no profit, it is perfectly just that the expense should be taken into account in the case of *bona-fide* possessors.

38. *Paulus, On the Edict, Book XX.*

In the case of other necessary and useful expenses, it is evident that these can be separated, so

that *bona-fide* possessors may receive credit for the same, but the plunderer can only blame himself if he knowingly expended money on the property of another. It is more indulgent, however, to hold that, in this instance, the account of his expenses should be allowed, for the plaintiff ought not to profit by the loss of another, and it is a part of the duty of the judge to attend to this; for no exception on the ground of fraud is needed.

It is clear that the following difference may exist between the parties for the *bona-fide* possessor may, under all circumstances, deduct his expenses, although the matter in which they were incurred no longer exists, just as a guardian or a curator may obtain allowance for his; but a plunderer cannot do so, except where the property is rendered better through the expenditure.

39. *Gaius, On the Provincial Edict, Book VI.*

Expenses are considered useful and necessary where they are incurred for the purpose of repairing buildings, or in nurseries of trees, or where damages are paid on account of slaves, since it is more advantageous to make payment than to surrender the slave; and it is clear that there must be many other causes for expenses of this kind.

(1) Let us examine, however, whether we cannot also have the benefit of an exception on the ground of fraud with reference to expenditures for pictures, statues, and other things purchased for pleasure, so long as we are possessors in good faith; for while it may very properly be said to a plunderer that he should not have incurred unnecessary expenses on the property of another, still, he should always have the power to remove whatever can be taken away without injury to the property itself.

40. *Paulus, On the Edict, Book XX.*

The statement also which is contained in the Address of the Divine Hadrian, namely: "That after issue has been joined, that must be delivered to the plaintiff which he would have had if the estate had been surrendered to him at the time when he brought the suit," sometimes entails hardship. For what if, after issue had been joined, slaves, beasts of burden, or cattle, should die? In this instance, the party in compliance with the terms of the Address, must indemnify the plaintiff, because the latter could have sold them if the estate had been surrendered. It is held by Proculus that this would be proper where suit is brought to recover specific articles, but Cassius thinks otherwise. The opinion of Proculus is correct where a plunderer is concerned, and that of Cassius is correct in the case of *bona-fide* possessors; for a possessor is not obliged to furnish security against death, or, through fear of such an accident, injudiciously to leave his own right undefended.

(1) The plunderer is not entitled to any profit which he makes, but it increases the estate; and therefore he must deliver whatever is gained by the profits themselves. In the case of a *bona-fide* possessor, those profits only by means of which the possessor has become enriched will be included in the restitution as an increase of the estate.

(2) Where the possessor has obtained any rights of action, he must surrender them if he is evicted from the estate; for example, where an interdict *Unde vi*, or *Quod precario*, has been granted him.

(3) On the other hand, also, where the possessor has given security for the prevention of the threatened injury, he must be indemnified.

(4) Noxal actions are likewise included in the jurisdiction of the judge, so that if the possessor is prepared to surrender a slave on account of some damage which he has committed against the estate, or because he has been guilty of theft, he shall be released from liability, just as is done in the interdict *Quod vi aut clam*.

41. *Gaius, On the Provincial Edict, Book VI.*

If at the time when suit was brought against the possessor of the estate, he held but little property belonging to it and afterwards also obtained possession of more, he will be compelled to surrender this as well, if he loses his case, whether he obtained possession of the same before or after issue was joined. If the sureties whom he furnished are not sufficient for the amount involved, the proconsul shall require him to furnish such as are suitable. On the other hand, if he acquires possession of less property than he had in the beginning, provided this happens without any fraud on his part, he should be discharged from liability so far as the property which he had ceased to hold is concerned.

(1) Julianus says that the profits obtained from property which the deceased held as pledges must also be included.

42. *Ulpianus, On the Edict, Book LXVII.*

Where a debtor to the estate refuses to pay, not because he says that he is an heir, but for the reason that he denies, or doubts that the estate belongs to the party who is bringing suit for the recovery of the same, he will not be liable under the action for recovery.

43. *Paulus, On Plautius, Book II.*

After I accepted a legacy from you, I brought an action to recover the estate. Atilicinus says that it has been held by certain authorities that I am not entitled to an action for recovery against you, unless I refund the legacy. Still, let us consider whether the plaintiff who brings an action to recover the estate is only obliged to return the legacy where security is given him that, if judgment is rendered against him in the case, the legacy will be repaid to him; since it is unjust that in this instance the possessor should retain a legacy which he had paid, and especially where his adversary did not bring the action for the purpose of annoyance, but on account of a mistake; and Lælius approves this opinion. The Emperor Antoninus, however, stated in a Rescript that where a man retained a legacy under a will, an action for the recovery of the estate should be refused him, where proper cause was shown; that is, where the intention to cause annoyance was manifest.

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

Where a party who has received a legacy under a will brings an action for the recovery of the estate, and, for some reason or other, the legacy is not returned, it is the duty of the judge to cause the estate to be surrendered to the plaintiff, after deducting the amount which he received.

45. *Celsus, Digest, Book IV.*

Where anyone volunteers in the defence of a case without having the property in his possession, judgment shall be rendered against him; unless he can show by the clearest evidence that the plaintiff, from the beginning of the suit, was aware that he was not in possession of the property; because, under these circumstances, he was not deceived, and he who volunteered in defence of the action for recovery will be liable on the ground of fraud; and of course the damages must be estimated according to the interest the plaintiff had in not being deceived.

46. *Modestinus, Differences, Book VI.*

He should be understood to be, to all intents and purposes, a plunderer, who tacitly agrees to deliver the estate to someone who has no right to it.

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

A certain Lucius Titius having failed to have the testament of a relative set aside as forged; I ask whether he would not be able to file a complaint against the testament as being improperly executed, and not sealed? The answer was that he would not be prevented from instituting proceedings to show that the testament was not executed according to law, just because he did

not succeed in having it set aside as forged.

48. *Javolenus, On Cassius, Book IV.*

In appraising the value of an estate, the purchase-money obtained for its sale must be included, as well as the addition of whatever else it was worth, if this was done on account of business; but where it is disposed of in compliance with the terms of a trust, nothing more will be included than what the party acquired in good faith.

49. *Papinianus, Questions, Book HI.*

Where a *bona-fide* possessor wishes to institute proceedings against debtors of an estate, or parties who hold property belonging to the same, he should, by all means, be heard, if there is danger of any rights of action being lost by delay. The plaintiff, however, can bring an action *in rem* for the recovery of the estate without fear of being met by an exception. But what, for example, if the possessor of the estate is negligent, or knows that he has no legal right?

50. *The Same, Questions, Book VI.*

An estate may exist under the law even though it does not include anything corporeal.

(1) Where a *bona-fide* possessor erects a monument to a deceased person for the purpose of complying with a condition, it may be said because the wish of the deceased is observed in this matter, that if the expense of erecting a monument does not exceed a reasonable amount, or more than that ordered by the testator to be expended for this purpose, the party from whom the estate is recovered will have the right to retain the amount expended, by pleading an exception based on fraud; or he can recover the same by a suit on the ground of business transacted, or, as it were, for attending to matters connected with the estate. Although by the strict rule of law heirs are not liable to any action to force them to erect a monument, still, they may be compelled by Imperial or pontifical authority to comply with the last will of the deceased.

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

The heir of an insane person will be compelled to indemnify the substitute or a relative in the next degree for the profits of the intermediate time by means of which the said insane person seems to have become enriched through his curator; with the exception of such expenses as have been incurred either necessarily or beneficially with reference to the estate. Where, however, any necessary expense has been incurred in behalf of the said insane person, it must also be excepted; unless the said insane person had other sufficient property by means of which he could be supported.

(1) Interest on profits received after the action to recover an estate has been brought is not to be paid. A different rule is applicable where they were received before the action for recovery of the estate was brought, and for that reason increased the assets.

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

Where a possessor has obtained dishonorable profits from an estate, he will be compelled to surrender them also, lest a strict construction may give him the benefit of profits not honorably acquired.

53. *Paulus, On Sabinus, Book X.*

The alienation of property by the possessor is necessary, not only for the payment of debts by the estate, but where expenses have been incurred by the possessor on account of the estate, or where property is liable to be destroyed or deteriorated by delay.

54. *Julianus, Digest, Book VI.*

Where a party purchases from the Treasury certain shares in an estate, or the whole of it, it is not unjust that a right of action should be granted him by which he may bring suit for the

entire property; just as a right of action for recovery is granted to anyone to whom an estate has been delivered under the Trebellian Decree of the Senate.

(1) There is no doubt that the heir of a debtor can, by an action for the recovery of the estate, obtain possession of articles pledged by the deceased.

(2) Where buildings and lands have become deteriorated through the negligence of the possessor; for instance, where vineyards, orchards, or gardens have been cultivated in a manner which was not like that employed by the deceased owner; the possessor must permit an assessment of damages in court to the extent to which the property has been diminished in value.

55. *The Same, Digest, Book LX.*

When an estate has been recovered by suit, the *bona-fide* possessor will be compelled to surrender whatever he has collected under the *Lex Aquilia*, not only to the extent of the simple value, but to double the amount; for he should not make a profit out of what he collected on account of the estate.

56. *Africanus, Questions, Book IV.*

When an action is brought for the recovery of an estate, all the profits acquired by the possessor must be surrendered, even where the plaintiff himself would not have obtained them.

57. *Neratius, Parchments, Book VII.*

Where the same party defends two actions against the same estate, and judgment is rendered in favor of one of them, the question sometimes arises whether the estate should then be surrendered to him who gained the suit, just as would have been done if no defence had been made against the other; so that, in fact, if judgment should afterwards be rendered in favor of the other party, the defendant would be released from liability; since he was neither in possession, nor had acted fraudulently to avoid being in possession, as he had surrendered the property when he lost the case; or because it was possible that the other plaintiff might be able to obtain a decision in his favor, the defendant should not be obliged to surrender the estate unless security is given him, for the reason that he was compelled to defend the action for recovery of the estate against the other party. The better opinion is that it should be the judge's duty to come to the relief of the defeated party by security or a bond, since in that way the property remains for the benefit of him who is slow in asserting his rights against the successful plaintiff who preceded him.

58. *Scævola, Digest, Book III.*

A son who was emancipated by his father in compliance with a condition of his mother's will, entered upon the estate which his father had possession of before he emancipated his son, and of which he had also obtained the profits, and expended some of them in honor of his son, who was a senator. The question arose, as the father was prepared to surrender the estate, after having reserved the sum which he had expended for his son, whether the latter, if he still persisted in prosecuting his action for the recovery of the estate, could be barred by an exception on the ground of fraud? I answered that even if the father did not avail himself of the exception, the duty required of the judge could sufficiently dispose of the matter.

TITLE IV.

CONCERNING ACTIONS FOR THE RECOVERY OP A PORTION OF AN ESTATE.

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

After the action which the prætor promises to grant to a party who alleges that the entire estate belongs to him, it follows that he should grant an action to him who demands a share of the estate.

(1) Where anyone brings suit for an estate, or for a portion of the same, he does not base his claim upon the amount which the possessor holds, but upon his own right; and therefore, if he is the sole heir, he will claim the entire estate, although the other party may be in possession of only one thing; and if he is an heir to one share of it he will demand a share, even though the other party may be in possession of the entire estate.

(2) Nay, more, where two parties are in possession of an estate, and two others allege that certain shares belong to them, the latter are not required to be content with making their claims against the two in possession; as, for instance, the first claimant against the first possessor, or the second against the second possessor, but both should bring suit against the first, and both against the second; for one has not the possession of the share claimed by the first, and the other possession of that claimed by the second, but both are in possession of the shares of each of the others, in the character of heirs.

Where the possessor and plaintiff both have possession of the estate, each of them alleging that he is entitled to half of it, they must bring suit against one another, in order to obtain their shares of the property; or, if they do not raise any controversy on the ground of inheritance, they must bring suit for partition of the estate.

(3) Where I claim to be the heir to a share of an estate, and my co-heir, together with a stranger, is in possession, since my co-heir has no more than his share, the question arises, whether I must bring suit for the recovery of the estate against the stranger alone or against my co-heir also? Pegasus is said to have held the opinion that I should bring suit against the stranger alone, and that he must surrender whatever he has in his possession; and perhaps this should be ordered by the court upon application. Reason, however, suggests that I ought to bring suit for recovery of the estate against both of them; that is to say, against my co-heir also, and the latter ought to bring suit against the possessor who is a stranger. The opinion of Pegasus is, however, the more equitable one.

(4) Moreover, if I claim to be heir to half of the estate, and I am in possession of a third of the same, and I desire to obtain the remaining sixth let us consider what plan I should adopt. Labeo states that I should bring suit against each one for half, so that the result will be that I should obtain a sixth part from each of them, and shall then have two thirds. This I think to be correct, but I myself will be required to surrender one sixth of the third which I formerly possessed; and therefore the judge in the discharge of his duty must direct me to set off what I possess, if my co-heirs are the parties from whom I am claiming the estate.

(5) The prætor sometimes grants permission to bring suit for a portion of an estate which is not certainly ascertained, where proper cause exists; for instance, where there is a son of a deceased brother, and the surviving wives of other deceased brothers are pregnant. In this case it is uncertain what portion of the estate the son of the deceased brother can claim, because it is not known how many children of the other deceased brothers will be born. Therefore, it is perfectly just that the claim of a share which is not known should be granted to the son; so that it may not be too much to say that where anyone is reasonably doubtful as to what share he should bring suit to recover, he ought to be permitted to claim a share which is as yet uncertain.

2. *Gaius, On the Provincial Edict, Book VI.*

Where the same estate belongs to several persons some of whom enter upon the same, and others deliberate as to its acceptance, it is held that if those who enter bring an action to recover the estate, they should not sue for a larger share than they would have had if the others had entered upon it; nor will it be of any advantage to them if the others do not enter. But if the others do not enter, they can then bring suit for the shares of the latter, provided they are entitled to them.

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

The ancient authorities were so solicitous to maintain the interest of an unborn child who would be free at birth, that they reserved all its rights unimpaired until the time it was to be born. This is apparent in the law of succession concerning those who are in a more remote degree of relationship than the unborn child, and who are not admitted to the succession, as long as it is uncertain whether or not a child will be born. Where, however, there are others in the same degree of relationship as the one that is unborn, then the question has arisen what share of the estate should remain in suspense, since it is impossible to ascertain how many may be born; hence, there are so many various and incredible accounts given with reference to this matter that they are usually classed with fables. It is said that four daughters were born of a married woman at a single birth; and, also, certain writers, who are not unreliable, have stated that five children were born of a Peloponnesian woman on four different occasions, and that many Egyptian women have had several children at once. We have seen three brothers, the Horatii, senators, of one birth, girded for battle; and Lælius states that he had seen a free woman on the Palatine Hill who had been brought from Alexandria in order to be shown to Hadrian with her five children, four of whom he alleges she was said to have brought forth at one time, and the fifth four days afterwards.

What conclusion must then be arrived at? Authors learned in the law have taken a middle course, namely, they have considered what might not very rarely occur; and as three might happen to be born on one occasion, they assigned a fourth share to the son already born; for (as Theophrastus says) what happens once or twice, legislators pay no attention to, and therefore if a woman is actually about to bring forth only one child, the heir that is living will be entitled, not to half of the estate, but only to a fourth of the same:

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

And where a less number are born, his share will increase in proportion; and if more than three are born, there will be a decrease in the share to which he became the heir.

5. *Paulus, On Plautius, Book XVII.*

The following should be borne in mind, namely, that if a woman is not pregnant, but it is thought that she is, her son in the meantime is sole heir to the estate, although he is not aware that he is such.

(1) The same rule applies in the case of a stranger, where he is appointed heir to a certain portion of an estate, and posthumous children to the remainder. But if the appointment of heirs should happen to be made in the following terms: "All children born to me, together with Lucius Titius, shall be heirs to equal shares"; doubt may arise whether he cannot enter upon the estate, just as one who did not know to what share he was entitled under the will. It is more advantageous, however, that he should be enabled to enter upon the estate if he does not know to what share of the same he is entitled, provided he is not ignorant of other matters which he should know.

6. *Ulpianus, Opinions, Book VI.*

Where it has been decided that a sister is co-heir together with her four brothers to the estate of their mother, a fifth part of each of the shares which they possessed must be granted to her, so that they will give her no more than the fifth part of each one of the separate four shares to which they had previously believed themselves to be entitled.

(1) Where expenses are justly incurred on account of liabilities of an estate, they must be calculated proportionally against the party who has obtained a share of the estate by the right of a patron.

7. *Julianus, Digest, Book VIII.*

A party cannot obtain what he has secured by a judgment in an action for partition by means of an action for the recovery of an estate, the community of a joint ownership having been

dissolved; for the jurisdiction of the judge only extends to his being able to order that an undivided share of the estate shall be delivered to the party applying for it.

8. *The Same, Digest, Book XLVIII.*

The possessor of an estate should be permitted to defend the action so far as surrendering a share of the same is concerned; for he is not prohibited from holding the entire estate, as he is aware that half of it belongs to him, and does not raise any controversy with reference to the other half.

9. *Paulus, Epitomes of the Digest of Alfenus, Book HI.*

Where several heirs were appointed, and one of them at the time was in Asia, his agent made a sale and kept the money as the share of his principal. It was subsequently ascertained that the heir who was in Asia had previously died, after having appointed his agent heir to half his share and another party to the other half; and the question arose in what way an action to recover the money derived from the estate could be brought? The answer was that it ought to be brought for the entire estate against the party who had been the agent, because the money belonging to the estate had come into the possession of the said agent through the sale; nevertheless, they must bring an action against this co-heir for half the estate. The result would then be that if all the money was in the possession of the party who had been the agent, they might recover the entire amount from him, with the assistance of the court; or if he had returned half of it to his co-heir, they could take judgment against him for half, and against his co-heir for the other half.

10. *Papinianus, Questions, Book VI.*

Where the son of a person who was appointed heir to a certain portion of an estate was ignorant of the fact that his father had died

during the lifetime of the testator, attended to the share of the estate in behalf of his father, as if he was absent, and, having sold certain property, collected the purchase-money of the same; an action for recovery could not be brought against him because he did not hold the purchase-money, either as heir or as possessor, but as a son who had transacted business for his father; but an action on the ground of business transacted would be granted to the other co-heirs, to whom a share of the estate of the deceased belonged. The following, therefore, should not give rise to apprehension, that is to say, that the son should be held liable to the heirs of his father (by whom perhaps he was disinherited), because he was, as it were, attending to their business which was connected with the estate; since the matter in which he was engaged did not belong to the estate of his father; for it is only just that, where an action based on business transacted is brought in behalf of another, what is collected for someone else ought to be given up to the party entitled to it. But, in the present instance, the business did not belong to the father, as he had ceased to exist, nor did it belong to the paternal succession, since it arose out of the estate of another.

When, however, the son becomes the heir of his father and raises the controversy that his father died after he had become the heir; the question arises whether he may be considered to have changed the character of his right of possession? Nevertheless, as a party who has been transacting the business of an estate, and has become indebted on account of it, and afterwards raises a controversy with reference to the succession, can be sued as a possessor of a right; it must be held that, in this instance, the same rule is also applicable to the son.

TITLE V.

CONCERNING POSSESSORY ACTIONS FOR THE RECOVERY OF ESTATES.

1. *Ulpiamis, On the Edict, Book XV.*

It is customary for the prætor to consider those parties whom he constitutes actual heirs; that

is to say, to whom the possession of the estate is granted, after civil actions have been proposed to the heirs:

2. *Gaius, On the Provincial Edict, Book VI.*

And, by means of this action for the recovery of an estate, the possessor of the property obtains just as much as an heir can obtain and secure by means of the civil actions above mentioned.

TITLE VI.

CONCERNING SUITS FOR THE RECOVERY OF TRUST ESTATES.

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

Next in order comes the action open to parties to whom an estate is delivered. Anyone who receives an estate which has been delivered in compliance with a decree of the Senate in pursuance of which rights of action pass, can make use of the action for the recovery of an estate founded upon a trust:

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

And this action has the same effect as a civil suit for the recovery of an estate.

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

Nor does it make any difference whether a person was requested to deliver the property to me or to him to whom I am the heir; and if I am the possessor of the estate of some other successor of the party to whom it was left in trust, I can proceed by means of this action.

(1) It must be remembered that this action will not lie against anyone who surrenders the estate.

(2) These actions which are granted to me can be brought in favor of my heir, as well as against him.

THE DIGEST OR PANDECTS.

BOOK VI.

TITLE I.

CONCERNING ACTIONS FOR THE RECOVERY OF SPECIFIC PROPERTY.

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

After actions which are open for the recovery of an entire amount, there is added the action for the recovery of certain specific property.

(1) This action *in rem* for the recovery of specific property is applicable to all movables, both animals and to such things as are destitute of life, as well as to those where land is involved.

(2) By means of this action, however, no claim can be asserted for persons who are free but over whom we have some control, as for instance, children who are subject to paternal authority; hence proceedings instituted on their account are either investigations by a magistrate, or interdicts, or suits brought before the prætor; and as Pomponius says in the Thirty-seventh Book: "Unless the party states the nature of his claim"; as where he claims his son as belonging to him, or being under his control, in accordance with the law of Rome. In this instance it seems to me, as well as to Pomponius, that his method of procedure is proper, for he says that a party can, under the law governing Roman citizenship bring an action for recovery where he states the basis of his claim.

(3) By means of this action not only can specific property be recovered, but, Pomponius, in the Twenty-fifth Book of Passages, says that an action may be brought for a flock, and also for a herd of cattle, and for a stud of horses, as well, and it may be said for all other animals which are kept together in droves. It is sufficient if the flock itself belongs to us, even though individual heads of the same may not be ours, for it is the flock which is claimed, and not the individuals constituting the same.

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

Where equal numbers of a flock belong to two parties, neither of them has a right to bring an action for the entire flock, nor even for half of it. Where, however, one has a larger number than the other, so that if those that do not belong to him are removed, he can still claim the flock, those which are not his will not be included among those to be surrendered.

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

Marcellus states in the Fourth Book of the Digest, that a man had a flock of three hundred head of which he lost one hundred, and purchased an equal number of others from a person who owned them, or was the *bona-fide* possessor, although they belonged to some one else; these animals also he says will be included in the suit for recovery; and even where there are no others remaining, except such as have been purchased, he can still include them in his suit to recover the flock.

(1) The objects which compose the equipment of a vessel must be sued for separately, and suit for the boat belonging to the ship also must be brought in the same manner.

(2) Pomponius says that where articles of the same description are so confused and mingled that they cannot be detached and separated, an action must be brought to recover, not all of them, but a portion of the same; as for instance, where my silver and yours is melted into a single mass it will be our common property; and either of us can bring an action for the recovery of an amount proportionate to the weight which we own in said mass, even though it may be uncertain to what weight each one of us is entitled.

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

In this instance an action can also be brought for the division of common property, but a party will be liable to an action for theft as well as to one for the production of property in court, if

he fraudulently manages to have the silver commingled; as in an action for the production of property the amount of the value must be taken into consideration, and, in one for the division of property in common or in one for recovery, the party whose silver was greater in value will obtain the most.

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

Pomponius also says that where grain belonging to two persons was mixed without their consent, each one of them will be entitled to an action *in rem* for such an amount of the heap as appears to belong to him; but, where the grain was mingled with their consent, it will then be held to be in common, and an action for the division of property owned in common will lie.

(1) He also says that if a mixture should be made of my honey and your wine, some authorities think that this also becomes common property; but I maintain the better opinion to be, (and he himself mentioned it) that the mixture belongs to the party who made it; as it does not retain its original character. Where, however, lead is mixed with silver, for the reason that it can be separated it will not become common property, nor can an action for the division of common property be brought; but an action *in rem* will lie because the metals can be separated. But he says that, where they cannot be separated, as for instance, where bronze and gold are mixed, suit for recovery must be brought in proportion to the amount involved; and what was stated with reference to the mixture of honey and wine will not apply, because though both materials are mingled, they still remain.

(2) He also states that where your stallion impregnated my mare, the colt will not be yours but mine.

(3) With reference to a tree which was transplanted into the field of another and threw out roots, Varus and Nerva granted an equitable action *in rem;* for if it had not yet taken root, it would not cease to be mine.

(4) Where proceedings *in rem* are instituted, and the parties agree with reference to the property sued for, but a mistake is made in the name of the latter, it is held that the action is properly brought.

(5) Where there are several slaves of the same name, for instance, several called Eros, and it is not apparent to which one the action refers, Pomponius says that no decision can be rendered.

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

Where anyone brings an action *in rem*, he is obliged to designate the thing, and also to state that he brings suit for all, or for a portion of the same; for the word "thing" does not mean something in kind, but a specific article. Octavenus says with reference to this, that a party must state the weight of raw material, and where the property is stamped, the number, and where goods have been manufactured, the nature of the same.

(1) The dimensions must also be given when the article can be measured. If we bring suit claiming that certain clothing is ours, or that it should be delivered to us, are we obliged to state the number of the articles and the color also? The better opinion is that both those things should be done; for it would be a hardship to compel us to say whether our clothes are worn or new.

(2) A difficulty arises occasionally with reference to household utensils, namely, whether it is only necessary to mention a dish, or whether we must add whether it is square or round, plain or ornamented, for it is difficult to insert these additions in the complaint; nor should the requirements be so rigid, although in an action to recover a slave his name should be mentioned, and also whether he is a boy or a grown man, and, by all means, this should be done if there is more than one. But, if I am ignorant of his name, I must make use of some description of him; as for example, that he is a portion of a certain estate, or the son of a certain woman. In like manner, where a man brings an action for land, he must state its name

and where it is situated.

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

Where a man who offers to conduct the defence of an action for the recovery of land, loses his case, he has, nevertheless, a well grounded right of action to recover it from the possessor, so Pedius says.

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

Pomponius adopts the following opinion in the Thirty-sixth Book. If you and I own a tract of land together, and you and Lucius Titius have possession of it, I should not bring an action against you for both of the quarters, but against Titius, who is not the owner, for the entire half. It would be otherwise if both of you had possession of different parts of the said tract; for then, undoubtedly, I would be compelled to bring suit against you and Titius for your respective shares of the entire tract; for, as parts of the land were severally held, a certain portion of them must necessarily be mine; and therefore you yourself must bring an action against Titius for a quarter of the same. This distinction does not apply to movable property nor to a suit for the recovery of an estate; for in these instances possession of property for a divided part cannot exist.

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

In this action, the duty of the judge would be to learn whether the defendant is in possession or not; but it is not important under what title he holds possession; for where I have proved the property to be mine, the possessor will be required to surrender it unless he pleads some exception. Certain authorities, however, and Pegasus among them, hold that the only kind of possession involved in this action, is that which applies where an interdict *Uti possidetis* or *Utrubi* is applied for; as he says that where property is deposited with anyone, or loaned to him; or where he hired it; or is in possession of the same to insure the payment of legacies or of a dowry; or in behalf of an unborn child; or where security was not given for the prevention of threatened injury; since none of these instances admit of possession, an action for recovery cannot be brought. I think, however, that suit can be brought against anyone who holds property and has the power to surrender it.

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

When suit is brought for movable property, where is it to be delivered, that is, if it is not actually in the hands of the possessor? It is not a bad regulation where a possessor in good faith is the party sued, for the property to be delivered either where it is situated, or where the action to recover it is brought; but this must be done at the expense of the plaintiff, which has been incurred through travel by land and sea, in addition to the cost of maintenance,

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

Unless the plaintiff prefers that the property should be delivered at his own expense and risk, where judgment is rendered; for then provision will be made, with security, for delivery.

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

Where, indeed, the defendant is a possessor in bad faith who obtained the property in some other place, the same rule applies; but if he removed it from the place where issue was joined and took it elsewhere, he should, at his own expense, deliver it at the place whence he removed it.

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

Not only must the property be delivered, but the judge must take into account any deterioration which it may have sustained. Suppose, for instance, that a slave is delivered who has been weakened, or scourged, or wounded; the judge must then consider to what extent he may have been diminished in value, although the possessor can be sued in an action under the *Lex Aquilia*. Wherefore the question arises whether the judge ought not to estimate the

amount of damage caused, unless the right of action under the *Lex Aquilia* is relinquished? Labeo thinks that the plaintiff is obliged to give security that he will not bring suit under the *Lex Aquilia;* and this opinion is the correct one.

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

If, however, the plaintiff should prefer to make use of the action under the *Lex Aquilia*, the possessor must be released from liability. Therefore the choice is given the plaintiff of obtaining not triple, but double damages.

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

Again, if the defendant delivers the slave after he has been scourged, Labeo says that the plaintiff is also entitled to an action for injury.

(1) Where anyone sells property through necessity, perhaps it will be the duty of the judge to relieve him so that he will only be compelled to deliver the purchase-money; for if he has gathered the crops and sold them to avoid their being spoiled; in this instance he will not be compelled to deliver anything more than the price.

(2) Moreover, if there was a field for which suit was brought, and it was assigned to soldiers, in consideration of a small sum paid to the possessor, must the latter deliver this also? It is my opinion that he must do so.

(3) Where suit is brought for a slave, or for some animal which died without its death being caused by the malice or negligence of the possessor, several authorities hold that the price should not be paid. The better opinion, however, is that where the plaintiff would have sold the property if he had obtained it, then the value ought to be paid if the party was in default, for if he had delivered it, the other might have sold it and have profited by the price.

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

Undoubtedly, however, even where a slave dies, some decision must be rendered with reference to profits and the offspring of a female slave, and a stipulation entered into to provide for eviction; for the possessor, after issue has been joined, is certainly not liable for misfortune.

(1) It is not understood to be a case of negligence where the possessor dispatched a ship, which is the subject of litigation, across the sea at a suitable time, even though she may have been lost; unless he committed her to the care of incompetent persons.

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

Julianus says in the Sixth Book of the Digest, that if I purchase a slave from Titius, who belonged to Mævius, and afterwards, when Mævius brings an action against me to recover him, I sell him, and the purchaser kills him, it is but just that I should pay the price received for him to Mævius.

(1) Julianus also states in the same Book, that if the possessor is in default in delivering a slave, and the latter dies, an account of the profits which accrued up to the time when the case was decided must be taken into consideration. Julianus also says that not only the profits must be surrendered, but everything connected with the property itself; and therefore the offspring of a female slave, as well as the profits derived from the latter. So far does this principle extend, that Julian states in the Seventh Book, that if the possessor should acquire the right of action through the slave under the *Lex Aquilia*, he should be compelled to assign it.

But if the possessor should fraudulently have relinquished possession, and someone has wrongfully killed the slave, he can be compelled either to pay the value of the slave, or to assign his own right of action, whichever the plaintiff may prefer. He must also surrender any profits which he may have obtained from another possessor, as he cannot realize anything through a slave the title of whom is in litigation. He is not, however, obliged to surrender any profits which have accrued during the time when the slave was in possession of the party who

recovered him in a suit. What Julianus states concerning an action under the *Lex Aquilia* is applicable where the possessor has acquired a right to the slave by usucaption, after issue has been joined, because he then begins to have a perfect title.

18. *Gaius, On the Provincial Edict, Book VII.*

Where the possessor has obtained a right to a slave through usucaption, after issue has been joined, he must give him up and furnish security to indemnify the plaintiff against fraud, so far as he is concerned; for there is danger that he may have either pledged him or manumitted him.

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

Labeo says that security must also be given by the defendant that everything has been properly transacted with reference to the property in question; for example, where he has furnished security for the prevention of threatened injury.

20. *Gaius, On the Provincial Edict, Book VII.*

Again, the possessor must also deliver anything he may have obtained through the slave after issue has been joined, but not what he acquired by means of his own property, in which inheritances and legacies obtained by him through the slave are included; for it is not sufficient for his body alone to be delivered, but it is necessary that everything connected with the property should also be given up; that is to say, that the plaintiff should have everything he would have come into possession of if the slave had been delivered to him at the time when issue was joined. Therefore, the offspring of a female slave must be surrendered, even though they may have been born after the possessor acquired ownership of the mother by usucaption; that is to say, after issue was joined, in which instance delivery and the provision of security against fraud must take place with reference to the offspring as well as the mother.

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

Where a slave runs away from a *bona-fide* possessor, we may ask whether the slave was such a one as ought to have been guarded? For if he seemed to have been of good reputation so that he should not have been kept in custody, the possessor must be released from liability; but if, in the meantime, he has obtained ownership of him by usucaption, he must assign his rights of action to the plaintiff, and surrender the profits obtained while he was in possession of the slave. If, however, he had not yet obtained ownership of him by usucaption, he must be released without giving security, so that he need not bind himself to the plaintiff to pursue the slave; as the plaintiff himself can do so; but, in the meantime, while the slave is in flight, can he become his owner through usucaption? Pomponius says in the Thirty-ninth Book of the Edict, that this is not unjust.

If, however, the slave should have been guarded, the possessor will be liable for the slave; so that, even if he had not acquired ownership of him by usucaption, the plaintiff must assign to him his rights of action. Julianus, however, thinks in instances of this kind, that where the possessor of the slave is released from liability on account of his flight, although he is not compelled to furnish security to pursue him, he must give a bond that if he should secure him, he will give him up. Pomponius approves this opinion in the Thirty-fourth Book of Various Passages, and it is the better one.

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

Where the slave escapes through the fraud of the possessor, judgment shall be rendered against him as if he was in possession.

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

A person is entitled to an action *in rem* where he has become the owner of property either by the Law of Nations, or by the Civil Law.

(1) Sacred and religious places cannot be sued for by actions *in rem,* as if they were the

property of individuals.

(2) Where anyone attaches to his own property something which belongs to another, so that it becomes a part of it; as for instance, where anyone adds to a statue of his own an arm or a foot which belongs to another, or a handle or a bottom to a cup, or a figure in relief to a candlestick, or a foot to a table, the greater number of authorities very properly state that he becomes the owner of the whole, and that he truthfully can say that the statue or the cup is his.

(3) Moreover, anything which is written on my paper or painted on my board, immediately becomes mine; although certain authorities have thought differently on account of the value of the painting; but where one thing can not exist without the other, it must necessarily be given with it.

(4) Wherefore, in all these cases in which my property draws the property of another to itself by superiority, it becomes mine; and if I bring suit to recover it, I can be compelled by an exception on the ground of fraud, to pay the increased value of the article.

(5) Again, whatever is joined or added to anything else forms part of it through accession, and the owner cannot bring suit to recover it so long as the two articles remain attached; but he can institute proceedings for them to be produced in court, in order that they may be separated, and the suit for recovery be brought, except of course, in the case stated by Cassius, where articles are welded together; for he says that if an arm is welded to the statue to which it belongs, it is absorbed by the unity of the greater part, and that anything which has once become the property of another cannot revert to its former owner, even if it should be broken off.

The same rule does not apply to anything that is soldered with lead; because welding causes a mingling of the same material, but soldering does not do this. Therefore, in all these instances, an action *in factum* is necessary; that is where one for production, or *in rem* does not lie. But with reference to articles which consist of distinct objects, it is evident that the separate parts retain their peculiar character; as for instance, separate slaves and separate sheep; and therefore I can bring suit for the recovery of a flock of sheep, as such, even though your ram may be among them, and you yourself can bring suit to recover your ram.

The rule is not the same where an article consists of coherent parts, for if you attach the arm of some other person's statue to a statue of mine, it cannot be said that the arm is yours, because the entire statue is embraced in one conception.

(6) Where the building materials of one person have been used in the house of another, an action will not lie to recover them on account of the Law of the Twelve Tables; nor can suit be brought for the production, except against the party who knowingly used the materials of another in the construction of his own house; but recourse must be had to the ancient action entitled *de tigno juncto*, which is for double damages, and is derived from the Law of the Twelve Tables.

(7) Moreover, where anyone builds a house on his own ground with stone belonging to another, he can indeed bring suit to recover the house; but the former owner can also bring an action to recover the stone, if it is taken out, even though the house may have been demolished after the time necessary for usucaption has elapsed, subsequent to the date when the house comes into the possession of a *bona-fide* purchaser; for the individual stones are not acquired by usucaption, even if the building becomes the property of another through lapse of time.

24. *Gaius, On the Provincial Edict, Book VII.*

A party who intends to bring an action for the recovery of property should consider whether he can obtain possession of it by means of some interdict; because it is far more convenient for he himself to be in possession, and to compel his adversary to assume the burden of plaintiff, than to bring suit himself while the latter is in possession.

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

Where a person undertakes the defence of a case without any good reason, as he is not in possession and has not acted fraudulently to avoid being in possession, Marcellus says he cannot have the case dismissed, if the plaintiff is not informed of the facts, and this opinion is the correct one; this, however, is on the presumption that issue has been joined. But where a party, before issue is joined, avers that he is not in possession when in fact he is not, and does not deceive the plaintiff and departs, he cannot be held to have undertaken to defend the case.

26. *Paulus, On Plautius, Book II.*

For if the plaintiff is aware of the facts, then he is not deceived by another, but by himself; and therefore the defendant will be discharged.

27. *The Same, On the Edict, Book XXI.*

But if, when I wish to sue Titius, anyone should state that he is in possession, and thereupon volunteers in defence of the case, and I prove this by testimony during the trial, judgment must unquestionably be rendered against the other party.

(1) A party should be in possession not only when issue is joined, but also when the decision is rendered. If he was in possession at the time that issue was joined, but lost it without fraud on his part when the case was decided, he should be released from liability. Again, if he was not in possession at the time issue was joined, but had possession when the case was decided, the opinion of Proculus must be accepted, namely: that, by all means, a decision must be rendered against him, and hence all profits from the time he acquired possession will be included in the judgment.

(2) Where a slave for whom suit is brought has become depreciated in value through the malice of the possessor, and afterwards dies, not through the fault of the former, but from some other cause; no estimate shall be made of the amount of his diminution of value, because it makes no difference to the plaintiff. This, however, has reference only to the action *in rem;* for the right of action under the *Lex Aquilia* continues.

(3) A party who, before issue was joined, has fraudulently relinquished the possession of property, is liable to an action *in rem;* and this may be inferred from a decree of the Senate by which it is provided, as we have already stated, that fraud previously committed is included in the suit for the recovery of an estate; for if fraud which has been committed is embraced in such an action, which itself is one *in rem*, hence it is absurd for fraud already committed to be included in an action *in rem* for the recovery of some specific article.

(4) Where a father or the owner of a slave is in possession through his son or through the slave, and either of the latter should be absent at the time when judgment is rendered, without the fault of the said father or owner; time should either be granted, or security be furnished for the delivery of possession.

(5) When the possessor incurs any expense with reference to the property for which an action is brought, before issue is joined, an account should be taken of said expense by means of an exception on the ground of fraudulent intent; if the plaintiff perseveres in the action to recover his property, without refunding the expenses. The same rule will apply where the possessor defends a slave in a noxal action, and having lost the case, pays the damages; or, by mistake, builds a house on unoccupied land which belongs to the plaintiff, unless the latter will permit him to remove the building.

Certain authorities have stated that this also should be done by the Court that hears a case for the recovery of a dowry which involves land given to the wife. But if you give instruction to your slave while he is in your possession, Proculus thinks that this rule should not be observed; because I ought not to be deprived of my slave, and the same remedy cannot be applied which we have referred to above in the case of the land.

28. *Gaius, On the Provincial Edict, Book VII.*

Suppose, for example, that you have taught him to be an artist, or a copyist; it is held that no estimate can be obtained by application to the Court:

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

Unless you are holding the slave for sale, and would get a better price for him on account of his profession;

30. *Gaius, On the Provincial Edict, Book VII.*

Or the plaintiff has been previously notified to pay the expense, and he, seeking to avoid this, an exception on the ground of fraud has been interposed by the defendant.

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

But where a demand is made for profits in the case of a slave for whose recovery an action is brought, the puberty of the slave must not only be considered, but also what services he could render, even if he had not arrived at that age. It would, however, be dishonorable for the plaintiff to demand an accounting for the profits which might have been obtained through the skill of the slave, because he obtained this at the expense of the possessor.

32. *Modestinus, Differences, Book VIII.*

If, however, he taught the slave some trade, then, after the latter has reached the age of twenty-five years, the expenses incurred in doing so may be set off.

33. *Paulus, On the Edict, Book XXL*

Not only the profits which have been collected, but also those which could honestly have been collected, must be estimated; and therefore,

if the property which is the subject of litigation should be lost either through the fraud or negligence of the possessor, Pomponius thinks that the opinion of Trebatius is the better one, namely, that an account must be taken of the profits to the extent they would have existed if the property had not been destroyed, that is to say, until the time the decision was rendered; and this view is also accepted by Julianus.

Under this rule, if the owner of the mere property brings an action and the usufruct is lost through delay, an account of the profits must be calculated from the time when the usufruct was separated from the mere ownership.

34. *Julianus, Digest, Book VII.*

The same rule applies where land is added to other land by alluvion.

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

And, on the other hand, if the plaintiff should bequeath the usufruct of certain property, after issue has been joined, some authorities very properly are of the opinion that no account of the profits should be taken after the time when the usufruct was separated from the property.

(1) Where I bring an action for land which does not belong to me, and the judge states in his decision that it is mine, he should also render judgment against the possessor for the profits; for he must be ordered to deliver the profits by the same mistake, as the plaintiff should not relinquish the profits for the benefit of the possessor, who has lost the case; otherwise, as Mauricianus says, the judge cannot decide that delivery must be made of the property; and why should the possessor hold what he could not have held if he had relinquished possession at once?

(2) A plaintiff who has accepted the estimate of property is not compelled to secure the possessor against eviction; for the possessor must blame himself if he did not surrender the property.

(3) Where property cannot be divided without being ruined, it is established that one can bring an action for a share of the same.

36. *Gaius, On the Provincial Edict, Book VII.*

When a person institutes proceedings in an action for recovery, in order that he may not do so in vain, he ought to inquire whether the defendant against whom he brings the action, is the possessor or has fraudulently relinquished possession.

(1) A party who is sued *in rem*, may also have judgment rendered against him on the ground of negligence; and the possessor of a slave against whom an action has been brought for his recovery, is guilty of negligence if he permits him to appear in the arena, and he is killed; and also where the slave was a fugitive, and he did not secure him, and he escaped; or where suit is brought for a vessel, and he dispatched it in bad weather, and it was lost by shipwreck.

37. *Ulpianus, On the Edict, Book XVII.*

Julianus says in the Eighth Book of the Digest, that if I build on the land of another of which I am the *bona-fide* purchaser, but do so at a time when I knew that the land belonged to another, we should see whether I am not entitled to an exception; unless someone may say that I am entitled to an exception on the ground that I anticipated a loss. I think, however, that such a party has no right to an exception; for, as soon as he was certain that the land belonged to another he should not have erected the building; but permission should be granted him to remove the building which he erected, if he does so without loss to the owner of the land.

38. *Celsus, Digest, Book HI.*

Upon the land of another, which you purchased without investigation, you built or planted, and you were then evicted. In this instance, a good judge will decide in different ways in accordance with the legal condition of the parties, and the circumstances of the case. Suppose the owner to have done the same thing, then, in order to recover his land, he must reimburse you for your expenses, but only to the amount by which it is rendered more valuable; and if what was added to it amounts to more than the purchase-money, he will be required to pay only what was expended. Suppose that the party is poor, and if he is compelled to pay this he must sacrifice his household goods and the tombs of his ancestors; it will then be sufficient for you to be permitted to remove as much as you can of what you have built, provided that the land will not be rendered worse than it would have been if no building had been erected upon it in the first place. We, however, decided that if the owner is ready to pay you a sum equal to what the possessor would have had if these things were removed, he shall have power to do so. But you are not to be permitted to act maliciously, as, for instance, to scrape off plaster which you have put on, or to deface paintings, which would have no effect except to cause annoyance. Suppose that the owner is a party who expects to sell the property as soon as he recovers it; then, unless he delivers the amount which we have already stated he must deliver in the first example, the damages for which judgment has been rendered against you must be paid after this is deducted.

39. *Ulpianus, On the Edict, Book XVII.*

Contractors who build with their own materials immediately transfer the ownership of the same to those who own the land on which they erect the building.

(1) Julianus very properly says in the Twelfth Book of the Digest, that a woman who gives land in pledge as security for the debt of another, can recover the same by an action *in rem*, even though the land has been sold by the creditor:

40. *Gaius, On the Provincial Edict, Book VII.*

Because the creditor is held to have sold a pledge which was void.

41. *Ulpianus, On the Edict, Book XVII.*

Where anyone buys property under the condition that if some other party offers more, he will relinquish the purchase, as soon as the condition is fulfilled he can no longer avail himself of an action *in rem;* but where land has been transferred to a party under such a condition, he can

make use of an action *in rem* to recover it before an increased price is offered, but he cannot do so afterwards.

(1) Where a slave or the son of a family sells and delivers a tract of land to me, I am entitled to an action *in rem* to recover the same, if he had the free administration of his *peculium*. The same rule applies where a slave delivers the property of his master with the consent of the latter; just as where an agent makes a sale of, or delivers, property with the consent of his principal, I will be entitled to an action *in rem*.

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

Where a suit *in rem* is brought, the heir of the possessor — if he himself is not in possession — will be released; still, if any personal liability of the deceased has been incurred, this must, by all means, be included in the judgment.

43. *The Same, On the Edict, Book XXVII.*

Whatever is attached to religious objects is itself religious; and therefore stones which have formed part of a religious structure cannot be recovered, even after they have been removed; the plaintiff, however, will be entitled to extraordinary relief by an action *in factum*, and he who removed the stones will be compelled to restore them. But where, stones belonging to another have been employed for building a monument without the consent of the owner, and before the monument has been used they are detached and removed to be employed elsewhere, they can be recovered by the owner. And even if they have been removed to be replaced in the same structure, it is established that the owner of the same can, in like manner, recover them.

44. *Gaius, On the Provincial Edict, Book XXIX.*

Fruit hanging on a tree is considered to be part of the soil.

45. *Ulpianus, On the Edict, Book LXVIII.*

Where a slave is restored to the plaintiff after an action has been brought for his recovery, and this was done by a *bona-fide* possessor, I think that he should give security against malice alone, but other possessors should give security against negligence as well; and a *bona-fide* possessor must be included among them, after issue has been joined.

46. *Paulus, On Sabinus, Book X.*

Where property for which suit is brought by an action *in rem* is estimated at the amount that the plaintiff makes oath to in court, the ownership of the same at once passes to the possessor; for I am considered to have compromised and arranged the matter with him, on the basis which he himself established.

47. *The Same, On Plautius, Book XVII.*

This is the case where the property is at hand, if it is elsewhere, it passes, when the possessor obtains it by the consent of the plaintiff; and therefore it is not contrary to the rule that the estimate of the judge should only be made where the plaintiff gives security, "that nothing will be done by him to prevent possession of the property being delivered".

48. *Papinianus, Opinions, Book II.*

Where expenses have been incurred by a *bona-fide* possessor with reference to a tract of land which it is apparent belongs to another; he cannot bring an action to recover said expenses from anyone who presented him with the land, or from the owner of the same; but, through the aid of an exception on the ground of fraud, he can be reimbursed for said expenses, by order of Court, on equitable considerations; that is to say, where the expenses exceed the amount of the profits collected before issue was joined, for where a set-off is permitted, the owner will be required to return the amount to which the expenses exceed the profits, if the land has been benefited.

49. *Celsus, Digest, Book XVIII.*

I am of the opinion that the land on which a house stands is a portion of the same; and not merely a support, as the sea is to ships.

(1) Whatever remains of my property, which I have the right to recover at law is mine.

50. *Callistratus, Monitory Edict, Book II.*

Where a field belongs to anyone by the right of purchase, proceedings cannot properly be instituted by an action of this kind before the field has been delivered, and possession of the same lost.

(1) An heir may properly bring suit for what is due to the estate, even though he may not yet have obtained possession of it.

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

Where an action *in rem* is brought and a decision is rendered against the heir of the possessor, the negligence and fraud of the heir in the matter must be taken into consideration in rendering judgment.

52. *Julianus, Digest, Book LV.*

Where the possessor of a tract of land fraudulently relinquished possession of the same before issue was joined, his heirs cannot be compelled to undertake the defence of the action *in rem;* but an action *in factum* should be granted against them by which they may be forced to surrender the amount to which they have profited by means of the property.

53. *Pomponius, On Sabinus, Book XXXI.*

Where the possessor of land has cultivated or planted it, and the land is subsequently recovered by a suit, he cannot remove what he planted.

54. *Ulpianus, Opinions, Book VI.*

There is a great difference between the duties of an advocate and the defence of one's own case; and where a party subsequently ascertains that certain property belongs to him, he will not lose his ownership of the same, because, while ignorant of the fact, he aided another who was bringing suit to recover it.

55. *Julianus, Digest, Book LV.*

Where the possessor of land dies before issue is joined, leaving two heirs, and an action to recover the entire estate is brought against one of them, who was in possession, there is no doubt that judgment must be rendered against him for all of it.

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

A suit for the recovery of a *peculium* will not be allowed, as it is in the case of a flock; but a party to whom a *peculium* was bequeathed must bring an action for the separate articles composing the same.

57. *Alfenus, Digest, Book VI.*

A party against whom a suit was brought for the recovery of land, was again sued by another for the same land; and the question arose if he should deliver the land to either of the plaintiffs by order of court, and afterwards judgment should be rendered in favor of the other plaintiff, how would he avoid sustaining a double loss? I answered that whichever judge decided the case first must order the land to be delivered to the plaintiff under the condition that he would execute a bond or give security to the possessor that if the other party recovered the land, he would deliver the same.

58. *Paulus, Epitomes of The Digest of Alfenus, Book HI.*

Where a man was sued for the recovery of a slave and also for a theft committed by the said

slave; the question arose what it would be necessary for him to do if judgment was rendered against him in both cases, if the slave was recovered from him in the first place? The ' answer was that the judge should not compel him to deliver the slave, unless security was previously furnished that where any damages were paid by him he should be fully reimbursed for them, because he had joined issue in a case involving the same slave. Where, however, judgment was first rendered in the case involving the theft, and he surrendered the slave by way of indemnity, and then another judgment was rendered in favor of the plaintiff in the action for the recovery of the slave; the judge should not make an estimate of damages because the slave was not surrendered, since no negligence or malice could be attributed to the party in failing to deliver the slave.

59. *Julianus, On Minicius, Book VI.*

A man living in a house belonging to another placed windows and doors therein, and these the owner of the building removed after a year had elapsed. I ask whether the party who put them there can bring an action for the recovery of those doors and windows? The answer was that he can, for whatever is attached to the building of another forms a part of the same as long as it continues so, but as soon as it is removed, it immediately reverts to its former condition.

60. *Pomponius, On Sabinus, Book XXIX.*

Where a possessor who is a child or an insane person destroys or spoils anything, he cannot be punished.

61. *Julianus, On Minicius, Book VI.*

Minicius, where a man had used materials belonging to another to repair his own ship, having been asked whether the ship would still remain the property of the same man, answered that it would; but if he did this while building the ship, it would not be the case. Julianus states in a note that the property in the entire ship follows the position of the keel.

62. *Papinianus, Questions, Book VI.*

Where suit is brought for a ship against a possessor in bad faith, an estimate of the profits must be made, just as in the case of shops and ground which is ordinarily leased. This is not contrary to the rule that an heir is not forced to pay interest upon money which has been deposited but which he does not handle; for although it is true that freight, like interest, is not derived from nature but is collectible by law; still, freight can be demanded in this instance, because the possessor of the ship is not required to be liable to the plaintiff for risk, but money is loaned at interest at the risk of the lender.

(1) Generally speaking, however, where a question arises concerning the estimation of profits, it is established that it must be considered, not whether the possessor in bad faith has enjoyed them, but whether the plaintiff would have been able to enjoy them, if he had been permitted to be in possession of the property. Julianus also adopted this opinion.

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

Where anyone loses possession through negligence, but not on account of fraud, since he must allow an estimate to be made, he will be entitled to be heard by the court, if he asks that his adversary should be ordered to assign his right of action; and as the prætor will grant him aid at any time where some one else is in possession, he will not be taken advantage of in any way. He should be granted relief, even if the party who received the sum assessed is in possession; and the latter will not readily be heard if he desires to refund the money after he has once received it under the decision of the judge at the risk of the defendant.

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

When an action *in rem* is brought, it is certain that the profits must be delivered even with reference to those things which are merely kept for use and not for enjoyment.

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

If anyone who purchased land from someone who was not its owner interposes an exception on the ground of fraud, he will not be required to surrender the land to the owner, unless the money which was paid to a creditor who held the land in pledge for debts, together with the interest for the intermediate time is recovered by him, that is, provided the interest amounts to more than the profits which he recovered before the suit was brought, for they can only be set off against interest recently due on the principal; since it is only just that expenses should be allowed as in the case of improvements of land.

(1) Where a man gave his daughter, who was a female slave, not by way of dowry but as a portion of her *peculium;* then, if he does not bequeath her anything as *peculium*, the slave must be included among the assets of the estate. Where, however, a father disinherited his daughter in consideration of her dowry and *peculium;* and for that reason either left her nothing by his will, or left her that much less; a defence based upon the intention of her father will protect the daughter.

66. *Paulus, Questions, Book II.*

We have no less right to bring suit to recover something which is our own, because it is expected that we will lose the ownership of the same, if the condition upon which a legacy or a grant of freedom depends should be complied with.

67. *Scævola, Opinions, Book I.*

A man who bought a house from the guardian of a minor sent a carpenter to repair it, and he found some money therein. The question arises to whom does that money belong? I answered that if it was not money concealed, but some which had been lost, or which the party to whom it belonged had by mistake failed to remove, it should, nevertheless, continue to be his to whom it originally belonged.

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

Where a person is ordered to surrender property and does not obey the order of court, stating that he is unable to do so; if, indeed, he has the property, possession shall be forcibly transferred from him on application to the judge, and the only decision to be rendered in the matter is with reference to the profits.

If, however, he is unable to deliver the property, and has acted fraudulently to avoid doing so, he must be ordered to pay as much as his adversary swears to, without any limitation; but where he is unable to deliver the property, and did not act fraudulently to avoid doing so, he can be ordered to pay no more than what it is worth; that is to say, the amount of the interest of his adversary. This is the general principle, and applies to all matters where property is to be delivered by order of court, whether interdicts or actions *in rem* or *in personam* are involved.

69. *Paulus, On Sabinus, Book XIII.*

Where a person has acted fraudulently in order to avoid being in possession, he can be punished in this manner, namely: the plaintiff shall not be required to give him security that he will assign to him the rights of action which he has in the case.

70. *Pomponius, On Sabinus, Book XXIX.*

And it is settled that he cannot even be granted a Publician Action, lest he may be able to obtain property by violence and against the will of the owner, by the payment of a fair price.

71. *Paulus, On Sabinus, Book XIII.*

Where a possessor has fraudulently relinquished possession, but the plaintiff is unwilling to make oath, and prefers that his adversary should be ordered to pay the real value of the property, his desire should be granted.

72. *Ulpianus, On the Edict, Book XVI.*

If you purchased the land of Sempronius from Titius, and after the price has been paid it is delivered to you, and then Titius becomes the heir of Sempronius, and sells and delivers the same land to another party, it is just that you should be preferred; for even if the vendor himself should bring suit against you to recover the property, you can bar him by an exception; but if he himself was in possession, and you should bring an action against him, you could make use of a replication against an exception on the ground of ownership.

73. *The Same, On the Edict, Book XVII.*

In an action brought to recover some specific property the possessor is not compelled to state what share of it belongs to him, for this is the duty of the plaintiff, and not of the possessor. The same rule is observed in the Publician Action.

(1) To a superficiary,

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

(That is to say, one who has a right to occupy the surface of ground belonging to another, on the condition of paying a certain rent for it).

75. *Ulpianus, On the Edict, Book XVI.*

The prætor promises an action *in rem* where proper cause is shown.

76. *Gaius, On the Provincial Edict, Book VII.*

The principles have been stated with reference to a suit for recovery of the entire property must be understood to equally apply to the recovery of a portion of the same; and it is the duty of the judge to order those things which should be given up to be also delivered in proportion, at the same time that the share itself is surrendered.

(1) An action for the recovery of a share which is not yet ascertained will be granted, if there is good cause for it. It is good cause where, for instance, the *Lex Falcidia* is applicable in the case of a will, on account of the uncertain sum which is to be reserved from legacies, when thorough investigation has not been made by the Court. Where a legatee to whom a slave has been bequeathed is entirely ignorant of what share in said slave he should bring suit for; an action of this kind will be granted. We understand that the same rule applies to other matters.

77. *Ulpianus, On the Edict, Book XVII.*

A certain woman gave a tract of land by a letter to a man who was not her husband, and then rented the same land from him. It might be maintained that he had a right to an action *in rem*, since he had acquired possession through her, just as through a tenant. It was stated that he had indeed been on the land which was donated to him when the letter was sent; and this was sufficient to constitute delivery of possession, even though the renting of the ground had not taken place.

78. *Labeo, Epitomes of Probabilities by Paulus, Book IV.*

If you have not harvested the crops on a tract of land belonging to another of which you are merely in possession, you are not obliged to deliver anything produced by said land.

Paulus, on the other hand, asks whether the crops become the property of the possessor because he gathered them on his own account? We must understand the harvesting of crops to mean not only where they are entirely gathered, but where this has begun and has proceeded to the extent that the crops have ceased to be supported by the land; as, for instance, where olives or grapes have been gathered, but no wine or oil has been made by anyone; for in this case, he who has gathered the crops is considered, from that time, to have obtained them.

79. *The Same, Epitomes of Probabilities by Paulus, Book VI.*

If you bring suit against me to recover a slave, and he dies after issue is joined, the profits must be estimated during the time that he lived. Paulus says, "I think that this is true only where the slave had not yet become so ill as to render his services worthless; for even if he

had continued to live in that state of ill health, it would not be proper for the profits to be estimated during that time".

80. *Furius Anthiannus, On the Edict, Book I.*

We are not compelled to endure an action *in rem*, because anyone is allowed to allege that he is not in possession, so that if his adversary can prove that the other party is actually in possession of the property, he can have the possession transferred to himself by an order of court; even though he does not prove that the property is his.

TITLE II.

CONCERNING THE PUBLICIAN ACTION IN REM.

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

The prætor says: "Where anyone desires to institute proceedings to recover property delivered to him for good reason, and the title to which has not yet passed by usucaption, I will grant him an action."

(1) The prætor says, and very properly, "Where the title has not yet passed by usucaption"; for, if this has once taken place, he has a right to a civil action and does not require an honorary one.

(2) But why did he merely mention delivery and usucaption, when there are numerous provisions of the law by means of which anyone may obtain ownership, as, for instance, in case of a bequest?

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

Or donations made *mortis causal* For the Publician Action can be brought where possession has been lost, because it is obtained in the same way as a legacy.

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

And there are many other provisions of the law to the same effect.

(1) The prætor says: "He may bring suit for a good reason"; and not only is the Publician Action available by a purchaser in good faith, but also by others; as for instance, by one to whom property has been transferred by way of dowry, and which has not yet been acquired by *usucaption;* for a very good cause of action exists whether the property given by way of dowry was appraised or not. Likewise, where property is transferred on account of a judgment.

4. *Paulus, On the Edict, Book XIX.* Or for the purpose of paying a debt,

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

Or for the surrender of a slave in lieu of damages, whether there was good ground for this, or not.

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

Moreover, in a noxal action, where no defence was made, I can remove the slave by order of the prætor and if, after removing him, I lose possession of him, I can avail myself of the Publician Action.

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

But if the property has been adjudged to me, I can bring the Publician Action.

(1) Where the value of the property is estimated in court it resembles a slave; and Julianus says in the Twenty-second Book of the Digest that, if the defendant tenders the amount of the appraisement, the Publician Action will lie.

(2) Marcellus, in the Twenty-seventh Book of the Digest, says that where anyone purchases

property from a person who is insane, being ignorant that this was the case, he can acquire it by usucaption; and therefore he will have a right to the Publician Action.

(3) Where anyone obtains property as a gift, he is entitled to the Publician Action; which also will lie against a donor; for the plaintiff is a lawful possessor where he accepts a donation.

(4) Where a party purchases property from a minor, being ignorant that he is such, he has a right to the Publician Action.

(5) Also where an exchange has been made, the same action will lie.

(6) The Publician Action is not based on the question of possession, but upon that of ownership.

(7) If you tender me an oath in a suit which I have brought for the recovery of property, and I swear that the said property is mine, I am entitled to the Publician Action, but only against you; for the only person who can be prejudiced by the oath is the party who tendered it. If, however, the oath is tendered to the possessor, and he swears that the property does not belong to the plaintiff, he can make use of an exception only against the latter; for it does not operate to the extent of granting him a right of action.

(8) In the Publician Action, all those rules must be observed which we have mentioned in the action for the recovery of property.

(9) This action lies in favor of an heir as well as of prætorian successors.

(10) If I do not make a purchase, but my slave does, I am entitled to the Publician Action. The same rule applies where my agent, guardian, curator, or anyone else transacting my business makes a purchase.

(11) The prætor says: "Who purchases in good faith"; therefore, it is not every purchase which can profit by the action, but only one made in good faith; hence it is enough if I am a purchaser in good faith even if I should not buy from the owner, although he may have made the sale to me with fraudulent intent; for the fraud of a vendor will not prejudice me.

(12) In this action it will be of no disadvantage to me if I am the successor of the purchaser, and acted fraudulently, where the party himself whom I succeeded made the purchase in good faith; and it will not profit me if I was not guilty of fraud, where the purchaser whom I succeeded was guilty of fraud.

(13) If, however, my slave made the purchase, his fraud, and not mine, must be considered; and *vice versa*.

(14) The Publician Action has reference to the time of the purchase, and therefore it is held by Pomponius that nothing which was fraudulently done, either before or after the purchase was made, can become the subject of investigation in this action.

(15) This action has reference to the good faith of the purchaser alone.

(16) Therefore, in order for the Publician Action to be available, the following conditions must exist: the person who made the purchase must have acted in good faith, and the property purchased must have been delivered to him with that understanding. But even if he made the purchase in good faith, he cannot make use of the Publician Action before delivery.

(17) Julianus stated in the Seventh Book of the Digest, that the delivery of the property purchased must be made in good faith; and therefore if the party knowingly fakes possession of something that belongs to another, he cannot avail himself of the Publician Action, because he will not be able to acquire the property by usucaption. Nor must anyone think that it is our opinion that it is sufficient for the purchaser to be ignorant that the property belonged to another at the commencement of delivery, in order to enable him to make use of the Publician Action, but it is necessary that he should be a *bona-fide* purchaser at that time also.

8. *Gaius, On the Provincial Edict, Book VII.*

Nothing, however, is stated with reference to the payment of the purchase-money; wherefore it must be conjectured that it is not the opinion of the prætor that it should be asked whether the price has been paid or not.

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

The Publician Action is equally available whether the property is delivered to the purchaser or to his heir.

(1) Where a party purchases property which has been deposited with him, or loaned or pledged to him, it must be considered as having been delivered, if it remains in his possession after the purchase.

(2) The same rule will apply where the delivery preceded the purchase.

(3) Moreover, if I purchase an estate, and certain property belonging to it has been delivered to me for which I wish to bring suit, Neratius states that I will be entitled to the Publician Action.

(4) Where anyone sells the same property separately to two *bona-fide* purchasers, let us see which of them has the better right to the Publician Action; he to whom the property was first delivered, or he who merely bought it? Julianus, in the Seventh Book of the Digest, states: "That if the parties made the purchase from the same person who was not the owner, he will be preferred to whom delivery was made first; but if they buy said property from different persons who were not the owners, the one in possession is in a better legal position than the one who brings the action; and this opinion is correct."

(5) This action is not available with reference to property which cannot be acquired by usucaption; as, for instance, in the case of articles that had been stolen, or fugitive slaves.

(6) Where a slave belonging to an estate purchases property before the estate has been entered upon, and after delivery loses possession of the same; the heir, very properly, has a right to the Publician Action, just as if he himself had been in possession.

The members of a municipality also, where property has been delivered to their slave, will be in the same position;

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

Whether the slave purchased said property with reference to his own *peculium*, or not.

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

Where I have made a purchase, and the property has been delivered to another party at my request, the Emperor Severus stated in a Rescript that the Publician Action should be granted him.

(1) The Publician Action is granted where suit is brought for the recovery of an usufruct which has been delivered, and also where servitudes of urban estates have been created by delivery, or by sufferance; for instance, where a party allowed an aqueduct to be built through his house. The same rule applies in the case of rustic servitudes, for it is established that in this case delivery and sufferance protect them.

(2) The offspring of a stolen female slave that was conceived while she was in possession of a *bona-fide* purchaser, can be recovered by means of this action; even if the child was not in possession of the party who purchased it; but the heir of the thief is not entitled to this action, because he is the successor to the defective title of the deceased.

(3) Sometimes, however, even though the mother who was stolen had not been sold, but was presented to me (I being ignorant of the fact) and she afterwards conceived and brought forth while in my possession, I am entitled to a Publician Action to recover the child, as Julianus says; provided that, at the time I bring suit, I do not know that the mother was stolen.

(4) Julianus also states, in a general way, that no matter how I could acquire the mother by

usucaption, if she had not been stolen, I can acquire the child in the same way, if I was ignorant that the mother had been stolen. Therefore, in all these instances, I will be entitled to the Publician Action.

(5) The same rule applies in the case of the child of the daughter of a female slave, even if it was not born, but after the death of its mother was extracted from her womb by the Cæsarean operation; as Pomponius stated in the Fortieth Book.

(6) He also says that where a house has been purchased and is destroyed, any additions made to it can be recovered by an action of this description.

(7) Where an accession is made to land by alluvial deposit, it becomes of the same nature as that to which it is added; and therefore since the land itself cannot be recovered by a Publician Action, the addition cannot be either; but if it can, the portion added by alluvion may be also recovered; and this was mentioned by Pomponius.

(8) He also adds that, where an action is to be brought for parts of a purchased statue which have been removed, a similar action is available.

(9) He also states, that if I purchase a vacant lot and build a house upon it, I can properly make use of the Publician Action.

(10) He also says, if I build a house, and the lot afterwards becomes vacant, I can likewise make use of the Publician Action.

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

Where a man presented a slave to his betrothed, and, before the title passed by usucaption, received him back by way of dowry; it was stated by the Divine Pius in a Rescript that if the parties were divorced, the slave should be returned, for a gift between two betrothed persons is valid; and therefore she, as the possessor, will be granted an exception; and if possession should have been lost, the Publician Action would be granted, whether a stranger or the donor was in possession of the property.

(1) Where an estate is delivered to anyone under the Trebellian Decree of the Senate, even if the party should not obtain possession of the same, he can make use of the Publician Action.

(2) In the case of perpetual leases and other real property which can not be acquires by usucaption, the Publician Action is available where a *bona-fide* delivery of the land has been made.

(3) The same rule applies where I purchased in good faith, from a person who is not the owner, a house which carried with it the surface of the land.

(4) If the property is of such a nature that some law or constitution forbids its alienation, in this instance the Publician Action will not lie, because, under such circumstances, the prætor affords no protection to anyone to prevent his breaking the law.

(5) We can make use of the Publician Action even in the case of an infant slave less than a year old.

(6) Where anyone wishes to recover a portion of some property he can avail himself of the Publician Action.

(7) He also can properly employ this action who has had possession only for a moment.

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

Wherever property is legally acquired by us in any way and is lost, this action will be granted to us for the purpose of recovering said property.

(1) Sometimes, however, the Publician Action can not be brought by persons who have lawfully obtained possession; for possession derived from pledge and precarious gifts is lawful; but a right of action is not usually allowed in cases of this kind, of course, for the

reason that neither the creditor nor the party who has a precarious title obtains possession with the understanding that he shall believe himself to be the owner.

(2) When anyone makes a purchase from a minor, he must prove that he did so with the consent of his guardian, and not in violation of law. But where he made the purchase through the deceit of a pretended guardian, he is held to have acted in good faith.

14. *Ulpianus, On the Edict, Book XVI.*

Papinianus states in the Sixth Book of Questions, that where a man forbids delivery or gives notice, and the property has been sold by his agent at his request, and the agent delivered it in spite of this; the prætor will protect the purchaser, whether he is in possession, or whether he brings an action to recover the property. But where the agent is compelled to make payment to the purchaser on account of an action based on purchase, the former can recover in a counter action on mandate; for it might happen that the property could be recovered from the purchaser by the party who gave the order to sell it, because through ignorance he did not make use of the exception which he should have pleaded, for instance: "If the party with whom I dealt did not make the sale with your consent".

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

If my slave, while in flight, purchases property from some one who is not the owner, the Publician Action will lie in my favor, even though I may not have obtained possession, through him, of the property delivered.

16. *Papinianus, Questions, Book X.*

Paulus states in a note that an exception on the ground of legal ownership may be pleaded in bar of the Publician Action.

17. *Neratius, Parchments, Book HI.*

The Publician Action was not invented for the purpose of depriving the real owner of his property (and this is proved in the first place on equitable principles; and in the second place by the use of the exception: "If the property in dispute does not belong to the possessor"); but, for the reason that where a man purchases anything in good faith and has obtained possession of it, he, rather than his adversary, should be entitled to hold it.

TITLE III.

CONCERNING ACTIONS FOR THE RECOVERY OF LAND WHICH HAS BEEN PERPETUALLY LEASED, NAMELY, EMPHYTEUTIC LAND.

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

Some lands belonging to towns are called "*vectigales*", and others are not. Those are styled *vectigales* which are leased perpetually, that is to say, under an agreement that so long as the rent is paid for them it shall not be lawful to take them away from those who leased them, or from their successors. Lands are not of this description which are leased for cultivation under the terms by which we are accustomed to rent them privately for that purpose.

(1) Where parties lease land from municipalities in perpetuity, although they do not become the owners of the same it is established that they are, nevertheless, entitled to an action *in rem* against a possessor, and even against the members of the municipality themselves:

2. *Ulpianus, On Sabinus, Book XVII.* Provided, however, they always pay the rent.

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

The same rule applies where they have made a lease for a specified time, and the term agreed upon has not yet expired.

THE DIGEST OR PANDECTS.

BOOK VII.

TITLE I.

CONCERNING USUFRUCT AND ITS USE AND ENJOYMENT.

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

Usufruct is the right to use and enjoy the property of others, at the same time preserving intact the substance of the same.

2. *Celsus, Digest, Book XVIII.*

For usufruct is a right in the material part of a thing, so that, if it is removed, the usufruct itself must be removed also.

3. *Gaius, Diurnal, or Golden Matters, Book II.*

An usufruct can be created in any real property by means of a legacy, so that the heir may be directed to transfer the usufruct to some person; and he is understood to transfer it if he conducts the legatee upon the land or permits him to enjoy or use the same. Where any one wishes to create an usufruct, he can do so by means of agreements and stipulations, without making a will.

(1) An usufruct may be created not only with reference to land and buildings but also with reference to slaves, beasts of burden, and other property.

(2) In order, however, that the mere ownership may not become absolutely worthless on account of the perpetual existence of the usufruct, it has been decided that the usufruct may be extinguished in various ways, and revert to the mere ownership.

(3) Moreover, in whatever way an usufruct is created and terminated, mere use can in the same way be created and terminated.

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

In many instances usufruct is a part of the ownership and stands by itself, since it can be granted immediately, or from a certain date.

5. *Papinianus, Questions, Book VII.*

An usufruct can, in the beginning, be created with reference to a share of property whether it be divided or undivided, and it can also be lost by lapse of time fixed by law; and on the same principle it can be diminished by the operation of the *Lex Falcidia*. Where, however, the party who promised an usufruct dies, the obligation to grant the same is divided in proportion to the shares of the estate; and if it must be granted in land held in common, and one of the owners is defendant in a suit, the transfer shall be made in proportion to the share of the said defendant.

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

An usufruct may be created in several ways; for instance it may be bequeathed as a legacy. The mere ownership of the property can be left by way of legacy, and the usufruct be reserved, so that the usufruct will remain for the heir.

(1) An usufruct may be created also by an action for the partition of an estate, or by one for the division of property held in common, where the court adjudges the mere ownership to one party and the usufruct to another.

(2) An usufruct is, moreover, acquired for us not only through ourselves, but also through persons whom we have under our control.

(3) There is nothing to prevent my slave being appointed an heir, and the bare ownership be left as a legacy, the usufruct being reserved.

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

Where an usufruct is bequeathed as a legacy, the entire profits of the property belong to the usufructuary. An usufruct of either real or personal property may be bequeathed.

(1) When that of real property is bequeathed, as for instance, where the usufruct of a house is left, all income therefrom belongs to the usufructuary; and also whatever is derived from buildings, enclosures, and the other things which appertain to the house. Wherefore, it has been established that an usufructuary can be placed in possession of an adjoining building, with a view to the prevention of threatened injury; and he can retain possession of the said building as owner, if the other party persists in not furnishing security; nor will he lose anything when the usufruct is terminated. On this principle, Labeo states that the owner of property has no right to raise his building if you are unwilling; as, where the usufruct of unoccupied ground has been bequeathed, he cannot erect a house thereon; which opinion I think to be correct.

(2) Therefore, since all the produce of the property belongs to the usufructuary, he can, as Celsus states in the Eighteenth Book of the Digest, be compelled by application to the court to repair the house, only so far, however, as to keep it in good condition, but if any of it should be destroyed through age, neither one of the parties can be compelled to repair it; still, if the heir should do so, he must permit the usufructuary to use it; wherefore Celsus asks to what an extent must it be kept in repair? If any portions are destroyed by age he cannot be compelled to repair them, and therefore he is only liable for moderate repairs, since as the usufruct is left to him, he assumes other burdens also, as for instance, taxes, tribute, rent, or a provision for maintenance charged upon the property; and this Marcellus stated in the Thirteenth Book.

(3) Cassius also says in the Eighth Book of the Civil Law that an usufructuary can be compelled to make repairs by applying to the court, just as he is obliged to plant trees; and Aristo states in a note that this is correct. Neratius also says in the Fourth Book of Parchments, that an usufructuary cannot be prohibited from making repairs, for the same reason that he cannot be prevented from plowing or cultivating the soil; and not only can he make necessary repairs, but also he may make improvements for the purpose of enjoyment, as stucco-work, mosaic pavements, and things of this kind; but he cannot enlarge the buildings, or remove anything from them which is useful.

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

Even though his intention is to put something better in its place, and this opinion is the true one.

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

Moreover, where the usufruct of land has been bequeathed, whatever is derived from the land and whatever can be collected therefrom, is included in the profits which belong to the legatee, on the condition, however, that he makes use of it as a good citizen would do; and indeed, Celsus states in the Eighteenth Book of the Digest, that he can be compelled to cultivate the land in a suitable manner.

(1) If there are bees on the land, the usufruct of them also belongs to him.

(2) But where the land contains stone quarries, and the usufructuary desires to cut stone, or it contains chalk or sand pits; Sabinus says he has a right to make use of all these, just as a thrifty owner would do; which I think to be the correct opinion.

(3) Even where these quarries have been discovered after the bequest of the usufruct, when the usufruct of the entire field and not certain parts of the same were left, they are included in the legacy.

(4) Intimately connected with this is a question which has often been treated of with respect to accessions, made to property; and it has been established that the usufruct of alluvial soil also belongs to the usufructuary. But where an island appears in a river opposite a tract of land,

Pegasus says that the usufruct of it does not belong to the usufructuary of the adjoining land, although it is an accession to the property; for it is, as it were, a peculiar tract of real-estate to whose usufruct you are not entitled. This opinion is not unreasonable, for where the increase is not noticeable the usufruct is increased, but where it appears separately, it does not contribute to the benefit of the usufructuary.

(5) Cassius states in the Eighth Book of the Civil Law that the proceeds obtained from the capture of birds and game belong to the usufructuary, and therefore those from fishing do also.

(6) I am of the opinion that the yield of a nursery also belongs to the usufructuary, so that he also has the right to sell and to plant; but he is obliged to have the bed always prepared, and to renew it for the purpose of replanting the same, as a kind of implement to be employed for the benefit of the land; so that, when the usufruct is terminated it may be restored to the owner.

(7) He is likewise entitled to what this implement for the good of the land produces, but he has not the power to sell it; for if the usufruct of the land was bequeathed, and there is a field where the owner was accustomed to obtain stakes, osiers, or reeds for the use of the land, the usufruct of which was bequeathed; I am of the opinion that the usufructuary can make use of the same, provided he does not sell anything off of it, unless if it should happen that an usufruct was left to him of a clump of willows, or of the wood where the stakes were found, or of the bed of reeds; for then he can sell the same. Trebatius says that the usufructuary can cut stakes and reeds just as the owner of the land was accustomed to do, and can sell them, even though the former was not accustomed to do so, but to use them himself; as the condition of the usufructuary must be considered with reference to the amount to be used, and not to the manner of using it.

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

The usufructuary can take stakes for props from a thicket, and limbs from trees, and from a wood which is not a thicket he can take what he requires for his vineyard; provided he does not make the land any the less valuable.

11. *Paulus, Epitomes of the Digest of Alfenus, Book II*. But where the trees are larger he cannot cut them down.

12. *Ulpianus, On Sabinus, Book XVII*.

Where trees are uprooted or overthrown by the force of the wind, Labeo says that the usufructuary can recover them for his own use, and that of his household, but he must not use the timber for firewood, if he has any other available for that purpose; and I think that this opinion is correct, otherwise, if all the land should suffer this misfortune, the usufructuary could remove all the trees. Labeo, however, thinks that he has a right to cut down as many trees as are necessary for the repair of the house; just as he can burn lime, or dig sand, or take anything else which is necessary for the building.

(1) Where the usufruct of a ship has been bequeathed, I think that it can be sent to sea, although the danger of shipwreck may be threatened; as a ship is constructed for the purpose of navigation.

(2) The usufructuary can either enjoy the property itself, or transfer the right of enjoyment to another, or he can leave, or sell the latter; for a man who leases and one who sells also uses. But where he transfers it to someone to be held on sufferance, or donates it, I think that he uses it, and therefore retains the usufruct of the same; and this was the opinion of Cassius and Pegasus, and Pomponius adopts it in the Fifth Book on Sabinus. For not only do I retain the usufruct, if I lease it, but also where another person who is transacting my business leases the usufruct, Julianus states in the Thirty-first Book, that I still retain it.

Where, however, I do not lease it, but while I am absent, and ignorant of the fact, someone who transacts my business makes use of it, and enjoys it; I, nevertheless, retain the usufruct,

because I have acquired a right of action on the ground of business transacted; and this opinion Pomponius approves in the Fifth Book.

(3) Pomponius is in doubt as to the following case, namely, where a fugitive slave in whom I have an usufruct stipulates for something with reference to my property, or receives something by delivery, do I retain the usufruct under these circumstances, on the ground that I am making use of him? He fully admits that I do retain it, for he says that very often we may not be using slaves at the time, but we retain the usufruct in them; for example, where a slave is ill, or is an infant, his services are of no value, or where he becomes decrepit through old age. We still retain the usufruct if we plow a field, although it is so barren that it yields no crop. Julianus, however, states in the Thirty-fifth Book of the Digest, that even where a fugitive slave does not stipulate for anything the usufruct is still retained; for he says, on the principle that possession is retained by the owner where the slave has fled, on the same principle the usufruct is also retained.

(4) He also discusses the following question, namely, where anyone acquires possession of the slave, must the usufruct be lost, just as the slave ceases to be in possession of the mere owner? And first he says that it may be held that the usufruct is lost, but even if it is, it must also be held that whatever the slave may have stipulated for with reference to the property of the usufructuary, within the time established by law, can be acquired by the usufructuary. From this it may be said to be inferred that even if the slave is in the possession of another person, the usufruct is not lost, provided the slave stipulated for something for me; and it makes but little difference whether he is in possession of the heir, or of someone else, to whom the estate has been sold, or to whom the mere ownership has been bequeathed, or even of a plunderer; for it will be sufficient for the usufruct to be retained if there is a desire to hold it, and the slave performs some act in behalf of the usufructuary; and this opinion seems to be reasonable.

(*5*) Julianus presents the following question in the Thirty-fifth Book of the Digest. If a thief plucks, or cuts off ripe fruit which is hanging upon a tree, who will be entitled to a suit against him for its recovery; the owner of the land, or the usufructuary? And he thinks that as fruit does not belong to the usufructuary unless it has been gathered by him, even though it should be separated from the land by another person, the proprietor has the better right to bring an action for its recovery; but the usufructuary has a right to an action for theft, for it was to his interest that the fruit should not have been removed.

Marcellus, however, is influenced by the fact that if the usufructuary subsequently obtains possession of the fruit, it will perhaps become his; and if it does, under what rule will this happen, unless that, in the meantime, it belonged to the mere owner, for, as soon as the usufructuary secures it, it becomes his, just as where property is bequeathed under some condition, and, in the meantime, belongs to an heir, but when the condition is complied with, it passes to the legatee; for it is true that the mere owner is entitled to an action for its recovery.

Where, however, the ownership is in suspense, as Julianus himself says in a case where the young of animals which are permitted to grow up have died; and where a slave subject to an usufruct received something by delivery for which the price had not yet been paid, but security had been given; it must be held that the right of action for its recovery remains in suspense, and that the ownership of the property is even more in abeyance.

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

Where the usufruct in any property has been bequeathed, the owner can demand security for the property, and this can be done by order of court, for just as the usufructuary has a right to use and enjoyment, so also the mere owner has a right to be secure with reference to his property. This also applies to every usufruct, as Julianus states in the Thirty-eighth Book of the Digest. Where an usufruct has been bequeathed, an action for its recovery should not be granted to the usufructuary unless he gives security that he will make use of and enjoy it as

would meet with the approval of a good citizen; and where there are several heirs who are charged with said usufruct, security must be given to every one of them individually.

(1) Therefore, when an action is brought with reference to an usufruct, not only what has been done will be decided, but also it will be determined how the usufruct should be enjoyed in the future.

(2) The usufructuary is liable under the *Lex Aquilia*, for damage already committed, and can be held under the interdict *Quod vi aut clam,* as Julianus says; and it is certain that the usufructuary is also liable to the above-mentioned actions and to those of theft as well, just like any other party who has been guilty of an offence of this kind with reference to the property of another.

Hence, having been asked what is the benefit of the prætor promising an action, when one already existed under the *Lex Aquilia;* Julianus answered that because there were instances in which the Aquilian Action could not be brought, and therefore a judge was appointed in order that the party might comply with his decision; for where anyone does not break up a field, or does not plant vines, or allows aqueducts to be ruined he is not liable under the *Lex Aquilia*. The same principles are applicable where a party only has the use of property.

(3) When a controversy arises between two usufructuaries, Julianus says in the Thirty-eighth Book of the Digest, that it is perfectly just for an action like that in partition to be granted them; or that, by means of a stipulation, they should secure one another as to how they will make use of their usufructs; for why, Julianus asks, should the prætor suffer them to proceed to the employment of armed force, when he is able to restrain them by means of his judicial authority? Celsus also approves this opinion in the Twentieth Book of the Digest, and I think that it is correct.

(4) An usufructuary cannot make the condition of the property worse, but he can improve it. If the usufruct of land was bequeathed, the usufructuary should not cut down fruit trees, or demolish buildings, or do anything else to the injury of the property. And if the estate should happen to be one used for enjoyment, and possesses pleasure gardens, lanes, or shady and pleasant walks laid out under trees which do not bear fruit, he should not cut them down for the purpose of making kitchen-gardens, or anything else designed to produce an income.

(5) Hence the question arose, whether the usufructuary himself can open stone quarries, or chalk, or sand-pits? I think that he can do so, if he does not use for that purpose any portion of the land required for something else. Therefore he can look for places for quarries and excavations of this kind, and he can work any mines of gold, silver, sulphur, copper, iron, or other minerals which the original proprietor opened; or he himself can open them, if this does not interfere with the cultivation of the soil. And if he should happen to obtain more income by doing this than he derives from the vineyards, plantations, or olive orchards, which are already there, he can, perhaps, cut these down since he is allowed to improve the property.

(6) Where, however, the operations begun by the usufructuary pollute the air of the land, or necessitate a great array of workmen, or gardeners, which is more than the mere owner can endure; he will not be considered as exercising his usufruct as a careful person should do. Nor can he erect a building on the land, except one which is necessary for the harvesting of crops.

(7) Where, however, the usufruct of a house was bequeathed, Nerva, the son, says that he can put in windows, and can also paint the walls, and add pictures, marbles, statuettes, and anything else which adorns a house; but he will not be permitted to change the rooms, throw them together, or separate them, or reverse the front and back entrances, or open places which are retired, or change the hall, or alter the pleasure gardens in any way; for he must take care of everything as he found it, without changing the arrangement of the building. Moreover, Nerva says that a party to whom the usufruct of a house has been bequeathed, cannot raise the height of the latter, even if no lights should be obscured by doing so, because the roof would be more likely to be disturbed; and this Labeo also holds with reference to the mere owner. Labeo also states that the usufructuary cannot obstruct the lights.

(8) Again, where the usufruct of a house is bequeathed, the usufructuary cannot rent rooms in it, nor can he divide it up into apartments, but there is no doubt that he can rent it, but he must do so as one residence; nor can he open a public bath there. When it is said that "He cannot rent rooms in it"; this must be understood to mean what are commonly designated lodgings for travellers, or shops for fullers. I am, however, of the opinion that where there is a bath in the house for the use of the household, and it is situated in some retired place, and among pleasant rooms, the usufructuary would not act properly, or in accordance with the judgment of a careful man, if he rented it as a public bath; any more than if he should rent the house as a place in which to keep beasts of burden, or where the house had a building which could be used as a stable and coach-house, he should rent it as a bakery.

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

Even though he should receive much less income by doing so.

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

If, however, he should make any addition to the house, he cannot afterwards remove, or separate it; although it is clear that he can recover, as the owner, anything which has been detached.

(1) Where the usufruct which is bequeathed consists of slaves, he must not abuse them, but must employ them in accordance with their condition. For if he sends a copyist to the country, and compels him to carry a basket of lime, and makes an actor perform the duties of an attendant of a bath, or a singer act as a porter, or takes a slave from a wrestling arena, and employs him to clean out the vaults of water-closets, he will be considered to be making an improper use of the property.

(2) He must also furnish the slaves with sufficient food and clothing, in accordance with their rank and standing.

(3) Labeo states as a rule of general application that, in the case of movable property of every description, the usufructuary must observe a certain degree of moderation, so as not to spoil it by rough handling or violence, otherwise an action can be brought against him under the *Lex Aquilia*.

(4) Where the usufruct of clothing is bequeathed, the right not having reference to quantity; it must be said that he ought to make use of it so that it may not be worn out, but he cannot hire it as a good citizen would not employ it in that manner.

(5) Hence, if the usufruct of theatrical costumes, or curtains, or some other similar articles is bequeathed, he must not use them anywhere but on the stage. It should be considered whether he can hire them, or not; and I think that this can be done, even though the testator was accustomed to lend these articles and not to hire them. Still, I am of the opinion that the usufructuary can hire theatrical costumes as well as such as are used at funerals.

(6) The mere owner of the property must not interfere with the usufructuary, so long as he does not use the article in such a way as to render its condition worse. With reference to some articles, a doubt arises where he forbids him to use them whether he can legally do so; as for instance, in the case of casks, where the usufruct of land has been bequeathed. Certain authorities hold that where the casks are buried in the ground their use may be prohibited; and they say the same of vats, barrels, jars, and bottles, and also of window panes, if the usufruct of a house is bequeathed. I am of the opinion, however, that everything belonging to the land and the house is included, where a contrary intention does not exist.

(7) The owner of the property cannot subject it to a servitude, nor can he permit one to be lost, but it is evident that he can acquire a servitude, even if the usufructuary is unwilling, as Julianus says. Consequently, according to the same rule, the usufructuary cannot acquire a servitude in the land, but he can preserve one, and if there is one, and it should be lost by the usufructuary not using it, he will be liable on this account. The owner cannot impose a

servitude on the land even if the usufructuary consents,

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

Unless the condition of the usufructuary should not become worse thereby; as for instance, where the owner grants the servitude to a neighbor that he himself shall not have the right to raise his house.

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

He can make a place religious with the consent of the usufructuary, and this is permitted in favor of religion. Sometimes, however, the owner of the property alone can make the place religious; for suppose he buries the testator therein, when there is no other place so convenient for his burial.

(1) On the principle that the proprietor must not place the usufructuary in a worse condition, the question is frequently asked whether the owner of a slave can punish him? Aristo states in a note to Cassius, that he has a perfect right to punish him, provided he does so without malice; although the usufructuary cannot, by means of improper or unusual tasks, or by disfiguring him with scars, treat the slave so as to diminish the value of his services.

(2) The proprietor can also surrender the slave by way of reparation for damage committed by him, if he does so without malicious intent; since, a surrender of this kind does not legally terminate the usufruct, any more than usucaption of property which took place after the usufruct has been created. It is clear that an action for the recovery of the usufruct must be refused unless the amount appraised as damages is tendered by the usufructuary to the party who received the slave by way of reparation.

(3) If anyone should kill the slave, I have never had any doubt that the usufructuary will be entitled to a prætorian action in the same manner as under the *Lex Aquilia*.

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

Where the usufruct which is bequeathed consists of a field, other trees must be substituted in the place of those which have died, and the latter will belong to the usufructuary.

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

Proculus thinks that the usufruct of a house can be bequeathed in such a way that a servitude may be imposed upon it in favor of some other house belonging to the estate, as follows: "If So-and-So promises my heir that he will not do anything by which certain buildings may be raised in height, then I give and bequeath to him the usufruct of said buildings"; or as follows: "I give and bequeath to So-and-So the usufruct of such-and-such a house, so long as it shall not be built higher than it now is".

(1) Where trees are thrown down by the wind and the owner does not remove them, and the usufruct is rendered more inconvenient, thereby, or a roadway is obstructed; suit can be brought by the usufructuary against him in a proper action.

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

Where anyone makes a bequest in the following terms: "I give and bequeath the annual crops of the Cornelian Estate to Gaius Nævius"; this clause should be understood to mean the same as if the usufruct of the estate had been bequeathed.

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

Where the usufruct of a slave is bequeathed, whatever he earns by his own labor or by means of the property of the usufructuary belongs to the latter; whether the slave stipulates, or possession is delivered to him. But where a slave has been appointed an heir, or receives a legacy, Labeo makes a distinction dependent upon whose behalf he is appointed heir or receives the legacy.

22. *The Same, On Sabinus, Book XVIII.*

Moreover, when anything is given to a slave in whom someone else has the usufruct, the question arises what must be done in this instance? In all such cases, where anything is left or given to a slave to the advantage of the usufructuary, the slave acquires it for him, but where it is given for the benefit of the owner, he acquires it for the latter, and if it was given for the benefit of the slave himself, it is acquired by the owner; for we do not take into consideration where he who made the gift or left the legacy came to know the slave, or what service the slave performed to deserve it. But where a slave, in whom there is an usufruct, acquires something on account of complying with a condition, and it is established that the condition was inserted for the benefit of the usufructuary, it must be held that the latter is entitled to it; as the same rule applies in the case of a *donatio mortis causa*.

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

But just as the slave by stipulating acquires property for the usufructuary, in like manner, as Julianus states in the Thirtieth Book of the Digest, he can, by means of an informal contract, acquire an exception for the usufructuary; and also, by securing a release, he can obtain a discharge for him.

(1) We have previously stated that what is acquired by the labor of the slave belongs to the usufructuary; but it must be borne in mind that he can be forced to work; for Sabinus has given the opinion that the usufructuary can administer moderate punishment, and Cassius says in the Eighth Book of the Civil Law, that he cannot torture the slave, or scourge him.

24. *Paulus, On Sabinus, Book X.*

Where anyone about to give a present to an usufructuary, promises a slave, who is subject to the usufruct on his own stipulation, he will be bound to the usufructuary; for the reason that it is customary for a slave to be able to enter into a stipulation in favor of the usufructuary.

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

Where, however, a person stipulates for anything for himself or Stichus, a slave subject to an usufruct, with the intention that it shall, for the purpose of making him a gift, go to the usufructuary; it must be stated that if money is paid to the slave it will be acquired for the usufructuary.

(1) Sometimes, however, the question for whom this slave, subject to an usufruct, will acquire it, remains in abeyance; as, for instance, where the slave purchases another slave and receives him by delivery, and does not yet pay the purchase-money, but only furnishes security for it; in the meantime, the question arises to whom does the slave belong? Julianus states in the Thirty-fifth Book of the Digest, that the ownership of the slave is in abeyance, and the payment of the price will decide to whom he belongs; for if it is paid out of money of the usufructuary, the slave will belong to the latter by retroactive effect. The same rule applies where, for instance, the slave makes a stipulation for the payment of money; for the payment itself will determine for whose benefit the stipulation was entered into. Hence we see that the ownership is in abeyance until the price is paid. What then would be the case if the price is paid after the usufruct has terminated? Julianus says in the Thirty-fifth Book of the Digest, that it must still be considered from whence the price is to come; but Marcellus and Mauricianus think that where the usufruct is lost, the ownership will be acquired by the person to whom the property belongs. The opinion of Julian is, however, the more equitable one.

If, however, the price should be paid out of property belonging to both parties, Julianus says that the ownership will belong to both; of course, in proportion to the amount paid by each. Suppose, however, the slave pays out of the property of both at the same time; as for instance, if he owed ten thousand sesterces as the price, and he paid ten thousand out of the funds of each; for which one does the slave actually acquire the property? If he pays by counting out the money, the important point is who was the owner of the sum which is first paid, for the other party can bring an action to recover that which was paid subsequently; or if the money

was already expended by the individual who received it, a personal action can be brought for its recovery. But where the slave paid the entire amount in a sack, he who received it does not acquire the property, and therefore the ownership is not held to be acquired by anyone, because where the slave pays more than the price he does not transfer the money to the receiver.

(2) Where such a slave leases his own services and stipulates for a certain sum to be paid every year, this stipulation, during the time which the usufruct continues, will enure to the benefit of the usufructuary, but the benefit of the stipulation will enure to the owner during the ensuing year, although in the beginning it was for the benefit of the usufructuary; notwithstanding it is not customary for a stipulation when once obtained for the benefit of anyone, to pass to another, unless to his heir or to a party by whom he is arrogated. Hence, where an usufruct is bequeathed for a number of years, and the slave leases his services and stipulates, as is above stated, as often as the usufruct is lost by the change of condition of the usufructuary, and is subsequently restored, the stipulation will pass from one to the other, and after having gone to the heir, it will return to the usufructuary.

(3) It may be questioned whether what cannot be acquired by the usufructuary can be acquired by the owner? Julianus, in the Thirty-fifth Book of the Digest, states that what cannot be acquired by the usufructuary belongs to the owner. He also states that where a slave stipulates with reference to the property of the usufructuary for the proprietor, expressly, or by his order, he acquires for the latter; but, on the other hand, if he stipulates for the usufructuary, not on account of the property of the latter, nor in consideration of his own labor, the stipulation is void.

(4) Where a slave subject to an usufruct stipulates for a transfer of said usufruct, either without mentioning anyone or expressly for his owner, he makes the acquisition for the latter; just as in the case of a slave held in common by two parties, who, in a stipulation contracts for one of his owners for property which already belongs to him, the stipulation is not valid; because where any party stipulates for what belongs to him the stipulation is void, but where the slave stipulates for the other owner, he acquires all of said property for him.

(5) Julianus also states in the same Book, that where an usufructuary leases the services of a slave to the latter, the contract is inoperative for he says if anyone stipulates with me for my own property, the stipulation is void; for this is no more operative than where a slave belonging to another, who is serving me in good faith, does the same thing, he will acquire the property for his owner. In like manner, he says, if he rents my property from me, the usufructuary, this will not render me liable.

The general principle he establishes is, that where anyone making a stipulation with another would acquire property for me, if he makes a stipulation with me his act is void; unless, indeed, Julianus adds, he stipulates with me or leases from me especially for the benefit of his owner.

(6) If you suppose the case of two usufructuaries, and the slave makes a stipulation with reference to the property of one of them, the question arises whether he is entitled to all of it or only the share which he has in the usufruct? This case is the same which is treated of by Scævola in the Second Book of Questions, with respect to two *bona-fide* possessors; and he says that it is generally held and is consonant with reason, that where a stipulation was made with reference to the property of one of them, then part of it is only obtained for him, and part for the owner. But where the stipulation is expressly made, there should be no doubt, if the name of the party is mentioned, that he will obtain the whole of it. He says that the rule is the same where the slave stipulates by order of the party, as an order is understood to take the place of a name.

The same rule also applies to the case of usufructuaries; so that wherever an usufructuary does not acquire the whole of the property, it will be acquired by the mere proprietor, for we have already shown that he can obtain it by a title having reference to the property of the

usufructuary.

(7) As we have previously stated that the usufructuary can acquire property through what he owns, or by the labors of the slave; it should be taken into consideration whether this is applicable merely where the usufruct is created by means of a bequest, or where it is obtained by delivery, stipulation, or in any other way. The opinion of Pegasus is the correct one, which Julianus has followed in the Sixteenth Book, namely: that it is in every instance acquired by the usufructuary.

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

Whenever a slave subject to a usufruct leases his services, and before the time of the lease expires, the usufruct terminates, the time which remains will belong to the proprietor. But where, from the beginning, the slave stipulates for a specified sum in consideration of the performance of certain services, and the usufructuary suffers a loss of civil rights, the same rule applies.

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

Where a testator leaves fruit, which was already ripe, hanging upon a tree, the usufructuary will be entitled to it if he takes it from the tree upon the day when his legacy vests; for even standing crops belong to the usufructuary.

(1) Where the owner was accustomed to use shops for the sale of his merchandise or for conducting his business, then the usufructuary will be allowed to lease them even for a sale of different merchandise; and this precaution alone shall be observed, namely, that the usufructuary must not make an unusual use of the property, or employ the usufruct in a way which will insult or injure the owner.

(2) When the usufruct of a slave is bequeathed, and the testator was accustomed to employ him in different ways, and the usufructuary educates him or teaches him some trade; he can avail himself of the trade or skill obtained in this manner.

(3) Where anything is due as taxes for constructing a sewer, or must be paid for the channel of a water-course which traverses the land, the burden of the same shall be assumed by the usufructuary; and where anything is to be paid for the maintenance of a highway, I think that this expense also must be borne by the usufructuary. Therefore, where any contribution of crops is levied on account of the passage of an army, or due to a municipality, since possessors of property are accustomed to deliver to the municipal authorities a certain portion of their crops at a low price, and also to pay taxes to the Treasury, all the aforesaid burdens must be assumed by the usufructuary.

(4) Where any kind of servitude is imposed upon land, the usufructuary will be compelled to tolerate it, and therefore, if a servitude is owing as the result of a stipulation, I think that the same rule will apply.

(5) Where, however, a slave has been sold, and the purchaser is forbidden under a penalty from employing him for certain purposes, if the usufruct in the slave is bequeathed, must the usufructuary comply with these conditions? I think that he must comply with them; otherwise, he will not use and enjoy his right in a way that would be approved by a good citizen.

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

An usufruct in old gold and silver coins which are usually ordinarily used for ornaments can be bequeathed.

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

Celsus in the Thirty-second Book, and Julianus in the Sixty-first Book of the Digest, state that the usufruct in an entire estate can be bequeathed, provided it does not exceed three-fourths of the appraised value; and this is the better opinion.

30. *Paulus, On Sabinus, Book HI.*

Where a person who has two houses bequeaths the usufruct of one of them, Marcellus says that the heir can shut off the lights of one of them by raising the height of the other; since the house could be inhabited even if it was darkened. This must be regulated to such an extent that the entire house must not be darkened, but must have a certain amount of light which will be sufficient for the occupants.

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

The phrase, "Based on the property of the usufructuary", must be understood to refer to anything which the usufructuary may have presented or granted to the slave, or where the slave gained anything through the transaction of his business.

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

Where a person transfers a house, which is the only one he has, or a tract of land, he can reserve a servitude which is personal and not prædial; as for instance, the use or usufruct. But if he makes a reservation of pasturage or the right of residence, it is valid; as profits are obtained from the pasturage of many tracts of woodland. Where the right of residence is reserved, whether this is for a certain time or until the death of the person who reserves it, it is held to be a reservation of the use.

33. *Papinianus, Questions, Book XVII.*

Where the usufruct is bequeathed to Titius and the mere ownership to Mævius, and, during the lifetime of the testator Titius dies, nothing is left in the hands of the party appointed heir; and Neratius also gave this as his opinion.

(1) It is established that in certain instances the usufruct can not be regarded as a part of the property; and, therefore, where suit is brought for a portion of the land or of the usufruct and the defendant gains the case, and afterwards an action for recovery is brought for another part which has been obtained by accretion, Julianus says that in the action for the property on the ground of a previous decision rendered, an exception can be pleaded; but in the action for the usufruct it cannot be interposed, since the portion of the land which was added, for instance by alluvion, would belong to the original part, but the increased usufruct would accrue to the person.

34. *Julianus, Digest, Book XXXV.*

Whenever an usufruct is bequeathed to two persons in such terms that "they are to use and enjoy the same during alternate years"; as if, for instance, the bequest had been made to "Titius and Mævius"; it can be said that it was made for the first year to Titius, and for the second to Mævius. Where, however, there are two parties of the same name, and the terms of the bequest are as follows: "I give the usufruct to the two Titii, for alternate years"; unless both of them agree which one shall have the use of it first, they will interfere with one another. But if Titius acquires the ownership during a year in which he enjoyed the usufruct, he will not have the bequest in the meantime, but the usufruct will belong to Mævius for alternate years; and if Titius alienates the property, he will still be entitled to his usufruct; because, even if the usufruct was bequeathed to me under some condition, and, in the meantime, I acquired the ownership from the heir but while the condition was still unfulfilled, I alienated the property, I should be permitted to obtain the legacy.

(1) If you bequeath the usufruct of a tract of land to your tenant, he can bring an action to recover said usufruct, and he can bring suit against your heir on the ground of the lease; by which means he will avoid paying rent, and will recover the expenses which he incurred by cultivating the land.

(2) With reference to the point whether the usufruct of an entire estate or that of certain articles is bequeathed, I think that it is applicable where, if a house is burned down, an action for the usufruct of it — if it be the object of a special bequest — cannot be brought; but where the usufruct of the entire property was left, an action for the usufruct of the ground will lie;

since anyone who bequeaths the usufruct of his property is held to include not only that of things of a certain kind which are there, but also that of his entire possessions, and the ground on which the house stood is a part of these.

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

Where an usufruct has been bequeathed, and the person appointed heir purposely delays entering upon the estate in order that the acquisition of the legacy may be deferred; this will have to be accounted for; as was held by Sabinus.

(1) The usufruct of a slave was bequeathed to me, and when I ceased to use and enjoy it, it was directed that he should be free; and I subsequently obtained from the heir an estimated equivalent of the legacy in money. Sabinus was of the opinion that the slave will not for that reason become free; for it may be held that I am enjoying the usufruct in him, since I have obtained other property in his stead, and the condition of his freedom remains the same, so that he will become free at my death, or if my civil condition is changed.

36. *Africanus, Questions, Book V.*

A testator bequeathed the usufruct of a plot of land and erected a house upon it, and during his lifetime it was demolished or burned down; it was held that the usufruct could be demanded. On the other hand, the same rule would not apply if the usufruct of the house had been bequeathed, and the land afterwards was built upon. The case would be the same if the usufruct in certain cups was bequeathed, and they were afterwards melted into a mass, and were a second time fashioned into cups; for although their former condition as cups was restored, they were not the same as those in which the usufruct was bequeathed.

(1) I stipulated with Titius with reference to the Cornelian Estate, the usufruct therein being reserved; Titius then died, and it was asked what his heir was required to deliver to me? The answer was that the principal point had reference to the intention with which the usufruct was reserved, for if it was agreed in fact that the usufruct should be established merely in the person of someone, the heir must transfer the bare ownership; but if it was intended that the usufruct should be withheld for the promisor alone, his heir must transfer the ownership without any restriction. That this is true is more clearly apparent in the case of a legacy, for if an heir who was charged with the bequest of mere ownership, after reservation of the usufruct, should die before proceedings have been instituted with reference to the will, there is still less reason for doubt that the heir will be obliged to transfer complete ownership.

The same rule applies where the legacy is bequeathed under a condition and the heir dies pending its fulfillment.

(2) The usufruct of a slave was bequeathed to Titius, and before it had been transferred by the heir, who was intentionally in default, the slave died. No other conclusion could be arrived at than that the liability of the heir is in proportion to the amount of the interest of the legatee that there should have been no delay, so that the value of the usufruct should be appraised from the date of the default to the time when the slave died. The result of this also would be that if Titius himself should die, there would also have to be paid to his heir a sum equal to the value of the usufruct from the time when the default began to the day of his death.

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

The question arose, if I stipulated with you for you to give me an usufruct for the next ten years, and you neglected to give it, and five years elapsed; what would be the law? Moreover, if I stipulated with you to give me the services of Stichus for the next ten years, and five years pass, as above stated, what then? The answer was that suit could properly be brought for both the usufruct and the services of the slave for the term that you permitted to elapse without giving them.

38. *Marcianus, Institutes, Book III.*

The usufructuary is not considered to make use of anything, where neither he nor anyone else

in his behalf does so; as, for instance, where a party purchased or leased an usufruct or received it as a gift, or transacted the business of the usufructuary. It is evident that a distinction should be made here; for if I sell an usufruct, then, even though the purchaser does not use the property, I am held to still retain the usufruct.

39. *Gaius, On the Provincial Edict, Book VII.*

Because he who enjoys the purchase-money is none the less considered as possessing the usufruct than one who enjoys and uses the actual property:

40. *Marcianus, Institutes, Book III.*

But if I make a present of the usufruct, I no longer retain it, unless the person to whom it was given makes use of it.

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

It is still more evident that the usufruct of a statue or a picture can be bequeathed, because articles of this kind have a certain utility if they are deposited in a proper place.

(1) Although there are certain estates of such a description that we expend more upon them than we receive from them, nevertheless, the usufruct in them can be bequeathed.

42. *Florentinus, Institutes, Book XI.*

Where a bequest of the use of some property is left to one man, and the yield of it to another, the usufructuary will obtain whatever remains after the demands of the party entitled to the use are satisfied, but he himself will have a certain amount of use for the purpose of enjoyment.

(1) It makes a difference whether the usufruct of property or the value of the same is bequeathed to you; for if the usufruct of the property is left to you, any article which was bequeathed to you in addition, must be deducted from it, and you will be entitled to an usufruct in whatever remains; but where the usufruct of the value in money is left you, this also will be estimated, because it is an additional bequest, for by bequeathing the same property several times the testator does not increase the legacy; but where one specific article has been bequeathed, we can increase the legacy by bequeathing the estimated value of it also.

43. *Ulpianus, Rules, Book VII.*

The usufruct of only a portion of an estate can be bequeathed, and if it is not expressly stated what portion, half the estate is understood to be meant.

44. *Neratius, Parchments, Book III.*

An usufructuary is not permitted to put fresh plaster on walls which are rough; because, even though by improving the house he would render the condition of the owner better, he cannot do this through any right of his own; for it is one thing for him to take care of what he has received, and another to do something new.

45. *Gaius, On the Provincial Edict, Book VII.*

Just as the expenses of the maintenance of a slave whose usufruct belongs to anyone must be paid by the latter; so, also, it is evident that the expenses of his illness must naturally be borne by him.

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

Where a stranger is appointed heir by will, and an emancipated son is passed over, and the ownership of the estate is bequeathed to the mother of the deceased, the usufruct being withheld; then, if suit is brought for the possession of the estate in opposition to the will, the entire ownership, on the ground of filial duty toward the mother, must be delivered to her.

(1) Where a testator directs that his heir shall repair a house the usufruct of which he has bequeathed, the usufructuary can bring suit under the will to compel the heir to repair it.

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

If, however, the heir should not make these repairs, and on this account the usufructuary should not be able to enjoy the property; the heir of the usufructuary will be entitled to an action on this ground for an amount of damages equal to the difference it would have made to the usufructuary if the heir had not failed to make said repairs; even though the usufruct has been terminated by the death of the usufructuary.

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

If, while the usufructuary is absent, the heir makes the repairs as a person having charge of his business, he will be entitled to an action against the usufructuary on the ground of business transacted, even though the heir was looking to his own future benefit. Where, however, the usufructuary is ready to relinquish the usufruct, he is not required to make repairs, and is released from the suit based on business transacted.

(1) Where a thicket is cut down, even though this is done at an unsuitable season of the year, it is considered as part of the yield of the land; just as olives which are gathered before they are ripe, and grass cut before the proper time are also considered to be a part of the crops.

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

Where an usufruct is bequeathed to me and to you at the charge of Sempronius and Mucius, heirs of the testator, I will be entitled to a fourth part from the share of Sempronius and another fourth part from the share of Mucius; and you, in like manner, will be entitled to two-fourths taken from their respective shares.

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

Titius left the Tusculan Estate to Mævius, and appointed him a trustee for the transfer to Titia of the usufruct of half of the said estate. Mævius rebuilt a house which was ruined by age, and which was required for the collection and preservation of the crops. The question then arose, whether Titia was obliged to assume part of the expense in proportion to her usufruct? Scævola answered that if it was necessary to rebuild the house before the usufruct was transferred, Mævius would not be compelled to deliver it, unless an action for the expense was allowed.

51. *Modestinus, Differences, Book IX.*

It is understood that the bequest of an usufruct to Titius "when he dies", is void; as it has reference to the time when it must cease to belong to the party in question.

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

Where an usufruct is left by will on condition of paying the taxes on the property, there is no doubt that the usufructuary must pay them; unless it is proved that the testator provided expressly by means of a trust that they should also be paid by the heir.

53. *Javolenus, Epistles, Book II.*

Where the usufruct of a house is bequeathed as long as any part of said house remains, the legatee will be entitled to an usufruct in the entire ground.

54. *The Same, Epistles, Book III.*

The usufruct of certain land was conditionally bequeathed to Titius, you being charged with the same as heir, and you sold and delivered the said land to me after reserving the usufruct. I ask, if the condition was not fulfilled, or if it should be and the usufruct should terminate, to whom would it belong? The answer was, I understand, that your question has reference to the usufruct which was bequeathed; and therefore, if the condition on which the legacy was dependent was fulfilled, there is no doubt that the usufruct will belong to the legatee; and if, by any accident, it should be lost to him, it will revert to the ownership of the estate. Where, however, the condition is not fulfilled, the usufruct will belong to the heir, for all the rules

which have relation to the heir are carried out, just as those that pertain to the loss of an usufruct are ordinarily observed. But, in a sale of this kind, what has been agreed upon between the purchaser and the vendor must be considered; so that if it is apparent that the usufruct was reserved on account of the legacy, even though the condition was not fulfilled, it should be restored by the vendor to the purchaser.

55. *Pomponius, On Quintus Mucius, Book XXVI.*

If only the use of an infant slave should be bequeathed, even though in the meantime no employment be made of his services, still, as soon as the child passes the age of infancy, it begins to be operative.

56. *Gaius, On the Provincial Edict, Book XVII.*

The question has been raised whether an action on account of an usufruct should be granted a municipality? In this instance there seems to be danger that the usufruct may become perpetual, because it could not be lost by death, nor easily by change of civil condition; for which reason the ownership would be worthless, as the usufruct would always be separate from it. It, nevertheless, has been established that an action should be granted. Whence another doubt arises, that is to say, how long a municipality should be protected in the enjoyment of an usufruct? It has been settled that it will be protected for a hundred years, because this is the term of the longest life of man.

57. *Papinianus, Opinions, Book VII.*

The owner of an estate left to an usufructuary by will the interest which the latter had therein by way of usufruct, and this estate the legatee, after having had possession of it for a time, was compelled to surrender to the son of the testator, who had successfully conducted a case of inofficious testament; and it was apparent from what subsequently occurred that the right of usufruct remained unimpaired.

(1) Where the crops from certain tracts of land were left under a trust for the maintenance of freedom, and any of the parties who are entitled to the same die; the profits of their shares revert from them to the mere owner of the land.

58. *Scævola, Opinions, Book III.*

A woman who had an usufruct died during the month of December, and all the crops which were obtained from the land having already been removed by the tenants, in the month of October, the question arose whether rent should be paid to the heir of the usufructuary, although she died before the *Kalends* of March, when the rent became due; or whether it ought to be divided between the heir of the usufructuary and the municipality to which the ownership was bequeathed? I answered that the municipality was not entitled to any action against the tenant; but, according to what had been stated, the heir of the usufructuary would have a right to collect the entire rent on the day when it becomes due.

(1) "I give and bequeath to Sempronius one sixth part of the crops of cabbage and leeks which I have in the field of the Farrarii". The question is asked whether an usufruct seems to be bequeathed by these words? My answer was, that an usufruct was not bequeathed, but that the particular part of the crop gathered and which was mentioned in the bequest, was. The question also arose, if this was not an usufruct, whether the testator did not bequeath the sixth part of the crops which was gathered every year? I answered that it must be considered to have been left every year, unless the contrary was expressly proved by the heir.

59. *Paulus, Opinions, Book HI.*

Where trees are overthrown by the force of a storm without any negligence of the usufructuary, it has been decided that he is not required to replace them.

(1) Whatever is grown upon the land or is gathered therefrom belongs to the usufructuary, as well as the rent of fields already leased, if these things are expressly included. But as in the

case of a sale, unless the rents are expressly reserved, the usufructuary can eject the lessee.

(2) Whatever is obtained from the cutting of reeds or stakes belongs to the usufructuary, wherever it has been customary to consider this a portion of the income of the land.

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

The usufructuary of any description of land, if interfered with in his enjoyment of the same, or ejected, can bring suit for the restitution of everything which was seized at the same time; but if, in the meanwhile, the usufruct should be terminated by any accident, a prætorian action will be granted for the recovery of any crops which may have been previously gathered.

(1) Where land, the usufruct of which is sued for, is not in the possession of the owner, an action will be granted. Therefore, if there is a dispute between two parties with reference to the ownership of the land, the usufructuary is, nevertheless, entitled to occupy the premises; and security must be given him by the possession, if his own right is disputed, "That he to whom the usufruct was bequeathed will not be prevented from enjoying the same, as long as he is engaged in establishing his title".

If, however, the right of the usufructuary himself is disputed, his usufruct will remain in abeyance; but the owner of the land must furnish him with security to return to him any of the crops which the latter may have gathered from it, or, if he refuses to do so, the usufructuary will be permitted to enjoy the property.

61. *Neratius, Opinions, Book II*.

An usufructuary cannot attach a new gutter to a wall; and where a building is not completed, it has been decided that a usufructuary cannot finish it, even if he is unable to make use of that portion of it without doing so. And indeed, it is considered that he has not even an usufruct in said building; unless, when it was created or bequeathed, it was expressly added that he could do either of the two above mentioned things.

62. *Tryphoninus, Disputations, Book VII*.

It is very properly held that an usufructuary has a right to hunt in the woods or on the mountains of the property in which he has the usufruct; and where he killed a wild-boar or a stag, he does not take anything belonging to the owner of the land, but he renders what he acquired his either by the Civil Law or in the Law of Nations.

(1) Where wild animals were kept in enclosures, when an usufruct becomes operative the usufructuary can make use of them, but he cannot kill them; but if, in the beginning, he encloses them by his own effort, and they are caught in traps by him, are they lawfully the property of the usufructuary? It is most convenient, however, on account of the difficult distinction that would arise as to the uncertain rights of the usufructuary with reference to different animals, to hold that it would be sufficient, at the termination of the usufruct, to deliver to the owner of the property the same number of different kinds of animals which existed at the time the usufruct became operative.

63. *Paulus, On Private Law*.

We can transfer to others what is not our own; for example, where a man has land, even though he has not the usufruct, still he can grant an usufruct to another party.

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

Where an usufructuary is ready to relinquish his usufruct, he cannot be compelled to repair the house, even in instances where this would ordinarily be required of the usufructuary. However, after issue has been joined, and the usufructuary is ready to relinquish the usufruct, it must be held that he should be released from liability by the Court.

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

But as the usufructuary is obliged to repair anything which has been injured by his own act, or

by that of any of his family; he should not be released, even though he is ready to relinquish the usufruct; for he himself is obliged to do everything that the careful head of a household would do in his own house.

(1) An heir is no more compelled to repair property which a testator left ruined by age, than he would be if the testator had left anyone the ownership of the same.

66. *Paulus, On the Edict, Book XLVII.*

An action can not only be brought against an usufructuary under the *Lex Aquilia*, but he is also liable to one for demoralizing a slave as well as for injury, where he depreciated the value of the slave by torturing him.

67. *Julianus, On Minicius, Book I.*

Anyone to whom the usufruct has been bequeathed can sell the same to a stranger, even without the consent of the heir.

68. *Ulpianus, On Sabinus, Book XVII.*

The question was raised in ancient times whether the issue of a female slave belonged to the usufructuary? The opinion of Brutus prevailed, namely, that the usufructuary had no right to it, as one human being cannot be considered as the product of another; and for this reason the usufructuary cannot be entitled to a usufruct in the same. If, however, the usufruct was left in the child before it was born, would he be entitled to it? The answer is that since offspring can be bequeathed, the usufruct of it can be also.

(1) Sabinus and Cassius are of the opinion that the increase of cattle belongs to the usufructuary.

(2) It is evident that the person to whom the usufruct of a flock or a herd is bequeathed, must make up any loss out of the increase, that is to say, replace those which have died.

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

Or to supply others instead of such as are worthless; and the latter, after the substitution, become the property of the usufructuary, to avoid the owner from profiting by the entire number. And as those which are replaced at once belong to the owner, so also the former ones cease to belong to him, according to the natural law of production; for otherwise the increase belongs to the usufructuary, and when he replaces it, it ceases to do so.

70. *Ulpianus, On Sabinus, Book XVII.*

What then must be done if the usufructuary does not act as above stated, and does not replace the cattle? Gaius Cassius says in the Tenth Book of the Civil Law, that he is liable to the owner.

(1) In the meantime, however, while they are being reared and those which are dead are being replaced, the question arises, to whom does the increase belong? Julianus in the Thirty-fifth Book of the Digest holds that the ownership is in abeyance; for if they are used to replace others they belong to the proprietor; but, if not, they belong to the usufructuary; which opinion is the correct one.

(2) In accordance with this, if the young die, it will be at the risk of the usufructuary and not at that of the owner, and it will be necessary for him to provide others. Whence Gaius Cassius states in the Eighth Book,, that the flesh of any dead young animal belongs to the usufructuary.

(3) Where it is stated that the usufructuary must provide others; this is only true where the usufruct of a flock, a herd, or a stud of horses, that is to say, of an entire number, has been bequeathed; for where only certain heads of the same are left, there will be nothing for him to replace.

(4) Moreover, suppose that, at the time when the young animals are born, nothing has

occurred by which he was required to replace some of them, but after their birth this became necessary; it must be considered whether he should replace them from those born last, or those born previously? I think the better opinion to be, that those which are born when the flock is complete belong to the usufructuary; and that he will only lose by reason of some subsequent injury to the flock.

(5) Replacement is a matter of fact, and Julianus very properly says that it means to separate, set apart, and to make a certain division; because the ownership of those which are set aside is in the proprietor.

71. *Marcellus, Digest, Book XVII.*

Where anyone builds a house on a lot in which some other person has the usufruct, and the house is removed before the expiration of the time within which the usufruct will be terminated, the usufruct must be restored; in accordance with the opinion of the ancient authorities.

72. *Ulpianus, On Sabinus, Book XVII.*

Where the owner of the mere property bequeaths an usufruct, what Mæcianus stated in the Third Book of Questions, on Trusts, is correct, namely: that the bequest is valid; and if the usufruct should happen to be merged in the property during the life of the testator, or before the estate is entered upon, it will belong to the legatee. Mæcianus goes even further, for he holds that if the usufruct was merged after the estate had been entered upon, it becomes legally vested and belongs to the legatee.

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

Where the usufruct of unoccupied ground is bequeathed to me, I can build a hut there for the protection of personal property on the said ground.

74. *Gaius, On the Provincial Edict, Book VII.*

Where an usufruct is bequeathed to your slave Stichus, and to my slave Pamphilus, such a bequest is the same as if it had been made to me and to you; and therefore there is no doubt that it belongs to us equally.

TITLE II.

CONCERNING THE ACCRUAL OF USUFRUCT.

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

Where an usufruct is bequeathed, the right of accrual between usufructuaries only exists where the usufruct is left conjointly; but where it is left separately to each one of the parties, the right of accrual undoubtedly ceases to exist.

(1) Hence, it is asked by Julianus in the Thirty-fifth Book of the Digest, if an usufruct is left to a slave owned in common, and is acquired by both owners, whether if one of them rejects or loses the usufruct, the other shall have the whole of it? He thinks that it belongs to the other, and even though the usufruct was acquired by the owner of the slave, not in equal shares but in shares corresponding to their interest in the slave; still, the personality of the slave and not that of the owners must be considered; so that it belongs to one of the owners and does not accrue to the mere property.

(2) He also says that where an usufruct is bequeathed to a slave owned in common, and to Titius separately, and the usufruct is lost by the other joint owner, it will not belong to Titius, but to the remaining owner alone, as he was the only one who had a right to it jointly; and this opinion is the correct one, for as long as only one is making use of the property, it may be said that the usufruct is in its former condition. The same rule applies where the usufruct is left to two persons jointly, and to another separately.

(3) Sometimes, however, even if the parties were not joint legatees, the usufruct bequeathed

vests in one of them by accrual; as, for instance, where the usufruct of an entire estate is left to me separately, and it is left to you in the same way. For (as Celsus states in the Eighteenth Book, and Julianus in the Thirty-fifth Book of the Digest), we hold shares by concurrence; and this would also happen so far as the ownership is concerned; for if one rejected it, the other would be entitled to the entire estate. But there is this point in addition with reference to the usufruct; since it has been created and afterwards lost, the right of accrual, nevertheless, exists, for all authors quoted by Plautius are of this opinion; and, (as Celsus and Julian very properly say) an usufruct is created and bequeathed every day, and not, like ownership, only at the time when an action can be brought to recover it. Thus, as soon as either party does not find anyone associated with him, he alone can make use of the entire usufruct; nor does it make any difference whether it was jointly or severally bequeathed.

(4) Julianus also states in the Thirty-fifth Book of the Digest, that where two heirs have been appointed and the mere ownership bequeathed, the usufruct being reserved; the heirs have no right of accrual, for the usufruct is held to have been created, not divided by concurrence;

2. *Africanus, Questions, Book V*.

Wherefore any part of the usufruct which has been lost reverts to the legatee who is the owner of the mere property.

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

Neratius, in the First Book of Opinions, thinks that the right of accrual is extinguished under such circumstances; and the principle stated by Celsus agrees with this opinion, namely, that the right of accrual exists where two parties have the entire usufruct, and it is divided between them by their association.

(1) Therefore, Celsus states in the Eighteenth Book, that where two owners of an estate convey the property after having reserved the usufruct of the same, and either of them loses his usufruct, it will revert to the mere property, but not to all of it; for the usufruct of each accrues to the share which each one conveyed, and it must revert to the share from which, in the beginning, it was separated.

(2) But not only the right of accrual exists where an usufruct is bequeathed to two parties, but also where it is bequeathed to one, and the estate to another; for if the one to whom an usufruct was left should lose it, it will belong to the other rather through the right of accrual than by reversion to the property; nor is there anything unusual in this, for where an usufruct is bequeathed to two persons and, while held by one of them, is merged into the mere property, the right of accrual is not lost either by him with whom it was merged, nor by him for the benefit of the other; and no matter how he may have lost his usufruct before the merger, he may lose it in the same manner now. This opinion is held by Neratius and Aristo, and is approved by Pomponius.

4. *Julianus, Digest, Book XXXV*.

Where the mere property in an estate is bequeathed to you, and the usufruct of the same estate to me and Mævius, you, Mævius, and I will each have a third part of the usufruct, and the other third part will be merged in the property. But if either I or Mævius should lose our civil rights, a third part will be divided between you and one or the other of us, so that the one who has not lost his civil rights will have half the usufruct, and the property along with the remaining half of the usufruct will belong to you.

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

And if you convey the property to anyone after the usufruct has been reserved, Julianus thinks that, nevertheless, the right of accrual will exist; and that you are not considered to acquire a new usufruct.

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

The same rule applies where the usufruct is merged in property in the hands of one of three usufructuaries.

(1) But where property is bequeathed to anyone, the usufruct having been reserved, and a portion of the usufruct is bequeathed to me; it should be considered whether the right of accrual exists between me and the heir? The correct opinion is, however, that if anyone loses the usufruct it reverts to the property.

(2) Where the usufruct of an estate is left to me absolutely, and to you under a certain condition, it can be said that the usufruct of the entire estate belongs to me in the meantime, and that if I should lose my civil rights the entire usufruct will be lost; but if the condition is complied with, the entire usufruct will belong to you if I should lose my civil rights, but if I retain my condition, the usufruct must be divided between us.

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

Where anyone bequeaths an usufruct to Attius and his heirs, Attius will be entitled to half the same, and his heirs to the remaining half. Where, however, the language is, "To Attius and Seius together with my heirs"; the usufruct will be divided into three parts, of which the heirs will have one, Attius one, and Seius one; nor does it make any difference whether the bequest is to A and B with Mævius, or "to A and B and Mævius".

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

Where an usufruct is bequeathed to a woman, "with her children"; and she loses her children, she will be entitled to the usufruct; but where the mother dies, her children will, nevertheless, be entitled to the usufruct by the right of accrual. For, as Julianus remarks in the Thirtieth Book of the Digest, the same rule must be understood to apply where a testator appoints his children his sole heirs; even though he does not name them as legatees, but only wishes to make it more plain that the mother shall enjoy the estate, and have her children enjoy it with her. But Pomponius makes the inquiry: "What if the children and the foreign heirs are mingled together?" He says that the children must be understood to be legatees; and, on the other hand, if the testator wished his children to enjoy the estate along with their mother, it must be held that the mother should be understood to be a legatee; so, in this instance, the effect of the law will be in every respect similar to that previously mentioned.

9. *Africanus, Questions, Book V.*

Where the mere property of an estate is bequeathed to two parties and the usufruct to one, all of them are not entitled to third parts of the usufruct, but two of them take half and the usufructuary the other half. On the other hand the same rule applies where there are two usufructuaries and one legatee of the estate.

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

Sometimes a share of the usufruct is obtained through accrual by a party who has no share of his own, but has lost it; for if an usufruct is bequeathed to two persons, and one of them, after issue is joined, loses his usufruct, and soon after his co-legatee who did not join issue loses his also; then the one who joined issue against the party who offered himself to defend the suit, will obtain from the possessor only the half which he lost; for the share of his co-legatee will belong to him by accrual, but not to the owner of the property; for the usufruct accrues to the person, even though it may have been lost.

11. *Papinianus, Definitions, Book II.*

Where an usufruct in the same thing is bequeathed to different persons at the charge of different heirs, the usufructuaries are not less held to be separate than if the usufruct of the same property had been bequeathed to the two in equal shares; whence it happens that no right of accrual exists between them:

12. *Ulpianus, On Sabinus, Book XVII.*

Since each legatee can bring an action against one of the heirs to recover the usufruct.

TITLE III.

WHEN THE LEGACY OF AN USUFRUCT VESTS.

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

Although an usufruct consists of enjoyment, that is to say, in some effort exerted by him who enjoys and uses the right; still, it vests but once, and it is different from where something is bequeathed every month, or every day, or every year; for then the legacy vests daily, monthly, or yearly. Wherefore the question may arise, where an usufruct is bequeathed to anyone, for every day, or for every year, does it vest but once? I think that it does not, but as many times as it is mentioned, so that there are several legacies. Marcellus approves this opinion in the Fourth Book of the Digest, where an usufruct is bequeathed to anyone for alternate days.

(1) Therefore, if an usufruct is bequeathed which cannot be enjoyed every day, the bequest will not be invalid, but it will vest on the day when it can be enjoyed.

(2) An usufruct, however, and likewise an use, will not vest before the estate is entered upon, for an usufruct is not created until someone can immediately enjoy it. According to this rule, if the usufruct is bequeathed to a slave forming part of an estate, Julianus holds that, although other legacies may be acquired by the estate, in the case of an usufruct we must wait for the person of the owner who can use and enjoy the same.

(3) Moreover, if an usufruct is bequeathed from a certain day, it will not vest until the day arrives; for it is established that an usufruct can be bequeathed from a certain time or until a certain time.

(4) Not only does an usufruct not vest before the estate is entered upon, but a right of action based upon usufruct does not do so either; and the same rule applies where an usufruct is bequeathed after a certain day; hence, Scævola says that a party who brings an action before the day of the usufruct will gain nothing; although any legal procedure which is instituted before the proper time is void.

TITLE IV.

IN WHAT WAYS USUFRUCT OR USE IS LOST.

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

It is established that an usufruct is not only lost by forfeiture of civil rights, but that the right of action based on usufruct is also lost; and it makes little difference whether the usufruct was created by law or with the assistance of the prætor. Hence, where an usufruct is delivered, or is created not strictly by law but through a perpetual lease, or occupancy of the surface of land, it is lost with the forfeiture of civil rights.

(1) Thus usufruct can be lost by a forfeiture of civil rights only where it has been already created; but if anyone forfeits his civil rights before the estate is entered upon, or before the usufruct has vested, it is held that it is not lost.

(2) Where an estate in land is devised to you from a certain day, and you are asked to deliver the usufruct to me, it should be considered whether, if I have lost my civil rights before the day mentioned in the devise to you, my usufruct is not safe; as the loss of civil rights must occur before the usufruct vests, which may be said to be a liberal interpretation.

(3) To such an extent is it a fact that the loss of civil rights not only destroys an usufruct which has already been created, but if an usufruct has been bequeathed for every year, month, or day, that only is lost which is running at the time; and where, for instance, it is bequeathed for separate years, the usufruct for that year only is lost, and if for separate months, that month, and if for separate days, that day.

2. *Papinianus, Questions, Book XVII.*

Where an usufruct is left to two parties separately for alternate years, the property exists for years without the right of enjoyment; while, if it is left to one legatee alone to whom the usufruct for every other year is bequeathed, the entire property will vest in the heir during the time when the right of enjoyment does not belong to the legatee. Where, however, one of the two parties dies, the right to the property will be complete for the odd years, for there can be no accrual to the other party) since each one had his own times for the enjoyment of the entire usufruct without the other being associated with him.

(1) Where not death, but a loss of civil rights takes place, then, because there are several bequests, the usufruct only for that year will be lost, provided the party had the right of usufruct merely for that time; and this principle should be upheld in the case of a legatee who received the usufruct for a certain number of separate years, so that the mention of the terms has the effect of a renewal of the right.

(2) Where an usufruct is bequeathed to certain persons for alternate years, and they agree to enjoy it during the same year, they interfere with one another, since it does not seem to have been intended that they should enjoy it together; for it makes a great deal of difference whether an usufruct is bequeathed to two persons together for alternate years, (as then it cannot run longer than the first year, any more than if it had been bequeathed in the same way to one of them) or it is bequeathed to separate persons for alternate years; for if they wish to enjoy it together they will either interfere with one another, on account of this being contrary to the intention of the testator; or, if this is not the case, the usufruct for every other year will not be enjoyed by anyone.

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

Just as an usufruct can be bequeathed for separate years, so also it can again be bequeathed if lost by forfeiture of civil rights, as where the addition is made: "Whenever So-and-So loses his civil rights I bequeath to him"; or, as follows: "Whenever it shall be lost"; and then, if it is lost by the forfeiture of civil rights, it will be considered to have been renewed. Wherefore, it has been discussed, where an usufruct is bequeathed to anyone for as long as he lives, whether it must be held to be renewed as often as it is lost? Mæcianus adopts this opinion, and I think that it must be held to be renewed; therefore if an usufruct is bequeathed for a certain time, as for instance, for ten years, the same principle will apply.

(1) The question arises with reference to the renewal which takes place after an usufruct has been lost by forfeiture of civil rights, whether the right of accrual remains unimpaired; for example, where an usufruct was bequeathed to Titius and Mævius, and Titius, having lost his civil rights, the testator bequeathed him the usufruct a second time; and inquiry was made if Titius should again receive the usufruct by renewal whether the right of accrual would remain unimpaired between the parties? Papinianus states in the Seventeenth Book of Questions that it does remain unimpaired, just as if some other person had been substituted for Titius in the enjoyment of the usufruct; for these parties are held to be conjoined in fact, if not in words.

(2) Papinianus also asks if the testator, after having left the usufruct to Titius and Mævius, in the second bequest of the same, did not leave the entire usufruct but only a portion of it to Titius, would they be considered to be conjoined? He says in reply, that if Titius should lose his share, it would all accrue to his associate; but if Mævius should lose his, the whole would not accrue, but half would belong to him, and half would revert to the property.

This opinion is reasonable, for it cannot be held that the ground on which a person loses the usufruct and takes it back will entitle him to any accrual from the usufruct; as it is our opinion that he who loses an usufruct can gain nothing by accrual out of what he loses.

(3) There is no doubt whatever that an usufruct can also be lost by death; since the right of enjoyment is extinguished by death, just as any other right which attaches to the person.

4. *Marcianus, Institutes, Book III.*

Where the legatee of an usufruct is requested to deliver it to another person, the prætor should

provide that, if it is lost, it should rather affect the person of the trustee than that of the legatee.

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

An usufruct which has been bequeathed may be renewed without reference to the way in which it was lost, provided that it was not lost by death, unless the testator, under such circumstances, bequeathed it to the heirs of the usufructuary.

(1) Where anyone alienates only the usufruct in a slave by whom he has acquired an usufruct, there is no doubt that he retains the usufruct which was acquired through him.

(2) It is established that an usufruct is terminated by a change of the property to which it belongs; for example, if a bequest was made to me of the usufruct in a house, and the house has been demolished, or burned, the usufruct is unquestionably extinguished. Does this also apply to the ground? It is absolutely certain that where the house is burned down, no usufruct remains in either the ground or the materials; and Julianus is of this opinion.

(3) Where the usufruct of the ground is bequeathed, and a house is built upon the latter, it is established that the property is changed, and that the usufruct is extinguished. It is clear that if the mere owner built it, he will be liable to an action on the will, or to one on the ground of fraud.

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

And the usufructuary will be entitled also to the interdict *Quod vi aut clam;*

1. Julianus, Digest, Book XXXV.

Unless the building having been removed, the owner grants me an usufruct in the ground; that is where the time had elapsed by which the usufruct was lost.

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

Where the usufruct of an estate is bequeathed, if the house should be destroyed the usufruct will not be extinguished, because the house is an accession to the land; any more than if trees were to fall.

9. *Paulus, On Sabinus, Book HI*.

But I could still use and enjoy the ground on which the house had stood.

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

What would be the case, however, if the land was an accession to the house? Let us see whether, in this instance, the usufruct of the land would not also be extinguished, and we must hold the same opinion, namely, that it would not be extinguished.

(1) The usufruct is extinguished not only where the building has been levelled with the ground, but also where, after having demolished the house, the testator erects a new one in its place; for it is evident that if he repairs certain portions of it we must establish a different rule, even though the entire house should be renewed.

(2) Where the usufruct of a field or an enclosure is bequeathed, and it is inundated so as to become a pond, or a swamp, the usufruct will undoubtedly be extinguished.

(3) Moreover, where the usufruct of a pond is bequeathed, and it dries up so that it becomes a field; the property being changed, the usufruct is extinguished.

(4) I do not think, however, where the usufruct of tillable land is bequeathed and vineyards are planted thereon, or *vice versa*, that the usufruct is extinguished. It is certain, however, where the usufruct of a wood is bequeathed, and the trees are cut down, and seed sowed upon the land, that the usufruct is extinguished.

(5) Where the usufruct of a mass of metal is bequeathed, and vessels are made out of it, or

vice versa, Cassius, as quoted by Urseius, says that the usufruct is terminated, and I think this opinion to be the correct one.

(6) Thus, where an ornament is destroyed, or its shape is changed, this extinguishes the usufruct therein.

(7) Sabinus also states with reference to the usufruct of a ship, that where certain portions of the same are repaired, the usufruct is not lost; but where it is taken apart, even though it should be rebuilt out of the same timber and nothing additional be supplied, the usufruct will be extinguished; and this opinion I think to be the better one, for where a house is rebuilt, the usufruct is extinguished.

(8) Where the usufruct in a team of four horses is bequeathed, and one of them dies, the question arises, is the usufruct extinguished? I think that it makes a great deal of difference whether the usufruct in the horses, or in the team was bequeathed; for, if it was that of the horses it will remain in the others, but if it was that of the team, it will not remain, as it has ceased to be a team:

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

Unless, before the legacy vests, another horse is put in the place of the one that died.

12. *Ulpianus, On Sabinus, Book XVII*.

Where the usufruct of a bath is bequeathed, and the testator changed it into a lodging, or a shop, or made a residence out of it, it must be held that the usufruct is extinguished.

(1) Hence, if anyone leaves an usufruct in an actor and then transfers him to some other kind of service, it must be said that the usufruct is extinguished.

13. *Paulus, On Sabinus, Book HI*.

If an usufructuary has harvested a crop and then dies, Labeo says that the crop which is lying on the ground belongs to his heir, but that the grain still attached to the soil belongs to the owner of the land; for the crop is considered to be gathered when the heads of grain or stems of grass are cut, or the grapes are picked, or the olives are shaken off the trees, although the grain may not yet have been ground, or the oil made, or the vintage finished. But although what Labeo stated with reference to the olives being shaken off the trees is true, the rule is not the same concerning those which have fallen of themselves. Julianus says that the crops become the property of the usufructuary when he has gathered them, but that they belong to a *bona-fide* possessor as soon as they are once separated from the soil.

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

With the exception of the loss of civil rights and death, other causes of the extinction of usufruct allow partial loss of the same.

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

Sometimes the mere owner can grant freedom to a slave, for example, where the usufruct was bequeathed until the slave should be manumitted; for the usufruct is extinguished whenever the owner begins the manumission.

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

Where an usufruct is bequeathed to me on a certain condition, and, in the meantime, it is in the possession of the heir, the latter can bequeath the usufruct to someone else; with the result that, if the condition on which my legacy depends is complied with, the usufruct left by the heir is terminated. But if I should lose the usufruct, it will not revert to the legatee to whom it was bequeathed absolutely by the heir, because the right of joint legatees cannot be acquired under different wills.

17. *Julianus, Digest, Book XXXV*.

Where the usufruct of land is bequeathed to you absolutely, and the mere ownership of the same is bequeathed to Titius conditionally, while the condition is unfulfilled you acquire the mere right of ownership, and after the condition has been complied with, Titius will be entitled to the land without any restriction; and it makes no difference that the property was bequeathed after the usufruct had been reserved, because when you acquired it you lost all the right to the legacy of the usufruct.

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

Where an usufruct is bequeathed to a slave belonging to an estate before the estate is entered upon, the better opinion is that when it is entered upon, the usufruct vests in you, and is not terminated because of change of ownership, because it did not vest before you became the heir.

19. *Gaius, On the Provincial Edict, Book VII*.

Neither an usufruct, nor a right of way, nor a right to drive, is lost by change of ownership.

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

Will a person who has an usufruct retain it if he only makes use of it because he thinks that he is solely entitled to the use of the same? I am of the opinion that if he knows that he is entitled to the usufruct, and he only exercises the use, he must, nevertheless, be considered to enjoy the usufruct; but if he does not know this, he will lose the usufruct as his use is based not on what he has, but on what he thinks he has.

21. *Modestinus, Differences, Book III*.

Where an usufruct is bequeathed to a city, and the site of it is afterwards turned into a plowed field, it ceases to be a city, as was the fate of Carthage; therefore it ceases to have the usufruct, just as in case of death.

22. *Pomponius, On Quintus Mucius, Book VI*.

Where the use of a house is bequeathed to a woman, and she goes beyond sea and is absent for the time established by law for the loss of the use, but her husband uses the house, the use is, nevertheless, retained; just as if she had left her slaves in her house, and herself had travelled in foreign countries.

This must be stated even more forcibly if a husband leaves his wife at home, where the use of the house was bequeathed to the husband himself.

23. *The Same, On Quintus Mucius, Book XXVI*.

Where a field whose usufruct is ours is flooded by a river or by the sea, the usufruct is extinguished, since even the ownership itself is lost in this instance; nor can we retain the usufruct even by fishing. But as the ownership is restored if the water recedes with the same rapidity with which it came, so also, it must be said that the usufruct is restored.

24. *Javolenus, On the Last Works of Labeo, Book III*.

If I have the usufruct of a garden, and a river covers it and then recedes; it is the opinion of Labeo that the usufruct is also restored, because the soil always remained in the same legal condition. I think that this is true only where the river covered the garden by reason of an inundation; for if its bed was changed and it flowed in that direction, I think that the usufruct is lost, as the ground of the former bed becomes public property, and cannot be restored to its former state.

(1) Labeo states that the same rule of law should be observed with reference to a right of way and a road; but I am of the same opinion with reference to these things as I am with reference to the usufruct.

(2) Labeo says that even if the surface of the ground is removed from my field and replaced with other soil, the land does not, for this reason, cease to be mine, any more than if the field

were covered with manure.

25. *Pomponius, Various Passages, Book XI.*

It is established that an usufruct may be lost by want of use, whether it is that of a share or is undivided.

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

Where a field is occupied by enemies, or a slave is taken by them and afterwards liberated; the usufruct in either is restored by the right of *postliminium.*

27. The Same, Manuals, Book I.

Where a slave in whom another party has an usufruct is surrendered, by way of reparation for damage, by the mere owner to the usufructuary; the servitude is merged and the usufruct terminated by the acquisition of the property.

28. *The Same, On Plautius, Book XIII.*

If an usufruct is bequeathed for alternate years, it cannot be lost by not making use of it; because there are several legacies.

29. *Ulpianus, On Sabinus, Book XVII.*

Pomponius asks the following question: Where the mere owner of land rents it from me as usufructuary, and sells the same land to Seius without the reservation of the usufruct; do I retain the usufruct on account of the act of the purchaser? He says in reply: that although the mere owner may pay me rent, the usufruct nevertheless is extinguished, because the purchaser enjoys it not in my name, but in his own.

It is evident that the mere proprietor is liable to me on account of the lease, to the extent of the interest I had in his not doing this; although, if anyone rents the usufruct from me and leases it to another, the usufruct is retained; but if the mere owner leases it in his own name, it must be held to be lost, for the tenant does not enjoy it in my name.

(1) But if the mere owner should sell the usufruct after it had been purchased from me, it might be asked, would I lose the usufruct? I think that I would lose it; since the purchaser, in this instance also, does not enjoy it as having been bought from me.

(2) Pomponius also makes this inquiry: If I am asked to deliver to you an usufruct which has been bequeathed to me, am I held to enjoy it through you, so that the usufruct will not be lost? He replied that he is in doubt with reference to this question; but the better opinion is, as Marcellus states in a note, that this matter does, in no way, prejudice the beneficiary of the trust, as he will be entitled to a prætorian action in his own name.

30. *Gaius, On the Provincial Edict, Book VII.*

The flesh and hides of dead cattle do not form part of the product of the same, because the usufruct is extinguished as soon as they are dead.

31. *Pomponius, On Quintus Mucius, Book IV.*

Where the usufruct of a flock is bequeathed, and the number of the same is reduced to such a point that it cannot be considered a flock, the usufruct terminates.

TITLE V.

CONCERNING THE USUFRUCT OF THINGS WHICH ARE CONSUMED OR DIMINISHED BY USE.

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

The Senate decreed that, "the usufruct of all property which it is established could belong to the patrimony of any individual, can be bequeathed"; and, as the result of this Decree of the Senate, it is held that the usufruct of those things which are destroyed or diminished by use

can be bequeathed.

2. *Gaius, On the Provincial Edict, Book VII.*

In the case of money, however, it is necessary for security to be given to those at whose charge the usufruct of this money is bequeathed.

(1) By this Decree of the Senate it was not brought about that an usufruct of money should actually exist, for natural reason cannot be altered by the authority of the Senate; but where the remedy of security is introduced, a quasi usufruct was created.

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

After this the usufruct of anything can be bequeathed. But does this apply to an obligation? Nerva says that it does not; but the better opinion is the one entertained by Cassius and Proculus, namely, that it can be bequeathed. Nerva, moreover, says that the usufruct can be bequeathed to the debtor himself, and if this is done he must be released from paying interest.

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

Therefore security can also be required of him.

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

This Decree of the Senate not only has reference to a party who bequeaths the usufruct of money or other things which he has, but also where they belong to others.

(1) Where the usufruct of money is bequeathed, or that of anything else which consists in the consumption of the same, and security is not given; it must be considered when the usufruct is terminated, whether the money, or the other articles which are used by consumption can be recovered by a personal action? But so long as the usufruct exists, if anyone wishes to bring suit to compel the execution of a bond, it may be stated that an action can be brought for an uncertain sum on account of the omitted bond; but after the usufruct is terminated, Sabinus thinks that proceedings can be instituted for the recovery of the entire amount. This opinion Celsus adopts in the Eighteenth Book of the Digest, and it does not seem to me devoid of ingenuity.

(2) What we have stated with reference to the usufruct of money or of other articles which are made use of by consumption, also applies to the use of the same; for both Julianus and Pomponius state in the Eighth Book of Stipulations, that the use and usufruct of money are identical.

6. *Julianus, Digest, Book XXXV.*

If ten thousand *aurei* are bequeathed to you and the usufruct of the same ten thousand to me, the entire ten thousand will belong to you; but five thousand must be paid to me on condition that I give security to you that, "At the time of my death or loss of civil rights, they will be delivered to you"; for, if a tract of land is devised to you, and the usufruct of the same land to me, you would, indeed, have the ownership of the entire tract, but you would have part of it together with the usufruct, and part of it without, and I should give security which would be approved by a good citizen to you and not to the heir.

(1) But where the usufruct of the same ten thousand *aurei* is bequeathed to two persons, they will each receive five thousand, and must give security to one another and also to the heir.

7. *Gaius, On the Provincial Edict, Book VII.*

Where the usufruct of oil, wine, or grain is bequeathed, the property should be delivered to the legatee, and he should be required to give a bond that, "Whenever he dies or forfeits his civil rights, articles of the same quality shall be delivered"; or the former article must be appraised and security be given for a certain sum of money, which is more convenient.

We understand the same rule to apply to other things, the value of which is embraced in their use.

8. *Papinianus, Questions, Book XVII.*

Three heirs having been appointed by a testator, he bequeathed to Titius the usufruct of fifteen thousand *aurei*, and ordered two of the heirs to give security for the legatee. It was decided that there was a Valid legacy of the security, and that the Decree of the Senate did not oppose this interpretation, because the execution of the bond was not prevented; and that one of the legacies was for a certain amount, and the other for an amount which was uncertain, and therefore that suit might be brought for a part of the money as usufruct against the heir who had received security from his co-heir; and that he was liable to an action for an uncertain amount if he himself did not give security. With reference, however, to the heir who furnished security, and who, on account of the delay of his co-heir, had not received any, he would not, in the meantime, be liable under the Decree of the Senate for the usufruct, nor would he be liable to the action for uncertain damages because he had given security to his co-heir.

We are also of the opinion that the legatee can be compelled to promise; but when the usufruct is terminated, if the co-heirs are sued on account of their suretyship, they will not be entitled to an action on mandate, as no mandate was ever undertaken, but they only obeyed the will of the testator, and, in short, are released by the legacy of security.

It is not necessary to enter into a long discussion with reference to the following question, namely, that the second legacy, that is to say the one of the security, does not seem to have been left to the heirs but to the party to whom the usufruct of the money was bequeathed, and for whom the testator wished to provide, and whose interest he thought it was that he should not seek for sureties at his own risk.

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

In a stipulation having reference to the restoration of the usufruct of money, two occurrences also are mentioned, namely, death, and the loss of civil rights.

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

Since the use of money cannot be lost in any other way than by the said occurrences.

(1) Where only the use of money is bequeathed, since it must be understood, in this particular instance, that the term "use" also includes the profits, a stipulation must be entered into. Certain authorities hold that a stipulation should not be entered into before the money has been paid; but I am of the opinion that the stipulation will be valid whether it is made before, or after the money has been paid.

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

Where the usufruct of wool, perfumes, or spices is bequeathed, it is held that no usufruct is legally created in these substances, but recourse must be had to the Decree of the Senate which provides for security with reference to them.

12. *Marcianus, Institutes, Book VII.*

Where money was left to Titius in such a way that after the death of the legatee it was to go to Mævius; the Divine Severus and Antoninus stated in a Rescript that, although it had been added that Titius was to have the use of the money, still, the property of the same was bequeathed to him, and that mention was made of the use because the money was to be paid over after his death.

TITLE VI.

CONCERNING THE ACTION FOR THE RECOVERY OF USUFRUCT, AND THAT BY WHICH IT IS DENIED.

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

Where a servitude is attached to land subject to an usufruct, Marcellus, in the Eighth Book quoted by Julianus, approves the opinion of Labeo and Nerva, namely, that the usufructuary

cannot bring an action for the recovery of the servitude, but can bring one for the recovery of the usufruct; and, according to this, if the neighbor does not suffer him to walk or drive across the land, the latter is liable because he did not permit him to enjoy the usufruct.

(1) An usufruct requires those adjuncts to be bequeathed without which a party cannot enjoy it; and therefore where one is bequeathed, it is also necessary for access to be joined with it; to such an extent is this true, that where a person leaves the usufruct of a certain place in such language that the heir shall not be compelled to permit a road, this addition is considered void; and also where an usufruct is bequeathed and a right of way is withheld, the reservation is void, because a right of access always accompanies the usufruct.

(2) Where, however, an usufruct is bequeathed, and there is no right of access to the land which is subject to it and is part of the estate; the usufructuary can bring suit under the will to obtain the usufruct together with access to the same.

(3) Pomponius, in the Fifth Book, is in doubt as to whether, where an usufruct is bequeathed, the usufructuary has only a right of access, or has the right to a path or roadway as well? He very properly thinks that he ought to be granted means by which he may enjoy his usufruct.

(4) Will the heir be required to provide him with other benefits and servitudes also; as, for instance, those of light and water, or not? I am of the opinion that he can only be compelled to provide him with those alone without which he cannot use the property at all; but if he can use it, even with some inconvenience, the said benefits need not be furnished.

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

Where suit is brought for an usufruct of land under a will, against an heir who has cut down trees, demolished the house, or, in any way, diminished the value of the usufruct, either by imposing servitudes upon the land, or by releasing servitudes from neighboring property, it is the duty of the judge to ascertain what the condition of the land was before issue was joined, in order that the usufructuary may be protected by him in the enjoyment of what he is entitled to.

3. *Julianus, Digest, Book VII.*

Where a party to whom an usufruct was delivered in compliance with the terms of a trust, has ceased to use it for such a time as would have caused him to lose it if it had become his lawfully, he should not be granted an action for restitution; for it is absurd that parties who have only obtained possession of an usufruct and not the ownership of the same, should have the better right.

4. *The Same, Digest, Book XXXV.*

A tract of land was bequeathed to Titius, the usufruct having been reserved, and the usufruct of the same land was bequeathed to Sempronius, under a certain condition. I said that, in the meantime, the usufruct was united with the property, although it is settled that when land is bequeathed with reservation of the usufruct the usufruct remains with the heir, because when a testator bequeaths land with reservation of the usufruct, and the usufruct of the same to another under some condition, he does not do so intending that the usufruct shall remain with the heir.

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

He alone can claim the right to use and enjoy property who has the usufruct of the same; the owner of the land cannot do so, because he who holds the property has not a separate right to use and enjoy it, as his own property cannot be subject to servitudes for his own benefit; and it is necessary for a party to bring suit in his own right and not in the right of another. For although a prohibitive right of action will lie in favor of an owner against an usufructuary, he is considered still more to sue in his own right, rather than in that of another, when he denies that the usufructuary has the privilege of use against his will, or alleges that he has a right to prohibit him. But if it should happen that the party who brings the action is not the owner of

the property, even though the usufructuary has not the right to use it, he will still prevail, on the principle that the condition of possessors is preferable, even though they may have no legal right.

(1) The question arises, whether the usufructuary has a right of action *in rem* only against the mere owner, or also against some possessor? Julianus states in the Seventh Book of the Digest, that he is entitled to this action against any possessor whomsoever; for where a servitude is attached to land which is subject to usufruct, the usufructuary should bring suit against the owner of the adjoining land, not for the recovery of the servitude, but for the recovery of the usufruct.

(2) Where an usufruct is created in part of an estate an action *in rem* can be brought with reference to it, if someone claims an usufruct in the same, or denies that another is entitled to it.

(3) In all those actions which are brought with reference to usufruct, it is perfectly evident that the crops are involved.

(4) If, after issue has been joined in a case of usufruct, the usufruct is terminated, can any crops be claimed subsequently? I thing that they cannot, for Pomponius states in the Fortieth Book, that if the usufructuary should die, his heir would be entitled to an action only for crops which were due before his decease.

(5) Everything must be restored to the usufructuary who gains his case, and therefore where the usufruct of a slave is bequeathed, the possessor must surrender everything which he obtained by means of the property of the usufructuary, or from the labor of the slave.

(6) But if the usufruct should, perchance, be lost by lapse of time, one party being in possession, and another volunteering to defend the suit; it is not sufficient for the latter to renew the usufruct, but he must give security against its recovery by eviction. What if the party in possession had pledged a slave or the land for a debt, and the claimant should be forbidden by the person who received the pledge from making use of his right? Hence, he also will be entitled to security.

(7) Just as where the crops must be delivered to the usufructuary who brings an action *in rem* for his usufruct, they must likewise be delivered to the mere owner of the property, if he brings a prohibitory action. But, in any event, this is the case only where the party who brings suit is not the possessor; for the possessor is entitled to certain actions; but where either party is in possession he will obtain nothing by way of crops. Therefore, is it the duty of the judge to allow the usufructuary to have the privilege of enjoying the crops in security, and prevent the owner of the property from being disturbed?

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

Where a party has joined issue with reference to an usufruct, he will be discharged if he relinquishes possession without fraud; but if he voluntarily undertook to defend the case, and joined issue as if he were the possessor, judgment shall be rendered against him.

TITLE VII.

CONCERNING THE SERVICES OF SLAVES.

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

Services consist of acts, and in the nature of things they do not exist before the day comes in which they are to be rendered; just as when we make a stipulation for a child which is to be born of Arethusa.

2. *Ulpianus, On the Edict, Book XVII.*

The services of a slave which have been bequeathed are not lost by the forfeiture of civil rights.

3. *Gaius, On the Provincial Edict, Book VII*,

In the usufruct of a slave, his services as well as compensation for the same are included.

4. *The Same, On the Urban Edict Relating to Freedom, Book II*. The produce of a slave consists of his services, and on the other hand, the services of a slave are what he produces. And, as, in other matters, the produce is understood to be what is left after the necessary expenses have been deducted, this is also the case with refence to the services of slaves.

5. *Terentius Clemens, On the Lex Julia et Papia, Book XVIII.* Where the services of a slave are bequeathed, I have always been taught, and Julianus holds, that the use is understood to be given.

6. *Ulpianus, On the Edict, Book LV*.

Where an action is brought for the services of a slave who is an artisan, payment must be made in proportion to their value; but in the case of an ordinary laborer, this will depend upon the kind of work he does, which was the opinion of Mela.

(1) Where a slave is under five years of age, or is weak, or is one who is unable to do any work for his owner, no estimate of the value of his services shall be made.

(2) Nor shall any estimate of them, based upon the pleasure or affection of the owner, be considered; for example, where the owner is greatly attached to him, or employs him in his pleasures.

(3) Moreover, the value of his services shall be estimated after necessary expenses have been deducted.

TITLE VIII.

CONCERNING USE AND HABITATION.

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

Let us now consider use and habitation. A mere use may be created, that is to say, without complete enjoyment; and this is ordinarily created in the same ways as an usufruct.

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

Where the use is left, a party can use but not enjoy. Now let us examine certain cases.

(1) The use of a house is left to the husband, or to the wife; where it is left to the husband, he can not only live in it himself, but can also reside there with his slaves. The question arose whether he could live there with his freedmen. Celsus holds that he can not only do so, but, that he can also entertain a guest; for he states this in the Eighteenth Book of the Digest, which opinion Tubero approves. Moreover, I remember that the question whether he can take a tenant is discussed by Labeo in the Book of his Last Works, who says that he who resides there can take a tenant, as well as entertain guests, along with his freedmen,

3. *Paulus, On Vitellius, Book III*. And his clients.

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

But persons of this kind must not live in the house without him. Proculus, however, in a note on tenants, says that one cannot properly be designated a tenant, who lives with him. In accordance with this, if the party having the use of the property collects rent as long as he himself lives in the house, this should not be mentioned to his prejudice; for suppose that the use of a large house was left to a man in moderate circumstances, so that he is content with a small portion of the same? Again, he may live with persons whom he employs in labor instead of slaves, even though they are free, or the slaves of others.

(1) Where the use is left to a woman, Quintus Mucius first admitted that she could live with her husband, since otherwise, if she wished to use the house, she would have to remain unmarried; for, on the other hand, there never was any doubt that a wife could live with her

husband. Where the use is bequeathed to a widow, could this woman, if she contracted a second marriage after the use was established, reside there with her husband? And it is true, (as Pomponius in the Fifth Book, and Papinianus in the Nineteenth Book of Questions holds) that her husband can live with her if she is married subsequently. Pomponius goes still farther, and says that her father-in-law can also live with her.

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

Moreover, a father-in-law can live with his daughter-in-law; at all events, if her husband lives there also.

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

A woman can not only have her husband live with her, but also her children and her freedmen, as well as her parents. Aristo states this in a note on Sabinus. Indeed, we may go as far as to say that women can entertain the same persons that men can.

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

A woman, however, cannot receive anyone as a guest, unless he can live respectably with her who has the use of the house.

8. *Ulpianus, on Sabinus, Book XVII.*

Parties who have a right to use cannot lease the premises and give up their residence there, nor can they sell the use of the same.

(1) Where, however, the use of a house was bequeathed to a woman on condition that she would separate from her husband, she can be released from this condition, and can live with her husband. This opinion Pomponius also adopts in the Fifth Book.

9. *Paulus, On Sabinus, Book HI.*

Where the use of everything else is bequeathed, it must be held that the wife is entitled to the use of the property in common with her husband.

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

Where the right to a residence is left, the question arises is it the same as use? Papinianus in the Eighteenth Book of Questions admits that the bequest of use and habitation have practically the same effect; for the legatee of a right to a residence cannot give it away; he can entertain the same persons as the party who has the use; it does not pass to the heir; nor is it lost by want of use, nor by the forfeiture of civil rights.

(1) But where cresiV is left, it must be considered whether this constitutes use, and Papinianus in the Seventh Book of Opinions, states that the use is left, but not the income.

(2) Where, however, this is left in the following terms, "To Soand-So, the usufruct of the house for the purpose of residence therein"; it must be considered whether he is entitled only to the residence or to the usufruct as well? Priscus and Neratius think that the right of residence alone is left; which is correct. It is evident that if the testator had said, "The use for the purpose of residence", we would not doubt that it was valid.

(3) The question was raised by the ancient authorities whether the right of residence for a year would endure for life? Rutilius says that the right of residence belongs to the party as long as he lives, and Celsus in the Eighteenth Book of the Digest approves this opinion.

(4) Where the use of a tract of land is left, this is very much less than the crops, as no one doubts. Let us see, however, what is involved in this bequest. Labeo says the legatee can live on the land and can prevent the owner from entering thereon; but he cannot prevent a tenant or the slaves of the owner from doing so; that is to say, those who are there for the purpose of cultivating the soil, but if the owner should send his household slaves there, they can be prevented from entering, on the same principle that the owner himself can be prevented from doing so. Labeo also states that the usuary can alone make use of the store-rooms for wine

and oil, and that the owner cannot use them if the former is unwilling.

11. *Gaius, Diurnal, or Golden Matters, Book II*.

The party entitled to the use can remain on the land only as long as he does not molest the owner of the same, or interfere with those who are engaged in agricultural pursuits; and he cannot sell, lease, or transfer gratis to anyone the right which he has.

12. *Ulpianus, On Sabinus, Book XVII*.

He has a right to have the full use, if that of the farm-house and the country-seat are left him. It is evident that it must certainly be held that the proprietor is entitled to come for the purpose of gathering the crops, and, during the time of the harvest, it must be admitted that he can live there.

(1) In addition to the right of residence to which the person who was granted the use is entitled, he has also the right of walking and driving around. Sabinus and Cassius state that he is likewise entitled to firewood for daily use, and also to the garden, and to apples, vegetables, flowers, and water, not however, for profit but merely for use and not to be wasted. Nerva holds the same opinion, and adds that he can use straw, but not leaves, oil, grain, or fruit. Sabinus, Cassius, Labeo, and Proculus go still further, and say that he can take enough out of what is raised on the land for his own maintenance and that of his family, in instances where Nerva denies him that right. Juventius holds that he can use these things for the benefit of his guests and the persons whom he entertains, and this opinion seems to me to be correct; for more indulgence may be accorded the usuary, on account of the respect due to a person to whom a use has been left. I think, however, that he can make use of these things only while in the house.

With reference to apples, vegetables, flowers, and firewood, it must be considered whether he can only make use of them in that place, or whether they can be delivered to him in the town; but it is better to adopt the rule that they can be brought to him in the town, for this is not a matter of great importance, if there is an abundant supply of them on the land.

(2) Where the use of a flock is left, for instance, a flock of sheep; Labeo says that they can only be used for their manure; as he can not use the wool, the lambs, or the milk, for these are to be classed with the profits. I think that he can go still farther, and use a moderate quantity of milk, as the wills of deceased persons should not be interpreted so strictly.

(3) Where the use of a herd of cattle is left, the legatee will be entitled to the entire use of the same for plowing or for any other purpose for which cattle are adapted.

(4) Also, where the use of a stud of horses is bequeathed, let us consider whether the legatee cannot break them to harness and use them for draft. If the party to whom the use of said horses is left is a charioteer, I do not think that he can use them for races in the circus, because this might be considered to be hiring them; but if the testator, when he left them, was aware that this was his occupation and mode of life, he may be held to have intended them to be employed for this purpose.

(5) Where the use of a slave is left to anyone, he can use him for attendance upon himself, and upon his children and his wife, and he will not be deemed to have granted his right to another if he together with them make use of said slave; although if the employment of a slave is left to the son of a family or to another slave, as this will be acquired by the father or owner, he can only exact the use of him alone, and not that of those who are under his control.

(6) A legatee cannot lease the services of a slave subject to use, nor can he transfer them to another; and this is the opinion of Labeo. For how can a man transfer to another services which he himself should make use of? Labeo, however, holds that where a party has rented a farm, a slave of whom he has the use can work there; for what difference does it make in what way he uses his labor? Wherefore, if the party entitled to the use enters into a contract for the spinning of wool, he can have this done by female slaves of whom he has the use; and also, if

he makes a contract for the weaving of clothing, or for the building of a house or a ship, he can employ the labor of the slave of whom he has the use. This opinion does not conflict with that of Sabinus that, where the use of a female slave is granted, she cannot be sent to a wool-factory, nor compensation be received for her labor; but the legatee must, in accordance with law, have her work the wool for himself; for she is held to do this for him where he does not hire her labor, but performs the work which he agreed to do. Octavenus also approves this opinion.

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

It was held by Labeo that a male or a female slave can be compelled to pay money instead of working.

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

If I stipulate, or receive anything by delivery through a slave of whom I have the use, the question arises whether I make any acquisition either through my property or by his labor? It will not be valid if it is based on his labor, since I have no right to lease his services, but if what is acquired is derived through my property, we hold that if a slave of whom I have the use either stipulates or receives anything by delivery he acquires for me, since I am making use of his labor.

(1) It makes no difference whether the usufruct or the crop is bequeathed, for the use is included in the crop, but the crop does not include the use; and while a crop cannot exist without the use, still the use may exist without the crop. Hence, if the crop is bequeathed to you after the use has been reserved, the bequest is void, as Pomponius states in the Fifth Book On Sabinus; and he also says that where an usufruct is bequeathed but the crops are withheld, the entire legacy must be considered to be revoked. Where, however, the crop is bequeathed without the use it is held to have been created, since it might have been created in the beginning. But in case the usufruct is bequeathed and the use is withheld, Aristo stated that there is no revocation. This opinion is the more liberal one.

(2) Where the use is bequeathed and afterwards the crop to the same person; Pomponius says that it is joined to the use. He also says that if the use is bequeathed to you and the crop to me, we hold the use in common, but that I alone will be entitled to the crop.

(3) The use, however, may belong to one person, the crop without the use to another, and the mere property to still another; for example, where a party who had a certain tract of land bequeathed the use of the same to Titius, and afterwards his heir bequeathed the crop to you, or transferred them to you in some other way.

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

Where the use of land is bequeathed, the party entitled to the use can take sufficient supplies from the same to last only for a year; even though, by doing so, the crops of a moderate estate may be exhausted; for the same reason that he has a right to enjoy the use of a house and a slave in such a way that nothing which can be classed as produce may be left for another.

(1) Just as he to whom the use of land is bequeathed, cannot prevent the owner from coming there frequently for the purpose of cultivating the soil, as, by acting otherwise it would be precluding the owner from its enjoyment; so, also, the heir cannot act in any way so as to prevent the party to whom the use was bequeathed from making use of the land, as the careful head of the household should do.

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

Where the use of a tract of land is bequeathed in such a way that the latter must be provided with those things which are necessary for its cultivation, the use of them will belong to the legatee, just as if they had been expressly bequeathed to him.

(1) The owner of the property can have a watch kept over the land or the house by a forester

or a steward, even if the usufructuary or the party entitled to use should be unwilling; for it is to his interest to protect the boundaries of his estate. All these things are applicable, no matter in what way the usufruct or the use has been created.

(2) If we are only entitled to the use of a slave, and not to the fruit of his industry, as well, something can be given to him by us, or he can even transact business with our money, so that whatever he acquires thereby shall belong to his *peculium* through us.

17. *Africanus, Questions, Book V*.

Where the use of a house is bequeathed to the son of a family, or to a slave, I think that this legacy is valid and the same method can be employed to recover it which could have been employed if the profits of the same had also been bequeathed. Therefore, the father or the owner can live in the house just as well when the son or the slave is absent as when he is present.

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

If the use of a house is bequeathed without the rent, it is the duty of the heir as well as of the party entitled to the use of the same to keep it in repair, so that it will be closed and protected against the weather. Let us see, however, whether, if the heir receives the rent he himself is not obliged to make the repairs; but where the property the use of which is left is of such a description that the heir cannot collect the income thereof, the legatee will be compelled to repair it; which distinction is reasonable.

19. *The Same, On Vitellius, Book III*.

A portion of an use cannot be bequeathed; for we can enjoy a portion, but we cannot use one.

20. *Marcellus, Digest, Book XIII*.

A slave whose use is bequeathed to me acquires for me if he is my agent, and I employ his services in a shop; for he acquires for me by the sale and purchase of merchandise; and he likewise does so if he receives property through delivery by my order.

21. *Modestinus, Rules, Book II*.

The use of water is a personal right, and therefore cannot be transmitted to the heir of the party entitled to the same.

22. *Pomponius, On Quintus Mucius, Book V*.

The Divine Hadrian, where the use of a forest had been bequeathed to certain persons, decided that the produce of the same must also be held to have been bequeathed to them; because, unless they were permitted to cut down and sell the trees, just as usufructuaries are, they would obtain nothing from the legacy.

(1) Even though a legatee to whom the use of a house is bequeathed may be in such reduced circumstances that he cannot have the use of the entire building; still, the owner cannot use the part which is vacant, because the party entitled to the use will be permitted to use the entire house at one time or another; as occasionally the owner uses certain portions of a building and does not use others, according as the circumstances may demand.

(2) Where an use is bequeathed, if the legatee exercises his right to a greater extent than he should do, is it the duty of the judge to determine how far the use may be employed? He must see that he uses it not otherwise than he should do.

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

Neratius says that the owner of the property which is subject to an use cannot change its nature in any way. Paulus holds that he cannot make the condition of the party entitled to the use any worse; but he may make it worse, even where he improves the property.

TITLE IX.

IN WHAT WAY AN USUFRUCTUARY MUST GIVE SECURITY.

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

Where the usufruct of anything is bequeathed, it seemed to the prætor to be perfectly just that the legatee should give security with reference to two things; one, that will use the property as a good citizen should, and the other, that when the usufruct ceases to belong to him, he will restore what remains of it.

(1) This stipulation must be entered into, whether the property is movable, or consists of land.

(2) It must be borne in mind that this proceeding must also be employed in the case of trusts; for it is evident that if an usufruct is created by a *donatio mortis causa*, this security must be furnished in the case of legacies. Moreover, if the usufruct is created in any other manner, the same rule will apply.

(3) The party must give security that "the usufruct will be enjoyed as a good citizen would enjoy it"; that is to say, that the quality of the usufruct will not be deteriorated, and that he will do everything else which he would do, if the property belonged to him.

(4) The heir and the legatee will do well, as soon as the legatee begins to enjoy his right, to have it established by witnesses what the condition of the property is at the time, so that, by this means it may be apparent whether, and to what extent, the legatee has diminished the value of the property.

(5) It was considered more advisable that security should be given under these circumstances by means of a stipulation, so that if anyone should make use of the property in a way that a good citizen would not do, suit might be at once brought on the stipulation; and hence we do not have to wait until the usufruct terminates.

(6) This kind of a stipulation has reference to two cases; one where the party uses the property in a way which a good citizen would not do, and another where the usufruct must be restored; the first of these becomes operative as soon as an improper use of the property is made, and it may occur many times; the other takes effect when the usufruct expires.

(7) With reference to what we have stated, however, namely, that "he will restore what remains of it"; the owner does not stipulate for the thing itself, (as he would be considered to uselessly stipulate for his own property) he merely stipulates that whatever remains shall be restored. Sometimes, however, the provision for an appraisement of the property is inserted; for example, where an usufructuary who can prevent usucaption neglects to do so; as he undertakes to exercise every care over the property:

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

For the usufructuary must be responsible for its safe keeping.

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

All cases in which the usufruct can be lost are included in this stipulation.

(1) We understand the usufruct to "cease to belong" to the usufructuary even if it has not commenced to belong to him at all, although it may have been bequeathed to him, and the stipulation will, nevertheless, become operative on the principle that property ceases to belong to a party in whom the ownership has not yet begun to vest.

(2) Where an usufruct is renewed by a legacy "every time that it is lost", this stipulation will become operative, unless the bond is properly drawn up, but an exception will be required.

(3) Where, however, anyone leaves you an usufruct and the ownership of the property as well, on the condition that you have children, and the usufruct should be lost; and action can be brought on the stipulation, but an exception will be available.

(4) Where an heir alienates the property, and the usufruct afterwards is lost, let us consider whether he can bring suit on the stipulation. It may more forcibly be stated that, in accordance with the strict principles of law, the stipulation does not become operative because the property cannot be delivered to the heir or his successor; and the individual to whom it can be delivered — that is he in whom the ownership vests — was not a party to the stipulation. The latter, however, must provide for the protection of his own rights by means of another bond, at the time when he obtains the ownership; but if he should not do this, he will, nevertheless, be entitled to an action *in rem*.

4. *Venuleius, Stipulations, Book XII*.

If the usufructuary should obtain the property, the usufruct ceases to belong to him on account of the merger of the same; but if suit is brought against him on the stipulation, it must be held either that he has not proceeded in accordance with the strict principles of law, if the doctrine governing the conduct of a good citizen is considered applicable; or that the party must make use of an exception based on what has taken place.

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

The provision, "That no fraud has been committed", or will be committed, is contained in this stipulation; and as this mention of fraud always relates to matters *in rem*, it is held to include the bad faith of any of the parties, whether he be one of the successors or an adoptive father.

(1) Where the use without the enjoyment is bequeathed, the prætor orders security to be given, with the enjoyment of the produce omitted. This is reasonable, since security is given solely with reference to the use, and not to the usufruct.

(2) Therefore the stipulation will be operative if the enjoyment is obtained without the use.

(3) Where the right of residence, or of the services of a slave or those of any other animal, are left, the stipulation will become necessary, although these things are not copied from the usufruct.

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

The same rule is applicable to the returns from land, as for instance, where a vintage or a harvest is bequeathed; just as property obtained by means of an usufruct, if bequeathed, reverts to the heir on the death of the legatee.

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

Where property was delivered on account of an usufruct, and security was not given, Proculus says that the heir can bring an action for recovery, and if an exception is interposed on the ground that the property was delivered because of an usufruct, he will be entitled to a replication. This opinion is reasonable; but a personal action can be brought to compel the execution of a bond by the usufructuary.

(1) When the usufruct of a sum of money is bequeathed, the following two instances must be set forth in the stipulation, "Shall be paid when you die, or lose your civil rights"; and therefore these two instances alone are given, because the use of money cannot be lost in any other way than under such circumstances.

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

If the usufruct is bequeathed to you, and the mere ownership to me, security must be given to me; but where the mere ownership is bequeathed to me on a condition, some authorities, and among them Marcianus, are of the opinion that security must be given both to the heir and to myself; Which opinion is correct. Moreover, if the property is bequeathed to me, and when it ceases to belong to me, will belong to another; in this case also security must be given to both, as we established in the preceding instance. Where the usufruct is bequeathed to two parties jointly, they will be required to give security to another, as well as to the heir; the condition being referred to in the following terms: "To surrender the usufruct to the heir, if it does not

belong to the co-legatee".

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

Where an usufruct is bequeathed to me, and I am asked to deliver it to Titius, it should be considered who is obliged to give security, whether Titius should do so, or I, the legatee? Or shall we say that the heir can bring an action against me, and that I must sue the beneficiary of the trust? It is better to hold that if I have any expectation arising out of the usufruct, so that it may revert to me, that is to the legatee, if you lose it; the question can be settled by your giving security to me, and by my giving security to the mere owner of the property. If, however, the usufruct was left to me in trust for the beneficiary, and there is no hope of its reverting to me, then the beneficiary should give security directly to the mere owner of the property.

(1) It must be borne in mind that whether a party has an usufruct by direct operation of law, or even through the assistance of the prætor, he should, nevertheless, be compelled to give security or to defend any actions which may be brought.

(2) Pomponius says it is evident that if the ownership is bequeathed to anyone from a certain time, and the usufruct absolutely; it must be held that the usufructuary is released from liability on his bond, because it is certain that the property will come into his hands or into those of his heir.

(3) When the usufruct of clothing is bequeathed, Pomponius holds that although the heir may have stipulated that the clothing should be returned when the usufruct comes to an end; nevertheless, the promisor is not liable if he delivers the clothing which was worn out without malicious intent.

(4) Where several parties are the mere owners of property, any one of them can enter into a stipulation with reference to his own share of the same.

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

If I bequeath to you the usufruct of a slave which both of us own in common, the security must be given to my heir; for although he can institute proceedings for partition of the property, still, the question of the usufruct, which belongs to you, is not included in the duty of the judge who is to preside.

11. *Papinianus, Opinions, Book VII.*

Where the use of a house is left, security must be furnished which would be satisfactory to a good citizen; nor does it alter the case if the father wishes his sons, who are his heirs, to reside in the house with his widow, who is the legatee.

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

Where the usufruct of certain vessels is left, the security provided by the Decree of the Senate will not be necessary; but only that which states that "the party will use and enjoy as a good citizen should do". Therefore, where the vessels were delivered for the purpose of being enjoyed, no one doubts that the ownership of the same is not transferred to the party who received them, for they are not delivered for this purpose; but that the legatee might use and enjoy them. Hence, as the said vessels do not become the property of the usufructuary, they can be recovered by the owner of the same, if security is not given. It should be considered whether a personal action will lie under such circumstances? It has been decided that no one can bring an action of this kind to recover his own property, except from a thief.

THE DIGEST OR PANDECTS.

BOOK VIII.

TITLE I.

CONCERNING SERVITUDES.

1. *Marcianus, Rules, Book HI.*

Servitudes are either personal, as use and usufruct; or real, as the servitudes of rustic and urban estates.

2. *Ulpianus, On the Edict, Book XVII.*

One of the owners of a house held in common cannot impose a servitude upon it.

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

Some servitudes are attached to the soil, others to the surface.

4. *Papinianus, Questions, Book VII.*

Servitudes cannot be created by direct law from a certain time, or until a certain time, or under a condition, or on a certain contingency; (for example, "as long as I wish",) nevertheless, if such provisions as these are added, and a party brings suit for the recovery of the servitude, in violation of the terms of the contract, an exception may be interposed on the ground that the claim is contrary to what had been agreed upon, or for fraud, and this Cassius states was the opinion of Sabinus in which he himself concurred.

(1) It is established that limitations can be added to servitudes; as, for instance, with reference to what kind of transactions shall be permitted, or shall not be permitted upon a roadway, as, for instance, that it must only be traversed by a horse, or that only a certain weight shall be transported, or such-and-such a flock shall be driven over it, or that charcoal shall be carried.

(2) Where intervals of a certain number of days and hours are mentioned, this does not relate to the question of time, but only to the manner in which a servitude created in accordance with law shall be enjoyed.

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

Servitudes granted for a driveway, a pathway, the passage of cattle, and the conduct of water, are created in almost the same manner as those in which we have stated that usufruct is created.

(1) The enjoyment of servitudes may be limited with reference to time; for example, where a party may make use of the servitude from the third until the tenth hour, or on alternate days.

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

A servitude can be either released or created with reference to a certain part of the land.

7. *Ulpianus, On the Lex Julia et Papia, Book XIII.* The right of building a sewer is a servitude.

8. *Paulus, On Plautius, Book XV.*

A servitude cannot be imposed permitting us to pick apples, or to walk about, or to eat our dinner, on the land of another.

(1) If I have a servitude in your land, or if I become the owner of part of said land, and you become the owner of part of mine, the servitude will be retained in both parts of the same; although in the beginning, it could not have been acquired with reference to only a part.

9. *Celsus, Digest, Book V.*

If a right of way through the property of another is merely granted or bequeathed to anyone he will have the right to walk or drive over it, but only in a proper manner, that is to say over any

portion of the same; for certain things are tacitly understood to be excepted in ordinary conversation. He will not, however, be permitted to go through the house, or to walk or drive through the vineyards, when he might have done so just as conveniently elsewhere, and with less injury to the land subject to the servitude. For it is settled that in whatever direction he first directs his course, he must afterwards use the same in walking and driving; and that he has no power subsequently to change it. This view was also held by Sabinus, who stated in an argument that it was lawful for a party to direct a water-course wherever he pleased, but after this was done he could not change it; and it is true that this rule should also be observed in the case of a right of way.

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

Where the right to walk through property is bequeathed which cannot be enjoyed unless certain work is performed, Proculus says that the legatee has a right to make a path by excavation, or by substructure.

11. *Modestinus, Differences, Book VI.*

It is commonly held that a servitude cannot be acquired of a part of the ownership; and therefore, where anyone who has a tract of land stipulates for a right of way and afterwards alienates a portion of said land, he, in this instance, vitiates the stipulation by introducing matters for which, in the beginning, a stipulation could not have been made. A right of way with reference to a part cannot be either bequeathed or revoked, and if this is done, neither the bequest, nor the revocation will be valid.

12. *Javolenus, Epistles, Book IV.*

I do not doubt that a servitude of land can be duly acquired through a slave belonging to a municipality.

13. *Pomponius, On Quintus Mucius, Book XIV.*

Where a right of way has been granted, and the place indicated for the same is so narrow that neither a vehicle nor a beast of burden can enter it, it will be held that a pathway rather than a driveway is acquired. But if a beast of burden can be conducted through it but a vehicle cannot, the right of way for cattle is held to be acquired.

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

Servitudes of rustic estates, even though they are attached to corporeal property are, nevertheless, incorporeal, and therefore can never be acquired by use; there may be servitudes of such a kind that they do not admit of certain and continuous possession, for no one can have permanent and continuous possession of a path in such a way that it can be held not to be interrupted for any time. The same rule must be observed with reference to the servitudes of urban estates.

(1) The servitudes of a path leading to a tomb remains private property, and therefore it can be released to the owner of the land subject to the servitude; and, it can also be acquired even after the tomb has been invested with a religious character.

(2) Where land belonging to the public or a highway is situated between two estates, a servitude for drawing water may be imposed, but a water-course cannot. It is, however, customary to petition the Emperor to permit the party, "to conduct water across a highway in such a manner as to cause no inconvenience to the public".

The existence of sacred and religious places between two tracts of land prevents the creation of the servitude of a pathway; since no one is entitled to a servitude through places of this kind.

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

Whenever servitudes are neither personal nor real, then, because the neighbors have no interest in them, they are not valid; as for instance, one which states that you shall neither

walk nor stand on your own property. Therefore, if you grant me as a servitude that you will not have the right to use and enjoy the crops from your own land, this is void. It would be otherwise, however, if you granted me a servitude providing that you should have no right to draw water on your own land, for the purpose of diminishing my supply of water.

(1) The nature of servitudes is not such that a person should be compelled to do anything whatever, (as for instance, to move shrubbery in order to give a more pleasant view, or, for the same purpose, to paint something on his own land), but he should only tolerate something, or agree not to perform some act.

16. *Julianus, Digest, Book XLIX*.

Where a man has received real property as security, it is not unjust that he should be granted a prætorian action to enforce a servitude to which it is subject; just as an action of this kind will be granted for the recovery of the land itself. It is established that the same rule must be observed with respect to a party who holds land under a perpetual lease.

17. *Pomponius, Rules*.

A share in a right of way, or a pathway, or a driveway for cattle, or a water-course, cannot be made the subject of an obligation, because the use of these things is undivided; and therefore where a stipulator dies leaving several heirs, anyone of them can bring an action for the entire right of way; and if the party promising dies leaving several heirs, an action can be brought for the entire right against any one of them individually.

18. *Paulus, Questions, Book XXXI*.

Papinianus states in a note that it has been established that in all instances where servitudes have been extinguished by the entry of the heir, a legatee will be barred by an exception on the ground of fraud, if he does not permit the servitudes to be again imposed.

19. *Labeo, Last Works, Abridged by Javolenus, Book IV*.

I think that where anyone sells land, a servitude can be imposed upon it, even if it is not useful to him; for example, where a party would have no interest in a water-course, such a servitude can nevertheless be created, as there are certain things which we can have, even though they are of no advantage to us.

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

As often as a right of way or any other right attaching to land is purchased, Labeo is of the opinion that security should be given that nothing will be done by you to prevent the purchaser from availing himself of his right, because there can be no open delivery of a right of this description. I think that the use of such a right must be considered as equivalent to delivery of possession; and therefore interdicts corresponding to those relating to possession have been established.

TITLE II.

CONCERNING SERVITUDES OF URBAN ESTATES.

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

Where land belonging to the public or a highway intervenes, this does not prevent the servitudes of a right of way, or for driving cattle, or for raising the height of a house, from being enjoyed; but it does interfere with the right of supporting a beam by a wall, or of a projecting roof, and it also interferes with the servitudes for the flowing and dripping of water, for the reason that the sky over the aforesaid ground should be free.

(1) Where the usufruct of a house is yours, and I have the mere ownership of the same, and it is subject to the support of the building of a neighbor; suit can be brought against me for all of it, but no legal proceedings can be instituted against you.

2. *Gaius, On the Provincial Edict, Book VII*.

The following are the rights to which urban estates are subject, namely: that of raising a house and obscuring the lights of a neighbor, or of preventing a raising of this kind; that of allowing the dripping of rain-water on the roof or the ground of a neighbor; and also that of not allowing the right of inserting beams into the wall of a neighbor, and that of the projection of a building; and others similar to these.

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

A servitude providing against obstructing a view also exists.

4. *Paulus, Institutes, Book II*.

Where a servitude of lights is created, it is held that what is acquired is that a neighbor must not interfere with our lights, but if the servitude imposed is to prevent the obscuring of lights, we seem to have especially acquired the right that a neighbor shall not raise his building any higher against our will, so as to lessen the amount of light in our house.

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

We must understand the unwillingness of anyone in matters relating to servitudes to mean, not that he objects in so many words, but that he does not consent. Therefore, Pomponius states in the Fortieth Book, that even an infant and an insane person may be properly said to be unwilling; for these terms do not relate to the act, but to the right to impose servitudes.

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

Moreover, these servitudes just as those of rustic estates, are lost by want of use after a certain time has elapsed; except that this distinction exists between them, namely: that they are not absolutely lost by want of use, but only where the neighbor obtains freedom by usucaption at the same time. For instance, if your house is servient to mine so that it cannot be raised any higher lest it may obstruct the lights of my building, and I have my windows closed or obstructed during the time established by law; I lose my right only where you have had your house raised and remaining higher during the time aforesaid; otherwise, if you construct nothing new, I will retain the servitude. Moreover, if your house is subject to the servitude of the insertion of a beam, and I remove the beam, I only lose my right if you fill up the hole from which the beam was taken, and retain things in this state during the time prescribed by law; but if you make no change, my right remains unimpaired.

7. *Pomponius, On Quintus Mucius, Book XXVI*.

Mucius says, with reference to what is stated about my acquiring freedom for my building by usucaption, that I could not have acquired it by planting a tree in that same place; and this is correct, because the tree would not remain in the same condition and place as a wall would do, on account of the natural motion of the tree.

8. *Gaius, On the Provincial Edict, Book VII*.

Where a wall is, according to natural law, common property, neither of two neighbors has a right to tear it down, or repair it, because he is not the sole owner.

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

Where a man by raising his own house shuts off the lights of his neighbor, and is not subject to a servitude imposed upon his building, no action can be brought against him.

10. *Marcellus, Digest, Book IV*.

Gaurus to Marcellus: I have two houses, I bequeathed one of them to you, and my heir raised the other and obstructed your lights; can you bring an action against him, and do you think that it makes any difference whether the house which he raised was his own or the one which he inherited? I wish also to ask whether an heir is obliged to grant access to property, which has been bequeathed, through a house belonging to another; as this inquiry is frequently made where the usufruct of land is bequeathed, which cannot be reached except through the

property of another.

Marcellus answered: Where a man has two houses and bequeathed one of them, there is no doubt that the heir can obstruct the light to the one bequeathed by raising the other; and the same must be said where a party bequeathed a house to one legatee, and the usufruct of another house to another. A similar rule, however, is not always applicable to a right of way, because, without access, the legacy of usufruct is worthless; but a man can live in a house where the light has been obstructed. Moreover, where an usufruct of land is bequeathed, access to it should also be given, because if what was left was the privilege of drawing water, a right of way for this purpose ought also to be granted. It should, however, be stated that the heir is permitted to obstruct the light and to darken the house, only to such an extent that the light should not be entirely cut off, but as much left as will be sufficient for the ordinary requirements of the inmates of the house during the day.

11. *Ulpianus, On the Office of Consul, Book I.*

Where anyone wishes to cut off his neighbors' lights, or to do anything else which may interfere with their convenience, he must remember that he is obliged to preserve the original form and position of the building.

(1) Where no agreement exists between you and your neighbor as to the height of a building which you have undertaken to erect, you can have an arbiter appointed.

12. *Javolenus, On Cassius, Book X.*

Where buildings are subject to a servitude that no portion of them shall be raised any higher, shrubs can be placed upon them above that height; but where the servitude relates to the view and the shrubs would obstruct it, this cannot be done.

13. *Proculus, Epistles, Book II.*

A certain Hiberus, who owns a building in the rear of my warehouse, built bathrooms against the party-wall; although it is not lawful for anyone to conduct pipes along a party-wall, just as he has no right to build another wall over it; and the law applies with much more force to pipes, because, by means of them, the wall may be burned. I wish that you would speak to Hiberus about this, in order to prevent him from doing what is illegal. Proculus answered, "I do not think that Hiberus has any doubt in this instance that he is doing something which is not allowed in placing pipes along a party-wall".

(1) According to the opinions of Capito, it is permitted to encrust a party wall with ornamental stucco, as I can have very valuable paintings on a wall of this kind; but if my neighbor demolishes the wall, and proceedings are instituted for the prevention of threatened injury, on a stipulation, paintings of this description cannot be appraised any higher than ordinary plaster; and this rule must also be observed with reference to decorative encrustation.

14. *Papirius Justus, On the Constitutions, Book I.*

The Emperors Antoninus and Verus stated in a Rescript, that the owner, or anyone else with his consent, has a right to build on vacant land which is not subject to a servitude, if he leaves the lawful space between where he builds and the neighboring house.

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

Different rules are observed with reference to servitudes which provide against obstructing lights, or impeding the view; because with reference to the view, as the dominant owner has a greater interest in having a pleasant and unobstructed prospect; but, so far as the lights are concerned, nothing must be done by which they may be obscured, and therefore whatever the servient owner does to this end can be prohibited, if a servitude exists; and notice of a new structure can be served upon him, provided he acts in such a way as to obstruct the light.

16. *Paulus, Epitomes of the Digest of Alfenus, Book II.*

Light is the power of seeing the sky, and a difference exists between light and view; for a

view of lower places may be had, but light cannot be obtained from a place which is lower.

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

Where anyone plants a tree so as to interfere with the light, it may be stated with perfect propriety that he acts in opposition to a servitude which has been imposed; for even a tree renders the sky less plainly visible. Where, however, what is placed there does not at all interfere with the light, but only cuts off the rays of the sun; if this is done in a place where it was more pleasant to be without it, it can be said that no act has been committed in violation of the servitude; but if it is done so as to cut off the sunshine from a room, or from a sundial, it must be said that, by producing shade in a place where sunshine was necessary, he acts in violation of the servitude imposed.

(1) On the other hand, if a man removes the building or the branches of a tree, by which a place which was formerly shady becomes exposed to the sun, he does not violate the servitude; for he must act in such a way as not to obstruct the light, and in this instance he does not obstruct it, but he causes too much light.

(2) Sometimes, however, it may be said that even where a party removes or lowers a building, he still obstructs the light; if for instance, the light entered into a house by reflection or repercussion, or in some other way.

(3) The following clause with reference to delivery: "The dripping from the roof to remain as it is at present"; means that the neighbors are required to allow the dripping of water from the roof, but not to the extent that the purchaser is to tolerate it from neighboring buildings; and therefore the vendor alleges that he is entitled to a servitude of the dripping of water from a roof but is not subject to this so far as anyone else is concerned.

(4) What has been stated here with reference to the dripping of water from a roof, must be understood to apply to all other servitudes also, if nothing to the contrary has been expressly agreed upon.

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

Where pipes through which you conduct water being attached to my house cause me damage, I am entitled to an action *in factum*, and I can also demand from you a stipulation for the prevention of threatened injury.

19. *Paulus, On Sabinus, Book VI.*

Proculus says that a pipe attached to a party-wall, and which carries water from a cistern, or from the sky, is something which cannot legally exist; but that a neighbor cannot be prevented from having a bath-room against a wall of this kind, even though the wall might become damp; any more than he could be prevented from pouring out water in his own dining or bed-room. Neratius, however, says that the neighbor can be prevented from doing this, if the apartment was used for warm baths, so that it kept the wall constantly damp, and this was a source of injury to his neighbor.

(1) Where a room of earthenware is built against a party-wall, it can legally exist if it is so constructed that it will remain even if the party-wall is removed, provided it does not interfere with the repairs of the same.

(2) Sabinus says very properly that I can have a stairway against a party wall because it can be removed.

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

Servitudes which are only attached to the surface of the ground are retained by possession; for if I should happen to have a beam extending from my house and inserted into yours, then, since I have the right of such insertion, I have possession of the privilege on account of

the said beam. The result will be the same if I have a balcony supported by something on your land, or if I permit the dripping of water on your premises since I am using something which

belongs to you, and thus, as it were have possession by my own act.

(1) If my yard is higher than your house, and you have granted me the right to walk or drive through your yard to my house, and there is no level approaching to my house through your yard; I can legally build steps, or an inclined plane to my door, so long as I do not demolish anything more than is necessary for the purpose of establishing the right of way.

(2) Where a building from which water drips from the roof is removed in order that another of the same shape and nature may be erected there, the public welfare requires that the latter should be understood to be the same structure; for, otherwise, if a strict interpretation is made, the building afterwards erected on the ground will be a different one; and therefore when the original building is removed the usufruct will be lost, even though the site of a building is a portion of the same.

(3) Where the servitude of the dripping of water is imposed, the owner of the ground subject to the same cannot legally build upon the place where the water falls.

(4) Where the water was discharged in the first place from a tile-roof it can not subsequently be discharged from the one of boards, or one constructed of any other material.

(5) In whatever manner a servitude of the dripping of water was acquired, the fall can be made greater by raising the building to a higher level, since by this means the servitude will be more easily tolerated, as what falls from a height does so more gently, and sometimes is dispersed, and does not reach the place subject to the servitude; but it cannot be lowered, because that the servitude would become more onerous, that is to say, instead of a drip there will be a stream.

For the same reason the drip may be carried back, as in this instance, it will begin to fall more on our premises; but it cannot be brought forward, since it would then fall on another place than that subject to the servitude; for we can render anything less onerous, but not more so. And, by all means, it should be borne in mind that the condition of a neighbor may be improved, but not made worse, unless at the time that the servitude was imposed, some change was expressly provided for.

(6) Where anyone builds upon ground which is subject to the servitude of a drip from a roof, he has the right to raise his building to the place from which the drip proceeds; and indeed, if it falls upon the building itself he can erect it still higher, provided, however, the drip is still properly taken care of.

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

Where your house is subject to two servitudes in favor of buildings belonging to me, namely: that it must not be raised higher, and must

receive the water from off my building, and I grant you the right to raise your house without my consent; it must be held, so far as relates to the drip of my water, that if your house is raised higher, and it is impossible for the rain-water from mine to fall upon it, you will not for that reason be permitted to raise it any higher, but if the drip from mine is not interfered with, you can raise it higher.

22. *Julianus, On Minicius, Book II.*

A man who owns a house can impose such a servitude upon his neighbor as to compel him to give security not only with reference to the lights which exist at the present time, but also with reference to any that may subsequently be made.

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

Where a servitude is imposed as follows, "The lights which are now in existence are to remain in their present condition": this is not held to provide anything with respect to future lights; but if the words of the bond are: "Lights are not to be obstructed", this clause is ambiguous, and does not indicate whether the lights which now exist are not to be obstructed, or whether

other lights which may be afterwards made are included. The more favorable construction is that the clause refers in general terms to all lights, whether they exist at the present time, or are made after the contract has been executed.

(1) Even where a building has been planned but has not yet been erected, a servitude may be acquired by or imposed upon it.

24. *Paulus, On Sabinus, Book XV*.

Where a person has a building which is higher than that of another, he can legally raise his own house as high as he wishes, so long as this does not impose a more onerous servitude on the buildings below than they should bear.

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

What has been stated concerning the insertion of timbers into a building is applicable where one house supports something belonging to another; otherwise, no one can have his building rest upon that of another, (1) Where three houses stand on sloping ground, and the middle house is subject to a servitude in favor of the upper one, but the lowest is not servient to any, and the party-wall dividing the lower and the middle houses is raised by the owner of the lowest one, Sabinus says that in this instance the said owner can legally retain the wall which has been raised.

26. *Paulus, On Sabinus, Book XV*.

Where property is held in common, none of the owners can, by virtue of a servitude, build anything without the consent of the others, or prevent the others from building anything; since no one can have a servitude attached to his own property. Therefore, on account of the interminable controversies that may result, the property is usually divided; but, by means of an action in partition, one of the parties in

interest can prevent any work from being done, or can cause the others to remove anything which has already been constructed, provided this is for the benefit of all.

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

However, if you and I are joint-owners of the Titian House, and something is illegally inserted from it into my own house, I undoubtedly will have a right of action against you for this reason; or what has been inserted must be removed. The same rule applies where, under similar circumstances, some portion of your house has been made to project over the one owned by you and me in common, since I, alone, am entitled to an action against you.

(1) If you intend to build upon ground held in common your joint-owner has the right to prevent it, even though the privilege of building has been granted you by a neighbor; because you have no right to build on common property against the consent of the other joint-owner.

28. *Paulus, On Sabinus, Book XV*.

Where an opening is made in the lower portion of the wall of a room or a hall belonging to another, which was done for the purpose of washing the floor; it is not considered to be a ground for the creation of a servitude for a flow of water, or an act by which a right can be acquired by lapse of time. This is true because no water falls on that place from the sky, since what is performed by the hands is not perpetual; but water that falls from the sky, although it is not continuous, is, nevertheless, due to a natural cause, and for that reason is considered as perpetual. Again, all servitudes attaching to real property must be based upon perpetual causes, and therefore the right to conduct water which has its source in a reservoir or a pond, cannot be granted as a servitude. The right to have water drip from a roof must also depend upon a natural and perpetual cause.

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

Hence, if the neighbor suffers damage as the result of such an opening as has been mentioned and with reference to which no servitude exists; it must be said that there is good ground for a

stipulation providing against threatened injury.

30. *Paulus, On Sabinus, Book XV.*

Where anyone purchases and receives by delivery a house on which a servitude is imposed for the benefit of his own, the servitude is merged and extinguished; and if he wishes afterwards to sell the house, the servitude must be expressly renewed; otherwise the house will be sold free.

(1) If I obtained a portion of an estate over which I have a servitude, or to which I owe one, it is established that the servitude is not merged; as it is retained with reference to a portion of said estate. Therefore, if my land is servient to yours, and I transfer a share of mine to you, and you transfer a share of yours to me, the servitude will remain unimpaired. Moreover, an usufruct acquired in either of the two tracts of land will not interrupt the servitude.

31. *The Same, On the Edict, Book XLVIII.*

Where the heir is charged by the will not to obstruct the lights of a neighbor but to grant him a servitude, and he demolishes the building; a prætorian action should be granted the legatee by which the heir can be prevented from proceeding, if he afterwards attempts to raise the building above its former height.

32. *Julianus, Digest, Book VII.*

If my house is servient to those of Lucius Titius and Publius Mævius, the provision being that I shall not be permitted to build my house any higher, and I ask permission of Titius to raise it, and I keep it raised for the time established by law; I will obtain freedom from the servitude by usucaption as against Publius Mævius; for Titius and Mævius were not entitled to one servitude together, but to two. The proof of this is that if either one of them should release me from the servitude, I would be free from that one alone, and should still be subject to the servitude for the benefit of the other.

(1) Freedom from a servitude is obtained by usucaption, where the house is held in possession; and therefore if a party who has raised his house relinquishes possession of the same before the time provided by law has expired, the usucaption is interrupted; and any other person who subsequently acquires possession of the same house, will obtain freedom by usucaption by the lapse of the entire term established by law. For the nature of servitudes is such that they cannot be possessed, but the party who possesses the house is understood to have possession of the servitude.

33. *Paulus, Epitomes of the Digest of Alfenus, Book V.*

The person who is required to replace a column which supported a neighboring house is the owner of the house subject to the servitude, and not he who wishes this to be done; for where it is stated in the written contract for the sale of a house that, "The wall must support the same burden as at present", the meaning is clear enough that the wall must exist in perpetuity; for it is not stated in these words that the wall must be there forever, as this indeed could not happen, but that there should always be a wall of this kind to support the weight; just as where anyone binds himself to another that he will grant him a servitude in order to support his building, and if the house which is subject to the servitude and sustains the burden should be destroyed, another will be erected in its place.

34. *Julianus, On Minicius, Book II.*

Where a man has two vacant lots, he can, by conveying one, subject it to a servitude in favor of the other.

35. *Marcianus, Rules, Book HI.*

Where the owner of two houses sells one, and states that it is to be subject to a servitude, but does not mention the servitude when he delivers it; he can bring an action on sale, or sue for recovery of an uncertain amount of damages in order to have the servitude imposed.

36. *Papinianus, Questions, Book VII.*

A man had two houses covered with a single wooden roof; and bequeathed them to different persons. I said that, because it is established that the timbers of a building could belong to two persons since they own certain parts of the same edifice, in this instance the timbers over their houses will belong to the two persons; for they will not have rights of action against one another to prevent the insertion of beams into their respective houses; and it makes no difference whether the houses are bequeathed to both absolutely, or to one of them conditionally.

37. *Julianus, Digest, Book VII.*

The same rule applies where the houses have been transferred to two parties.

38. *Paulus, Questions, Book II.*

If my house is so distant from yours that neither can be seen from the other, or a mountain stands between them and cuts off the view, a servitude cannot be imposed upon one for the benefit of the other.

39. *The Same, Manuals, Book I.*

For no one can impose a servitude upon his own building, unless the grantor and the grantee have the buildings in sight, so that one can interfere with the other.

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

I stated as my opinion, that persons who did not have the right to do so, had acted contrary to law by making openings in a party-wall and inserting windows therein.

41. *Scævola, Opinions, Book I.*

A testator bequeathed the right of habitation and the right to use a wareroom in the same house to Olympicus, during his lifetime; and adjoining said house there was a garden and an upper room which was not bequeathed to Olympicus, but access had always existed to the garden and the room through the house in which the right of habitation was bequeathed. The question arose whether Olympicus was obliged to permit this access? I answered that this was not a servitude, but that the heir could go through the house to those portions of the same which have been referred to, provided he did not inconvenience the legatee.

(1) Lucius Titius, having opened the wall of his house, made a doorway leading to ground owned by the public, without exceeding what was prescribed for the drip from the roof and the projection of the gutters; I ask, since he did not obstruct the lights of Publius Mævius, his neighbor, or what space he required for his passage, or did not interfere with the drip of rain-water from his neighbor's house, whether his said neighbor, Publius Mævius, would have any right to prevent him from doing these things? I answered that, according to what had been stated, he would have none.

TITLE III.

CONCERNING THE SERVITUDES OF RUSTIC ESTATES.

1. *Ulpianus, Institutes, Book II.*

The following are the servitudes of rustic estates, namely: the right of walking, driving cattle, the right of way, and the right to conduct water. The first is the right a man has to pass or walk, but not to drive a beast of burden. The second is the right to drive a beast of burden, or a vehicle; and therefore a party who has the right to walk, has not the right to drive cattle; and he who has the latter privilege has also that of walking even without a beast of burden. The third is the right of passing, driving, or walking, for all are included in the right of way. The last is the right to conduct water over the land of another.

(1) Among rustic servitudes must be enumerated the right to draw water, as well as that to drive cattle to water, the right of pasturage, the rights of burning lime and of digging sand.

(2) It is clear that the delivery of servitudes and the toleration of the same admit of the intervention of the prætor.

2. *Neratius, Rules, Book IV*.

The servitudes of rustic estates include the right to raise a building and interfere with the residence of a neighbor, or to have a drain under the house or residence of a neighbor, or to have a projecting roof.

(1) The right to an aqueduct, or to draw water in order that it may be conducted over the same place, can also be granted to several persons; and this can be done on different days, or at different hours.

(2) Where the water-course or the supply of water to be drawn is sufficient, the right may be granted to several people to conduct the water over the same place, on the same days, or during the same hours.

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

Moreover, servitudes may be created in such a way that oxen by means of which the land is cultivated may be pastured in neighboring fields; and Neratius, in the Second Book of Parchments, holds that such a servitude can be imposed.

(1) Neratius also says that a servitude can be created so that crops may be collected in the farm-house of a neighbor and kept there; and that the supports for vines may be taken from the land of a neighbor.

(2) In the same Book he says that where stone quarries belonging to a neighbor adjoin your land, you can grant him the right to throw dirt, rubbish, and rocks thereon, and to leave them there, or to let stones roll upon your land, to be left there until they are removed by you.

(3) Where anyone has the right to draw water, he is considered also to have the right of passage for the purpose of doing so; and, as Neratius says in the Third Book of Parchments, if the right to draw the water and the right of access for that purpose are both granted him, he will be entitled to both; but where only the right of drawing water is granted, the right of access is also included; or where only access to the spring is granted, the right to draw water is included. This has reference to water drawn from a private spring. In the case of a public stream, Neratius states in the same Book, that the right of passage to it must be granted, but the right to draw the water is not necessary, and where anyone grants only the right to draw water, the grant will be void.

4. *Papinianus, Opinions, Book II*.

Servitudes for the pasturage of cattle, and also that of taking them to water, where the principal income of the land is derived from cattle, are held to be attached to the land, rather than to the person; but if a testator designated some certain individual in whose favor he desired the servitude to be established, it will not pass from the said person to the purchaser of the land, or to his own heir.

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

Therefore, according to him, the servitude can be recovered by an action.

(1) Neratius, in his work on Plautius, says that the right of drawing water for cattle or of driving cattle to water, or of digging chalk or of burning lime, on the ground of another, cannot exist unless the party has adjoining land; and he states that Proculus and Atilicinus hold the same opinion. But he also says that, although there is no question that a servitude for burning lime and digging chalk can be established, still this cannot be done for a greater amount than the requirements of the dominant estate demand.

6. *Paulus, On Plautius, Book XV*.

For example, when a man had a pottery, where vessels were made by means of which the

produce of the land was taken away; just as in certain places it is usual for wine to be transported in jars, or vats to be constructed, or tiles to be made to be used in the construction of a house. If, however, the pottery was employed for the manufacture and sale of vessels, an usufruct would exist.

(1) Moreover, the right of burning lime, quarrying stone, and digging sand, for the purpose of building something on the land differs very greatly from an usufruct; and so does the right to cut stakes for vines so that supports may not be lacking. But what would be the case if these things improved the condition of the property? It cannot be doubted that they are of the nature of servitudes, and this Marcianus approves to such an extent that he thinks that a servitude can be created permitting me to build a hut on your land; provided, of course, that I possess a servitude of pasturage, or of driving cattle to water; so that I may have a place in which to take refuge when the weather is bad.

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

Where anyone is borne on a chair or a litter, he is said to have the right to go on foot, and not to drive; but a party who has only the right to pass on foot, cannot drive a beast of burden. If he has the right to drive cattle, he can drive a wagon or beast of burden, but in neither instance has he a right to haul stone or timber. Some authorities hold that he cannot carry a spear upright, because he would not do this if he were either walking or driving, and fruit might be injured by doing so. A party who has a right of way has also the right to pass on foot and to drive; and the greater number of authorities hold that he can drag objects also, and carry a spear upright, provided he does not injure the fruit.

(1) In the case of rustic estates, a field lying between them which is not subject to a servitude renders a servitude inoperative.

8. *Gaius, On the Provincial Edict, Book VII.*

By the Law of the Twelve Tables, the width of a road subject to a right of way, must be eight feet, where it is straight; but where there is a bend, that is to say where the road curves, it must be sixteen.

9. *Paulus, Sentences, Book I.*

A servitude for the conducting or drawing of water from any other point than the source or spring cannot be established; but at present it is customary for it to be established from any place whatsoever.

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

Labeo says that a servitude may be created in such a way that a party can be permitted to look for water and convey it, if it is found; for if it is lawful to create a servitude relating to a house which is not yet built, why should it not be equally lawful to create one with reference to water which has not yet been found? Moreover, if it is lawful for us to grant a servitude for a party to seek for water, it can also be granted premitting him to conduct it after it has been found.

11. *Celsus, Digest, Book XXVII.*

Where the right of passing or driving through land belongs to several persons, it can be granted to me separately by each of them. Therefore, strictly speaking, the right will not become mine unless all of them grant it; and when the last grant is made all those made previously will become operative. The more favorable construction, however, is, that before the last party makes the grant, those who have previously done so cannot prevent me from using the right already granted.

12. *Modestinus, Differences, Book IX.*

There is a difference between the right to drive cattle, and the right of passage; where anyone can travel either on foot, or on horseback, the latter right exists; but where he can drive a herd

of cattle, or take a vehicle, the former right is implied.

13. *Javolenus, On Cassius, Book X.*

A servitude may be acquired in favor of certain kinds of land, as for instance, vineyards, because this would have reference rather to the soil itself than to the surface of the same; so that, if the vineyards were removed, the servitude will remain. But if another intention existed when the servitude was created, an exception on the ground of malicious fraud will be necessary.

(1) Where an entire field is subject to a servitude of passage or the driving of cattle, the owner cannot do anything in the said field by which the servitude may be interfered with; because it is so extended that every clod is subject to it. But where the right of passage or to drive cattle is bequeathed without any limit, the limits shall be established at once, and where they are first established there will the servitudes be created, and the remaining parts of the field will be free. Hence, an arbiter must be appointed who, in both instances, should determine the direction of the right of way.

(2) The width of a driveway for cattle, and that of a pathway, is the one which was designated; and if nothing was said with reference to it, it must be fixed by the arbiter. In the case of a right of way the rule is different; for if the width is not stated, that which is established by law is the proper one.

(3) If the place is designated but the width is not given, the party can cross said place wherever he wishes. But if the place is not mentioned and the width is not stated, a right of way may be chosen over any portion of the land, but the width of the same must be that prescribed by law; and if there is any doubt as to the direction, the services of an arbiter must be enlisted to decide it.

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

If I grant a right of way to anyone through a certain place, I cannot grant a water-course to another through the same place; and if I grant a water-course, I cannot sell or grant a footpath to another through the same place.

15. *The Same, On Quintus Mucius, Book XXXI.*

Quintus Mucius says that where a party has the right to conduct water every day, or during the summer, or for longer intervals, through the land of another; he has also the right to place pipes of earthenware or of any other material in the channel, so as to distribute the water more widely, and that he can do whatever he pleases in the channel, provided he does not render the water-course less valuable to the owner of the land.

16. *Callistratus, On Judicial Inquiries, Book III.*

The Divine Pius stated in a Rescript to bird-catchers, "It is not proper for you to catch birds on the land of others without the consent of the owners".

17. *Papirius Justus, On Constitutions, Book I.*

The August Emperors Antoninus and Verus stated in a Rescript, that, "Where water is taken from a public river for the purpose of irrigating fields, it should be divided in proportion to the size of the same; unless someone can prove that, by virtue of a special privilege, he is entitled to more". They also stated in a Rescript that, "A party should only be permitted to conduct water where this can be done without injury to another".

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

Where a right of way is created through several different tracts of land, it is still a single road, just as the servitude is also single, hence the question arises: If I pass through one tract of land but not through another for such a time as is necessary for the servitude to be extinguished, do I retain the servitude? The better opinion is that it is entirely lost, or entirely retained; therefore if I did not make use of either tract at all, the whole servitude is lost; but if I make

use of one, the entire servitude is preserved.

19. *Paulus, On Sabinus, Book VI.*

Where one of several joint-owners stipulates for a right of passage through land held in common, the stipulation is void, as the right can not be given him; but where they all stipulate, or a slave owned in common by them does so, each of the joint-owners can bring an action asking that the right of way be granted him, because this can be granted by you to all of them in this manner; lest if the stipulator for the right of way should die and leave several heirs, the stipulation may become of no effect.

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

If you grant me at the same time the right to walk and drive over your premises, and also the right to use and enjoy the same, and then I surrender to you my right of use and enjoyment, you cannot use and enjoy the property, unless you leave me the unimpaired right to pass through or drive.

Moreover, if I have a right to conduct water through your land, and you do not have the right to build upon the same without my consent, and I grant you the right to build, you must, nevertheless, grant me the servitude that you will not erect any building except in such a way, that my water-course may remain unaltered; and the condition of everything must continue to be the same as it would have been if, in the beginning, only a single grant had been made.

(1) A servitude can damage the land subject to it naturally, and not through anything due to the agency of man; as, for instance, if the water in the channel should be increased by showers; or water should flow into it from an adjoining field; or a spring should afterwards be discovered along the channel or within it.

(2) If there is a spring adjoining the Seian Estate from which spring I have a right to conduct the water through the said estate, and the estate should become mine, the servitude will remain.

(3) The right to draw water does not attach to a person but to the land.

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

If you grant me a water-course through your land without designating the part through which I shall conduct it, all your land will be subject to the servitude.

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

But then the only parts of the land which would be affected by the servitude are those which were free from buildings, trees, or vines, when the grant was made.

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

A right of way can be granted wider or narrower than eight feet, so long as it is wide enough to be traversed by a vehicle; otherwise it would be a right of passage and not a right of way.

(1) Where there is a permanent lake on your premises, the servitude of navigating it may be imposed, in order to obtain access to adjoining land.

(2) If the servient estate, or that to which the servitude is attached, should be confiscated, the servitude remains unimpaired in both instances, because land which is confiscated retains its former condition.

(3) Wherever a servitude is attached to an estate, it is attached to every part of it; and therefore if the property is sold a portion at a time, the servitude follows every portion; hence the separate owners can properly bring actions setting forth that they have a right of way over said land. Where, however, land subject to a servitude is divided into certain tracts among several owners, although the servitude attaches to all portions of the same, it will, nevertheless, be necessary for those who own shares that do not join the land subject to the servitude to have a legal right of passage through other parts of the land which has been

divided; or traverse it, if the adjacent owners allow this to be done.

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

Labeo states with reference to a water-course of mine, that I can lend it to any of my neighbors; but Proculus, on the other hand, says that it cannot be used for the benefit of any part of my land except that for which the servitude was acquired. The opinion of Proculus is the more correct one.

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

If I sell you a certain part of my land, the right to an aqueduct will also belong to you, even though it is principally used for the benefit of another part; and neither the excellence of the soil, nor the use of the water should be taken into consideration to imply that the right of conducting the water is only attached to that part of the property which is most valuable, or especially requires the use of it; but the division of the water must be made in proportion to the quantity of land reserved or alienated.

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

Where a right of way, a right to pass on foot, a right to drive cattle, or a right to an aqueduct through land is bequeathed, it is in the power of the heir to establish the servitude over any part of the same that he wishes, provided no advantage is taken of the legatee with reference to the servitude.

27. *Julianus, Digest, Book VII*.

If the Sempronian Estate is subject to a servitude in favor of land owned by you and me in common, and we purchase the same to be held in common, the servitude is extinguished; because the right of each owner has become the same in the two estates, respectively. But where the land purchased was subject to my own estate and to yours as well, the servitude will remain; because a servitude over an estate held in common can be attached to land owned in severalty.

28. *The Same, Digest, Book XXXIV*.

Where a right to pass through land is bequeathed to an estate held in common by two persons, unless both of them agree as to the direction of the pathway, the servitude is neither acquired nor lost.

29. *Paulus, Epitomes of the Digest of Alfenus, Book II*.

A party who had two adjoining tracts of land and sold the upper one. In the agreement it was stated that the purchaser should have the lawful right to discharge water upon the lower tract of land through an open ditch. The question then arose, if the purchaser should receive water from another tract, and wishes to discharge it upon the lower one, can he do so legally, or not? I answered that the lower neighbor was not obliged to receive more water than was necessary for the purpose of draining the land of the purchaser.

30. *The Same, Epitomes of the Digest of Alfenus, Book IV*.

A man who had two tracts of land, in the sale of one of them reserved the water which came from a spring on the land, and also a space of ten feet around it. The question arose whether the ownership of the ground reserved belonged to him, or merely whether he was entitled to access to it? The answer was that, "If what he retained was ten feet wide around said spring", it should be held that the vendor had only a right of way.

31. *Julianus, On Minicius, Book II*.

Three tracts of land which were contiguous belonged to three owners, and the owner of the lowest one had acquired for his tract from the highest one the servitude of a water-course, and this he conducted into his own land through the intervening tract with the permission of the owner of the same, and he afterwards bought the highest tract, and sold the lowest one on to

which he had conducted the water. The question was asked whether the lowest tract had lost the right of conducting the water, because as both estates had become the property of the same owner no servitude could exist between them? It was denied that the lowest tract had lost the servitude because the land through which the water was conducted belonged to another, and as no servitude could be imposed in any other way upon the uppermost tract so that the water might reach the lowest one, except by being conducted through the intermediate tract; so the same servitude in favor of the same tract of land could not be lost, unless, at the same time, the watercourse should cease to be conducted through the intermediate tract, or unless all three tracts should simultaneously become the property of a single owner.

32. *Africanus, Questions, Book VI.*

Where a tract of land is held in common by you and myself, and you have conveyed your portion of it to me, and also a right of way to said tract through your own adjoining property; it was held that the servitude was properly created in that way; and that, in this instance, the ordinary rule that servitudes cannot either be imposed or acquired with reference to shares is not applicable; for in this case the servitude is not acquired with reference to a share, but is acquired with reference to the time when the entire property shall belong to me.

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

Where you and I held two tracts of land, the Titian and Seian Estates, in common, and in dividing the same it was agreed that the Titian Estate should belong to me, and the Seian to you, and we conveyed our respective shares to one another, and in doing so it was stated that each one should be allowed to conduct water through the land of the other; it was held that the servitude was properly established, especially if a stipulation was added to the contract.

(1) You conduct water through the land of several persons. No matter in what way the servitude was created, unless an agreement was entered into, or a stipulation made with reference to it, you cannot grant to any of the owners, or to any neighbors the right to draw water from channels, but where an agreement or a stipulation was entered into, it is usual for this to be granted; although no land can be the subject of a servitude in favor of itself, nor can the usufruct of a servitude be created.

34. *Papinianus, Questions, Book VII.*

If one joint-owner of a tract of land permits anyone to have a right to walk or drive over it, the grant is void, and therefore if two tracts, which are servient to one another, become the common property of the owners, then, since it is established that servitudes can be retained with reference to a share, the servitude cannot be released by one of the parties to the other; although each joint-owner to whom a servitude is due enjoys the right in severalty; still, since it is not the persons but the estates which are subject to the servitudes, freedom cannot be acquired, nor can a servitude be released with reference to a part of an estate.

(1) Where a spring from which I have the right to conduct water dries up, and after the time fixed by law for the extinction of the servitude, it begins to flow again, the question arises whether the right to convey the water is lost?

35. *Paulus, On Plautius, Book XV.*

And Atilicinus says that the Emperor made the following statement in a Rescript to Statillus Taurus: "Those who were accustomed to obtain water from the Sutrine Estate appeared before me, and said that they were unable to conduct the water from the spring on the Sutrine Estate which they had used for several years, because the spring had dried up; and that afterwards the water began to flow from said spring, and they petitioned me that, as they had lost their right through no negligence of their own, but because they could not obtain the water, it might be restored to them. As their request did not seem to be unjust, I though that relief should be granted. It is therefore decreed that the right which they had on the first day when they could not succeed in obtaining water shall be restored to them."

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

When a vendor retains one of two estates, and a servitude for the conduct of water is imposed upon it by him, the servitude acquired for the estate which is purchased will follow the same if a sale is afterwards made; nor does it matter whether the stipulation by which it was agreed that a penalty should be promised had reference to the person of the purchaser, and made certain provisions in the event that he should not be permitted to enjoy the servitude.

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

"Lucius Titius to his brother Gaius Seius, Greeting: Of the water which flows into the reservoir which my father built on the isthmus, I give and grant to you gratuitously the depth of an inch, to be conducted either into the house which you have on said isthmus, or anywhere else you may wish". I ask whether by these terms the use of the water also belongs to the heirs of Gaius Seius? Paulus answered that as the use of the water was personal, it could not be transmitted to the heirs of Seius, as they occupied the position of parties entitled to the use of the same.

38. *The Same, Manuals, Book I.*

A right of way can be granted through a place where a river flows, if it can either be crossed by a ford or there is a bridge; but it is different where it must be crossed by ferry-boats. This is the case where the river runs through the land of one of the parties; but it is otherwise if your land joins mine, and then comes the river, and the land of Titius, and then a highway up to which I wish to acquire a right of way. Let us consider whether there is anything to prevent you from giving me a right of way as far as the river, and then my receiving one from Titius as far as the highway.

Again, let us consider whether the same legal principle will apply even if you are the owner of the land which is beyond the river on this side of the highway; because a right of way can be complete as far as a town, or as a highway, or as a river which must be crossed by ferry-boats, or as far as the land belonging to the same owner. If this

be the case the servitude is not held to be interrupted, even though a public river intervenes between two tracts of land belonging to the same person.

TITLE IV.

RULES COMMON TO BOTH URBAN AND RUSTIC ESTATES.

1. *Ulpianus, Institutes, Book II.*

We designate buildings urban estates, and where buildings belong to a house in the country, servitudes of urban estates can also be created there.

(1) These servitudes are said to belong to estates because they cannot be created without them; for no one can acquire a servitude over an urban or rustic estate, unless he himself has an estate.

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

With reference to the removal or drawing of water from the river by means of which, or where some one establishes a servitude over a reservoir, certain authorities have doubted whether these servitudes actually existed; but it was stated in a Rescript of the Emperor Antoninus to Tullianus that, although a servitude might not be valid in law, nevertheless, if the person in question acquired it under an agreement of this kind, or by any other legitimate means, he who was in possession of such a right should be protected.

3. *Gaius, On the Provincial Edict, Book VII.*

Where the owner of two tracts of land conveys one of them to you under the agreement that the tract which he conveyed shall be subject to a servitude in favor of the one which he retained, or *vice versa;* a servitude is understood to be lawfully imposed.

4. *Javolenus, On Cassius, Book X.*

It is not possible to provide that a monument shall only be built to a certain height, because what has ceased to be controlled by human law cannot be subject to a servitude; just as no servitude can be created providing that only a certain number of bodies shall be buried in one place.

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

I sell land which belongs to me alone; can I impose a servitude upon it to the effect that it shall be servient to myself and my neighbor? In like manner, if I sell property which I own in common with another, can I provide that it shall be subject to a servitude for the benefit of myself and my joint-owner? I answered that no one can stipulate for a servitude for the benefit of anyone but myself; and therefore the addition of the neighbor must be considered superfluous, as the entire servitude will belong to him who stipulated for it.

Again, when the land held in common is sold, I cannot subject it to the servitude for the benefit of myself and my joint-owner, for the reason that a servitude cannot, through the act of one of the joint owners be acquired for the benefit of land held in common.

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

Where anyone has two houses and sells one of them, he can state in the conveyance that the house which he does not sell is subject to a servitude in favor of the one which he does sell; or, on the other hand, that the one which is sold must serve the one which is retained; and it makes little difference whether the two houses are adjacent or not.

The same rule applies in the case of rustic estates, for where a man has two tracts of land, by conveying one of them he can impose a servitude upon it for the benefit of the other. But where he conveys two houses at the same time, he cannot impose a servitude on either for the benefit of the other; for he cannot acquire a servitude for the house of another, or impose one upon it.

(1) Where anyone disposes of a share in a house or in a tract of land, he cannot impose a servitude upon either, because a servitude cannot be imposed or acquired with reference to a share. It is evident that if he divides a tract of land into two parts, and alternates one part of what has been divided, he can impose a servitude upon either one of them; because neither is a part of an estate, but is an estate itself. This also may be stated with reference to a house, where the owner divides one building into two, by constructing a wall through the middle of the same, (as many persons do); for in this instance it must be considered as two houses.

(2) Moreover, suppose that we are two men who own two houses in common, by joining in the conveyance we can accomplish the same result that I alone could do, if I had two houses of my own. But even if we make separate conveyances the same thing will take place; for it is established that the last conveyance renders the former one effective.

(3) If, however, one of said houses belongs to one of two persons, and the other is the common property of both; then Pomponius, in the Eighth Book on Sabinus, states that I cannot acquire a servitude in favor of, or impose one on either. If anyone states in a contract of sale that the house which he sold shall be subject to a servitude, it is not necessary to convey the house free; wherefore he can either create a servitude for the benefit of his own house, or grant one to his neighbor; provided this is done before the delivery of the property. It is clear, if he stated that a servitude was to exist for the benefit of Titius, and he grants a servitude to Titius, the transaction is concluded; but if he grants a servitude to another party he is liable on the ground of sale. This is not in contravention of what Marcellus says in the Sixth Book of the Digest, namely: that where anyone, in the transfer of real property, says that it is subject to a servitude for the benefit of Titius, while in fact it is not, but the vendor is bound to convey the land to Titius; can the vendor bring an action on sale to compel the purchaser to permit the servitude to be imposed on the land which he contracted for?

He thinks the better opinion is that he should be permitted to bring the action. He also says that if the vendor is able to sell the servitude to Titius, he must still be permitted to bring suit. This is with the understanding that the statement was made at the time of delivery, for the purpose of retaining the servitude; but if, as he says, the vendor feared that Titius was entitled to the servitude, and therefore reserved it, an action on sale will not lie, if he made no provision for the servitude.

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

Where one house is conveyed by a party who has two; the description of the servitude should be expressly set forth; for if it is only mentioned in general terms that the house is subject to a servitude, the statement will be inoperative, because it is uncertain what kind of a servitude it reserved, or any kind of servitude may be imposed.

(1) Where a house which belongs to another party is situated between the two, a servitude can be created; as for instance, that the height of one of them may, or may not be raised; or even where a right of way is owing, that it shall only become operative if a servitude should subsequently be imposed on the intervening house; just as a servitude can be imposed on tracts of land belonging to several owners, even at different times. Although it can be stated that if I have three tracts of land which are adjoining, and I convey that at one end to you, a servitude can be acquired either for the benefit of your tract, or for that of both of mine; but if it is acquired for the tract most distant from you, which I have retained, the servitude will stand, because the intermediate tract is mine. But if I subsequently alienate either the tract for whose benefit the servitude was acquired, or the intermediate one, the right will be interrupted until a servitude is imposed on the intermediate tract.

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

If I have two houses, and convey them at the same time to two parties, it should be considered whether a servitude imposed on either of them is valid, since a servitude cannot be imposed on, or acquired for, the house of another; but where this is done before delivery, he who conveys the property acquires the servitude for, or imposes it on, his own property, rather than that of another; and therefore the servitude will be valid.

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

If I have become the heir to someone whose land is subject to a servitude in my favor, and I sold the land to you, the servitude must be restored to its former condition, because it is understood that you are, so to speak, the heir.

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

Whatever a vendor wishes to reserve for himself by way of servitude, must be reserved in express terms, for a general reservation such as the following: "Any persons entitled to servitudes may certainly retain them", has reference to strangers, and not to the vendor for the purpose of preserving his rights, for he has none, because no one owes him a servitude.

Again, if I was entitled to a servitude, and the ownership of the land afterwards became vested in me, it is held that the servitude is extinguished in consequence.

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

Right of access is granted to parties entitled to a privilege of this kind, for the purpose of making repairs to places which are not subject to the servitude, where such access is necessary, and it is not expressly mentioned in the grant of the servitude in what way access should be permitted. Therefore, the owner of land cannot make the ground religious along a river, or above one; if, for instance, the water should be conducted under ground, lest the servitude might be extinguished; and this is correct. You have, however, the right to conduct the water through a lower or a higher channel, except where it has been provided that you should not do so.

(1) If I have the privilege of conducting water through a channel near your land, the following rights are implied: I can repair the channels; I and my workmen can, for the purpose of repairing the same, approach as near as possible to the place; and I can also require the owner of the land to leave me sufficient space to approach the channel on the right and left banks of the same, and to throw down dirt, loam, stone, sand, and lime.

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

Where one tract of land is subject to a servitude for the benefit of another, and either one is sold, the servitudes pass with the property; and where buildings are subject to servitudes for the benefit of tracts of land, or *vice versa*, the same rule applies.

13. *Ulpianus, Opinions, Book VI*.

The vendor of the Geronian Estate set out in the contract for the Botrian Estate which he retained, that no tunny-fishery should take place near it. Although a servitude cannot be imposed on the sea by private contract, since by nature it is open to all, still, as the good faith of the contract demands that the conditions of the sale should be observed, the persons in possession or those who succeed to their rights are bound by the provisions of the stipulation or the sale.

(1) If it is known that there are stone-quarries on your land, no one can cut stone there either as an individual, or in the public service, without your consent, where he has no right; unless a custom exists in said quarries that, if anyone should wish to take stone from them he can do so, provided he first pays the usual compensation to the owner; and even then he can only take the stone after giving security to the owner that the latter shall not be prevented from using such stone as he needs, nor the enjoyment of the property by the owner be destroyed by the exercise of his right.

14. *Julianus, Digest, Book XLI*.

The creation of a right of way is not prevented by stating that it can only be used during the day; because, in fact, this is almost necessary in the case of property situated in towns.

15. *Paulus, Epitomes of the Digest of Alfenus, Book I*.

Where one party has granted another a right of passage or of driving cattle through a specified place, it is certain that he can grant either of these rights to several persons through the same place, just as, where anyone has imposed a servitude on his own house in favor of his neighbor, he can, nevertheless, impose a similar servitude on the same house in favor of as many other persons as he wishes.

16. *Gaius, Diurnal, or Golden Matters, Book II*.

A testator in his will can direct his heir not to raise the height of his house, in order to avoid obstructing the light of an adjacent building, or charge him to permit a neighbor to insert a beam into his wall, or to allow the rain water to fall on his premises from his roof, or permit his neighbor to walk or drive through his land or conduct water from it.

17. *Papinianus, Questions, Book VII*.

Where a neighbor builds a wall across your land with your permission, he cannot be proceeded against by means of the interdict *Quod precario habet;* nor, after the wall has been built, is it understood that the grant of a servitude is complete; nor can the neighbor legally claim that he has a right to hold the wall without your consent; since the building follows the condition of the land, and this renders the claim invalid.

But where a party who was subject to a servitude for your benefit builds a wall across his own premises with your consent, he will not obtain freedom by usucaption; and proceedings can be brought against him on the interdict *Quod precario habet*. If, however, you should permit him to build a wall by way of gift, you cannot apply for the interdict, and the servitude will be extinguished by the donation.

18. *Paulus, Manuals, Book I.*

It has been settled that several joint-owners, even where they do not join in the conveyance, may impose or acquire servitudes, on the ground that former acts are confirmed by more recent ones; so that it is the same as if all of them had made the grant at the same time. Therefore, if he who first granted the servitude should die, or dispose of his share in any other way, and afterwards his joint-owner should make a grant, the entire transaction will be void; for when the last one makes the grant the servitude is not considered to be acquired retroactively, but it is held to be the same as if when the last one made the grant all of them had done so; consequently, the last act will remain in abeyance until the new joint-owner makes a grant.

The same rule applies where a grant is made to one of the joint-owners, and afterwards some such occurrence as those above mentioned with reference to the person of another joint-owner takes place. Hence, on the other hand, if any of these things should happen to one of the joint-owners who has not made a grant, all of them will be compelled to make a new grant; for only so much time is conceded to them as to enable them to make a grant even at different times, and therefore the grant cannot be made to one person, or by one person.

The same rule applies where one party grants a servitude and another bequeaths it by will, for if all the joint-owners bequeath a servitude, and their estates are entered upon at the same time, it may be said that the servitude is properly bequeathed; but if the estates are entered upon at different times, the legacy does not legally vest; for it has been established that the acts of living persons may be suspended so far as their operation is concerned, but that those of deceased persons cannot.

TITLE V.

WHERE AN ACTION IS BROUGHT TO RECOVER A SERVITUDE, OR THE RIGHT OF ANOTHER TO IT IS DENIED.

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

Rights of action with reference to servitudes, whether they are rustic or urban, belong to those who own the land; but our burial-places are not the subject of our ownership, although we can claim a right of way to a tomb.

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

We are entitled to actions *in rem* for servitudes, (just as we are in the case of those relating to an usufruct), whether such actions are confessory or negatory; a confessory one being that employed by a party who claims he is entitled to a servitude, and a negatory one being that which can be brought by an owner who denies that one exists.

(1) This confessory action *in rem* lies in favor of no one else but the owner of the land; for no one can bring an action to recover a servitude except a party who has the ownership of adjacent land, and alleges that the servitude is attached to it.

(2) Neratius very properly states that if the usufruct of land situated in the middle of a tract is bequeathed, a right of way must also accompany it; that is to say, through such portions of said tract over which he who granted the usufruct would establish the right of way so far as is necessary for the enjoyment of the usufruct; for it must be borne in mind that where a right of way is granted an usufructuary for the purpose of enjoyment it is not a servitude, nor can a servitude exist for the benefit of a party entitled to the usufruct of the soil; but if one is attached to the land, the usufructuary can use it.

(3) Pomponius says that an usufructuary can apply for an interdict for a right of way, if he has availed himself of it within the year; for there are two kinds of judicial inquiries, one, relating to a question of law, that is to say in a confessory action; another relating to a question of fact, as in this interdict: as Julianus also stated in the Forty-eighth Book of the Digest.

Labeo says in support of the opinion of Julianus, that even if the testator who bequeathed the usufruct himself made use of the right of way, an interdict could justly be granted the usufructuary; just as an heir or purchaser is entitled to such an interdict.

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

It may also be stated that the same rule is applicable where anyone purchases part of an estate.

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

The actual locality is not a part of the ownership of the person to whom its servitude is due; but he is entitled to the right of way.

(1) A party who has a right to pass on foot without the right to drive, or has the right to drive without the right to pass on foot, can make use of an action for a servitude.

(2) In a confessory action which is brought with reference to a servitude, the profits can also be included. Let us consider, however, what the profits of a servitude are; and with reference to this, the better opinion is that the only thing which can come under the denomination of profits is the interest, (if any), which the plaintiff has in not being excluded from the enjoyment of the servitude. But in a negatory action, (as Labeo says), the profits are computed with reference to the interest of the plaintiff in not having his adversary use a right of way over his premises; and Pomponius concurs in this opinion.

(3) Where the land to which the right of way is attached belongs to several persons, each one is entitled to an action for the whole; and this Pomponius lays down in the Forty-first Book. In the appraisement of the damages, however, the amount of the interest will be taken into consideration, that is, the interest of the party who institutes the proceedings. Therefore, where only the right is concerned, any one of the parties can proceed separately, and if he gains his case, the others will profit by it; but the estimate will be limited to the amount of his interest; although the servitude cannot be acquired through one joint-owner alone.

(4) Where the land subject to the servitude belongs to two parties, suit can be brought for this purpose against either of them (as Pomponius says in the same Book), and whichever one defends the case must restore the whole, because this is something which is not capable of division.

(5) Where anyone does not question my right to walk, or drive, or use a right of way, but does not permit me to make repairs, or to cover the road with stone, Pomponius in the same Book says that I am entitled to a confessory action; for if a neighbor has a tree which hangs over in such a way as to make the road or path impassable or useless; Marcellus, in a note on Julianus, states, that an action can be brought for the right of passage or to recover the right of way.

With reference to the repairs of roads, we can also make use of an interdict, that is the one which is available for the repair of a pathway, or a driveway, but this proceeding cannot be instituted where the party wishes to cover the road with stone, unless this was expressly agreed upon.

(6) We are also entitled to actions *in rem* with reference to a right to draw water, for the reason that this is a servitude.

(7) The owner of a building is also entitled to an action relating to a servitude where he denies that he is subject to a servitude in favor of his neighbor, when his house is not entirely free, but is not subject to a servitude for the benefit of the party against whom the suit is brought. For example, I have a house adjacent to the Seian and Sempronian houses, and I owe a servitude to the Sempronian house, but I wish to institute proceedings against the owner of the Seian house, because he prevents me from raising the height of mine. I must bring an action *in rem* against him, for although my house is subject to a servitude, still, it is not subject to one in favor of the parties sued; and therefore I claim that I have the right to raise my house still higher, even against his consent, for my house is free, so far as he is concerned.

(8) Where a man is not permitted to raise his house any higher, an action can very properly be brought against him, alleging that he has no right to raise it. This servitude may even exist in favor of a party who owns a house some distance away:

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

And, therefore, if you have a house between mine and that of Titius, I can impose a servitude on the house of Titius to prevent him from raising his any higher, although a servitude of this kind can not be imposed on yours; because so long as you do not raise yours, the benefit of the servitude remains.

6. *Ulpianus, On the Edict, Book XVII.*

And if it should happen that the person who owns the intervening building, as he is not subject to a servitude, raises his house still higher, so that now I cannot be held to obstruct your lights if I should build; you will allege in vain that I have no right to build in this way without your consent; but if, within the time prescribed by law, the neighbor should demolish his building, your right of action will be revived.

(1) It should be borne in mind, however, that with reference to these servitudes, the possessor of the right may be also the plaintiff; and if perchance, I have not raised the height of my building; then my adversary is the possessor of the right, for, since nothing new has been done, he is in possession and can prevent me from building, by means of a civil action, or by an interdict *Quod vi aut clam*. The result will be the same if he hinders me by casting a pebble. But if I build without his objecting, I myself will then become the possessor.

(2) Moreover, we are entitled to an action with reference to a servitude which was imposed for the support of a burden, for the purpose of compelling the servient owner to maintain the support, and repair his building in the way which was provided when the servitude was imposed.

Gallus thinks that a servitude cannot be imposed in such a way that a man shall be compelled to do something, but that he shall not prevent me from performing some act; for in every servitude the duty of making repairs belongs to the party who claims the right, not to him whose property is subject to the same. The opinion of Servius, however, has prevailed so that, in the case stated, anyone can claim the right to compel his adversary to repair his wall, in order to support the burden. Labeo says, however, that this servitude is not attached to the person but to the property, hence the owner is at liberty to abandon the property.

(3) This action indeed is rather a real than a personal one, and will lie in favor of no one else but the owner of dominant tenement; and it can be brought against the owner of the servient tenement, just as in the case of other servitudes.

(4) Papinianus, in the Third Book of Questions, discusses the point whether, where a house belongs to several joint-owners, suit can be brought with reference to the entire servitude? He says that the owners can bring suit separately for the whole, just as can be done in the case of other servitudes with the exception of usufruct. This answer should not be given, he adds, where the house which sustains the burden of a neighbor is owned in common.

(5) The nature of the repairs which can be the subject of this action is dependent upon what was stated when the servitude was imposed; it might have been agreed that the party should repair with dressed stone, or ordinary building stone, or any other kind of material which was mentioned when the servitude was created.

(6) Profits are taken into consideration in this action, that is to say, the benefit which the party would have obtained if his neighbor had supported the weight of his house.

(7) The servient owner has a right to make the wall better than was agreed upon, when the servitude was imposed; but if he attempts to make it worse, he can be prevented from doing so either by this action, or by notice of a new structure.

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

The result of these actions is that the plaintiff, if he gains the case, by application to the judge will either have relief granted or security furnished. The relief which should be granted is that the judge must order the defendant to repair the defect of the wall and place it in a proper condition. The security is, that the judge shall order him to give a bond for the repair of the wall, and to provide therein that neither he nor his successors will prevent the plaintiff from raising it higher, and will maintain the edifice after it is built; and if he gives this security he shall be discharged from liability. But if he does not either allow the relief to be granted, or furnish security, he shall be ordered to pay damages to the amount to which the plaintiff will make oath in court.

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

It being thus the duty of one neighbor to repair the wall, the support of the building of the other neighbor who is entitled to the servitude, while the repairs are going on, is not a part of the duty of the owner of the lower building; for if the owner of the upper one does not wish to prop up the building himself, he can demolish and rebuild it when the wall is rebuilt. In this instance also, as in that of other servitudes, a counter action will be granted; that is to say, one in which it is set forth that you have no right to use compulsion against me.

(1) An action will lie in my favor against him who grants me a servitude such as the following, namely: that I shall have the right to insert timbers into his wall, and upon said timbers (for example), to build a gallery in which to promenade, and to place columns on the top of the wall, for the purpose of supporting the roof of said gallery.

(2) These actions differ from one another in that the first may be employed to compel the adjoining neighbor to repair my wall; but the second is only available to compel him to receive my timbers; for this is not contrary to the ordinary nature of servitudes.

(3) If, however, it should be asked which party should sustain the position of possessor and which one that of plaintiff; it must be remembered that if the timbers are already inserted, the party who alleges that he is entitled to the servitude is in the position of possessor; but if they are not inserted, he who denies this right is the possessor.

(4) And if he who claims the servitude for himself should be successful, the servitude should not be granted to him, because he has it already, if the decision was rendered in accordance with law; nor should it be if it was wrongfully rendered, for the reason that, by the decree, the servitude was not to be established, but to be declared to exist. It is clear that if, after issue had been joined, the plaintiff lost the servitude by not making use of it through the malicious fraud of the owner of the building, it must be restored to him; just as has been decided in the case of the owner of the building.

(5) Aristo, in an opinion given to Cerellius Vitalis states, that he does not think that smoke can lawfully be discharged from a cheese-factory upon buildings situated above it, unless a servitude of this kind is imposed upon said buildings; and this is admitted. He also says that it is not legal to discharge water or anything else from an upper on to a lower building, as the party has only the right to perform such acts on his own premises as will not discharge anything upon those of another, and there can be a discharge of smoke as well as of water; hence the owner of the higher building can bring suit against the owner of the lower and allege that the latter had no right to do this. He says, in conclusion, that Alfenus holds that an action can be brought in which it is alleged that a party has no right to cut stone on his own ground in such a way as to allow the pieces to fall on my premises. Hence Aristo says that a man who rented a cheese-factory from the people of Minternæ could be prevented by the owner of a house above it from discharging smoke, but the people of Minternæ would be liable on the lease; and he also says that the allegation which he can make in his suit against the party who discharges the smoke is that he has no right to do so.

Therefore, on the other hand, an action will lie in which it may be alleged that he has the right

to discharge smoke, and this also Aristo approves. Moreover, the interdict *Uti possidetis* is applicable where a party is prevented from making use of his own property in any way that he pleases.

(6) A doubt is raised by Pomponius in the Forty-first Book of Passages, as to whether anyone can allege in an action that he has a right, or that another has no right to make a light smoke; as for example, one from a hearth on his own premises. He holds that such an action cannot be brought, just as one cannot be brought alleging that a party has no right to make a fire, or to sit down, or to wash on his own premises.

(7) He also approves of an opposite decision, for he says that, in the case of a bath, where a certain Quintilla had built an underground passage for vapors which were discharged upon the property of Ursus Julius, it was established that such a servitude could be imposed.

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

If you build on a place through which I have a right of passage, I can allege in a suit that I have a right to walk and drive there; and if I prove this, I can prevent you from working. Julianus also says that if a neighbor of mine, by building upon his land, avoids receiving the drip from my roof, I can bring an action based on my right; that is to say, the right to discharge the water of my roof on his premises; just as we have stated with respect to the right of way. But where he has not yet built, the other party, whether he has the usufruct or the right of way, can set forth that he has a right to walk or drive, and the right of enjoyment; but if the owner has already built, he who is entitled to the right of way can still allege that the right belongs to him, but the usufructuary cannot do so, because he has lost the usufruct; and therefore Julianus says that an action on the ground of fraud should in this case be granted. On the other hand, if you build across a right of way to which my estate is subject for your benefit, I can properly allege that you have no right to build, or to have a building there; just as I could do if you built anything on unoccupied land which belongs to me.

(1) Where a man has been accustomed to use a broader or a narrower road than he was entitled to, he will retain the servitude; just as a party who has a right to use water and uses it mixed with other water retains his right.

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

Where anyone has obtained the right of conducting water by long use, and, as it were, by long possession, it is not necessary for him to establish by law the right which he has to the use of the water; for instance, to show that it was derived from a legacy or in any other way; but he is entitled to an equitable action to prove that he has had the use of said water for a certain number of years, and that this was not obtained by force, or by stealth, or by sufferance.

(1) This action can be brought not only against the party on whose land the source of the water is situated, or through whose premises it is conducted, but also against all persons who try to prevent me from conducting the water; just as in the case of other servitudes. Generally speaking, I can institute proceedings by means of this action against anyone whomsoever that attempts to prevent me from conducting the water.

11. *Marcellus, Digest, Book VI.*

The inquiry was made can one of a number of joint-owners legally build on land held in common by them without the consent of the others; that is to say, if he is forbidden to do so by the said joint-owners, can he institute proceedings against them and allege that he has a right to build; or can the other joint-owners bring an action against him, and assert they have a right to prevent him, or that he has no right to build; and if the building is already constructed, can they not bring suit against him on the ground that he has no right to have a building there under the circumstances?

This can be best answered by saying that a joint-owner has a better right to prevent building, than to build; because he who is attempting to perform an act of this kind (as I have already

stated), if he wishes to use the common property, according to his own pleasure, as if he were the sole owner of the same, is appropriating to his own individual use a right which belongs to others.

12. *Javolenus, Epistles, Book HI*.

I alleged in an action that the defendant had no right to have his timbers inserted into my wall; must he also give security that he will not insert any into it hereafter? I answered that I think it is part of the fluty of the judge to compel him to give security with reference to future work as well.

13. *Proculus, Epistles, Book V*.

I have pipes by which I conduct water on the public highway, and these, having burst, flooded your wall; I think that you are entitled to an action against me, in which you can allege that I have no right to allow water to flow from my premises against your wall.

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

If a wall belongs to me, and I permit you to insert into it timbers which you had there formerly, and you then wish to insert others, you can be prevented from doing so by me; and, indeed, I have a right of action to compel you to remove any timbers which you have recently inserted therein.

(1) If a party-wall which you and I own, should, on account of any work which you have done, incline towards my house, I can bring an action against you and allege that you have no right to have a wall in that condition.

15. *Ulpianus, Opinions, Book VI*.

By raising his house a person caused it to obstruct the lights of a building belonging to a minor under twenty-five years of age, or under the age of puberty, of whom he was the curator or guardian; and although, in this instance, he himself and his heirs would be liable to be sued, for the reason that he had no right to commit an act which, on account of his office, he was required to prevent anyone else from doing; still, an action should be granted to the boy, or to the minor, against anyone who is in possession of the said house, to compel him to remove what was not lawfully constructed.

16. *Julianus, Digest, Book XVII*.

If I purchase from you permission to let rain-water drip from my house on to yours, and afterwards, with your knowledge, on account of the purchase, I allow it to do so; I ask, whether I can on this ground be protected by any action or exception? I answered that I can avail myself of either resource.

17. *Alfenus, Digest, Book II*.

If there should be a wall between two houses, which projects a half a foot or more towards the adjacent building, proceedings must be instituted alleging that the defendant ought not to permit the wall to project in this manner over the premises of the plaintiff without his permission.

(1) A certain part of the premises of Gaius Seius was subject to a servitude for the benefit of the house of Annius, which provided that Seius should have no right to put anything in that place; but Seius planted trees there, and under them kept basins and other vessels. All persons learned in the law advised Annius to bring suit against Seius on the ground that he had no right to have those things in that place without his consent.

(2) A neighbor placed a dunghill against the wall of another party from which the wall became damp; and advice was asked in what way he could compel his neighbor to remove the dunghill. I answered, that if he had done this in a public place he could be compelled to remove it by means of an interdict; but if it was done in a private place, it would be necessary to bring an action with reference to a servitude; and if there had been any stipulation for the

prevention of threatened injury, the party could avail himself of the stipulation if he had sustained any damage on account of what had been done.

18. *Julianus, On Minicius, Book VI.*

The slaves of a certain man had prevented a neighbor from conducting water, and the responsible party having concealed himself to avoid suit being brought against him, the complainant asked what he can do? I answered that the prætor, after having heard the case, must order the property of the defendant to be taken into possession and not surrendered until he had established a right of conducting water for the benefit of the plaintiff, if he had suffered any damage from drought, because he had been prevented from conducting water; as for instance, if his meadows or his trees had been dried up.

19. *Marcianus, Rules, Book V.*

Where anyone makes proper allegations in a suit with reference to a servitude which he enjoys in common with others, and loses the case in some way through his own negligence, it is not just that this should cause any damage to the other joint-owners; but if, through collusion, he abandons the suit to his adversary, an action on the ground of fraud should be granted to the others; as Celsus says, and he adds that this was also held by Sabinus.

20. *Scævola, Digest, Book IV.*

A testatrix owned some houses adjoining a tract of land which she bequeathed; the question arose, whether, if these were not included with the land and the legatee should bring suit to recover it, the said land would be subject to any servitude for the benefit of the houses; or if the legatee claimed that the land should be conveyed to him in compliance with the terms of a trust, whether the heirs ought to reserve a servitude in favor of the houses? The answer was that they should do so.

(1) Several citizens of a town, who owned different estates, purchased a tract of woodland, to be held in common for the enjoyment of the right of pasturage, and this arrangement was carried out by their successors; but some of those who had this right subsequently sold the separate estate above mentioned. I ask whether, after the sale, the right follows the said estates, since it was the intention of the vendors to also dispose of this right? The answer was that what had been understood between the contracting parties must be observed; but if their intention was not evident, that this right would also pass to the purchasers. I also ask, if when a portion of the said individual estates has been conveyed by the legatees to anyone else, whether it would carry with it any part of the right of pasturage? The answer was, that as this, right must be considered to be attached to the estate which was bequeathed, it would also go to the legatee.

21. *Labeo, Epitomes of Probabilities by Paulus.*

Where no water has yet appeared, no right of way to it, nor any canal for the conduct of the same can be established. Paulus says, I think, that this is not true, by any means; because a grant can be made permitting you to look for water, and, if it should be found to convey it.

TITLE VI.

HOW SERVITUDES ARE LOST.

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

The servitudes of estates are merged when the same person becomes the owner of both estates.

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

Where a man has the right to both walk and drive, and only uses that of walking during the period established by law, the right to drive is not lost, but still remains in force; as Sabinus, Cassius, and Octavenus hold; and a party who has the right to drive can also make use of that to walk.

3. *Gaius, On the Provincial Edict, Book VII.*

It is commonly held that servitudes attached to real property are not lost by death or by the forfeiture of civil rights.

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

The right of access to a burial-place is never lost by want of use.

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

A servitude can be retained for our benefit through a joint-owner, an usufructuary, or a *bona-fide* possessor:

6. *Celsus, Digest, Book V.*

For it is sufficient that there should be a right of access on account of the land.

(1) Where you and I have a right of way through the land of a neighbor, and I use it, but you cease to do so for the period prescribed by law, will you lose your right? And, on the other hand, if a neighbor who has a right of way through our land, walks or drives through my portion of the same, but does not enter yours, will this free yours? Celsus answered that if the estate is divided by metes and bounds between the joint-owners, then, so far as the servitude to which the land is entitled is concerned, it is the same as if it had been attached to both estates from the beginning, and either one of the owners can make use of his own servitude, and each can lose his own by want of use, and the interests of the two estates are no further involved; no injury is done to the party whose land is subject to the servitude, but in fact, his condition is improved, since one of the owners by making use of the right benefits himself and not the entire estate.

But where the estate subject to the servitude is divided in this way, the matter is involved in a little more doubt; for if the location of the right of way is certain and well defined, then, if the estate is divided in the line of the right of way, everything must be observed just as if there had been two distinct estates in the beginning, when the servitude was established; but if the land is divided across the line of the right of way, (and it does not make much difference if this is done equally or unequally) then the right of servitude remains just as it was when the land was undivided, and nothing less than the entire right of way can be retained by using it, or lost by failure to do so; and if it should happen that the owner uses only as much of the way as crosses one of the tracts of land, the other will not become free for that reason, since a right of way is one, and hence is indivisible.

The parties can, however, liberate either of the estates from the servitude, provided they expressly agree to do so; and, at all events, if the party who is entitled to the servitude should purchase one estate, after the division, will the servitude to which the other tract of land is subject remain operative? I do not see how anything absurd can result from this opinion, while one of the estates remains subject to the servitude; provided that, from the beginning, a narrower right of way was created than was mentioned in the contract, and that space enough still remains in the estate, with reference to which the servitude was not released, for the right of way to be made use of; but if insufficient space remains for this purpose, then, both estates should be freed; one on account of the purchase, the other because a right of way cannot be created over the space which remains.

If, however, the right of way was so established that the party was at liberty to walk or drive over any portion of the estate that he chose; and there was nothing to prevent his changing his direction from time to time, and afterwards the estate was divided; if he could walk and drive equally over any portion that he chose, then we must consider the case just as if, in the beginning, two servitudes had been imposed on both estates in such a way that one could be retained and the other lost by want of use. I know perfectly well that, under these circumstances, the right of one of the parties would be impaired by the act of the other, since, formerly it would have been sufficient if the party had walked or driven over part of the land

to enable him to retain the same right over the rest of it; but the party entitled to the right of way secured the advantage of being able to walk or drive over two roads equally; that is, over two roads each eight feet wide where straight and sixteen feet where curved.

7. *Paulus, On Plautius, Book XIII*.

If the right to conduct water is granted in such a way that this can only be done during the summer, or for one month, the question arises how it may be lost by want of use; because there is no continuous term during which the party could use it but did not do so? Therefore, if anyone has the use of water for alternate years or alternate months, the right is lost by lapse of double the time prescribed by law; and the same rule applies with reference to a right of way. If, however, the party has a right which he can make use of on alternate days, or only by day, or only by night, this will be lost by the lapse of time established by law, because it is but a single servitude; for Servius says that if he has a servitude which he can make use of every other hour, or only for one hour each day, he will lose the servitude by not using it, because what he has can be made use of every day.

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

If I have the right to allow the water from my roof to fall on your land, and I permit you to build there, I lose my right to allow the water to fall. In like manner, if I have a right of way over your land, and I permit you to build anything on the place over which I have the right of way, I lose it.

(1) A person who transfers a portion of a roadway to which he has a right, is considered to be using the whole of it.

9. *Javolenus, On Plautius, Book III*.

Where water flows into a part of a canal, even though if it does not reach the extreme end of the same, all parts of said canal are held to be used.

10. *Paulus, On Plautius, Book XV*.

Where I and my ward hold land in common, even though we both do not make use of a right of way attached to the same, I retain the right of way on account of the benefit to the ward.

(1) Where a party has a right to make use of water at night, but only uses it during the day for the period established by law for the loss of a servitude, he loses the right to make use of it at night, because he failed to exercise his privilege. The same rule applies to a party who has a right to use an aqueduct during certain hours, and makes use of it at others, and not during any part of the hours which are mentioned.

11. *Marcellus, Digest, Book IV*.

Where a party who was entitled to a right of way or a right to drive, provided he made use of vehicles of a certain kind, used one of another kind; let us consider whether he has not lost his servitude, and whether the case is not different where a party has been transporting a heavier load than he had a right to do; for the latter may be held to have made an excessive use of his right of way rather than to have done so wrongfully; just as if he had used a wider road, or had driven more beasts of burden than he should have done, or had obtained water from some ether source. Therefore, in all these instances, the servitude is not lost, but the party is not permitted to have as a servitude more than is included in the contract.

(1) Where land was left as a legacy under a condition, and the heir imposed certain servitudes upon it; if the condition of the legacy is complied with, the servitude will be extinguished. Let us consider whether if they had been acquired by the land, they would follow the legacy for the benefit of the legatee, and the better opinion is that they would.

12. *Celsus, Digest, Book XXIII*.

Where a party in good faith purchases land which did not belong to the vendor, and uses a right of way which is attached to the land, the right will be retained; and this also will be the

case even if he is a possessor by sufferance, or, after the owner has been ejected by force; for where land is invested with a certain character so that it is held in possession in that condition, the right is not lost; and it does not make any difference whether or not the party in possession, who holds it as it is, does so legally or not. Wherefore, it may be stated even more positively, that if water flows through a channel of itself, the right of conducting it there is retained; which opinion was very properly held by Sabinus, and is mentioned in Neratius in the Fourth Book of Parchments.

13. *Marcellus, Digest, Book XVII.*

Where a party who owns an estate entitled to a right of way over neighboring land sells a portion of the same adjoining the servient estate, but does not impose the servitude, and before the prescribed time by which a servitude is lost has elapsed, again acquires the portion which he sold, he will be entitled to the servitude which his neighbor owed.

14. *Javolenus, On Cassius, Book X.*

Where a place subject to a right of way or a right to walk or drive is overflowed by a river, and before the time established for the loss of the servitude has elapsed, the land is restored by a deposit of alluvium, the servitude is also restored to its former condition. If, however, so much time should elapse that the servitude is lost, the owner of the land can be compelled to renew it.

(1) Where a highway is destroyed by the overflow of a river, or by the destruction of a building, the nearest neighbor must furnish a roadway.

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

Where I am entitled to a servitude over several tracts of land, and I acquire one of the tracts situated between two others, I think that the servitude remains, for a servitude is merged only when the party to whom it belongs cannot make use of it; but where he has acquired land between two other tracts, it may be held that he is entitled to a right of way through the first and last of these.

16. *Proculus, Epistles, Book I.*

Several persons by reason of a right were accustomed to conduct through the same canal water which had its source on the land of a neighbor, in such a way that each one, on a certain day allotted to him, conducted the water from its source through a ditch which was held in common, and then through one of his own, each succeeding the other who was immediately above him; and one of them failed to conduct any water during the time established by law for the loss of a servitude. I think that he lost the right to conduct the water, for it was not exercised by the others who did conduct it, and this right belonged to each one of the parties as his own, and could not be exercised by another.

But where a water-course was attached to land belonging to several parties, it could have been used by one of them for the benefit of all those by whom the land was held in common.

Again, where one of the parties entitled to a right of conducting water, and who did conduct it through the same channel loses the right to do so by failure to use his privilege, no right for this reason will accrue to the others who used the channel; and the benefit of the right which was lost as to the share of one party by non-user will belong to him through whose land was traversed by the water-course, and he would enjoy freedom from this much of the servitude.

17. *Pomponius, Various Passages, Book XI.*

Labeo says that if anyone who has a right to draw water should, during the time by the lapse of which a servitude is lost, go to a spring but not draw any water, he will lose the right of way also.

18. *Paulus, On Sabinus, Book XV.*

Where anyone uses other water than that which is agreed upon at the time when the servitude

was imposed, the servitude is lost.

(1) The time during which the last owner of the land to which a servitude is attached did not use the water is counted against the party who succeeds to his place. If you have the right to insert a beam into an adjacent house, and your neighbor has not built it within the time prescribed by law, and therefore you are unable to insert it, you do not, for that reason, lose your right; because your neighbor cannot be considered to have acquired by usucaption freedom from the servitude to which his house was subject, since he never interrupted the use of your right.

19. *Pomponius, On Sabinus, Book XXXII.*

If, when selling a portion of my land, I provide in the contract that I shall have a right to conduct water over that portion to the remainder of my premises, and the time prescribed by law elapses before I excavate a ditch, I do not lose any right, as there is no place for the water to flow, and my right remains unimpaired; but if I dug the ditch and did not use it, I would lose my right.

(1) If I bequeath to you a right of way over my land, and, my estate having been entered upon, you should, for the time fixed by law for the loss of a servitude, remain ignorant that this right had been left to you; you will lose the right of way by failure to make use of it. But if, before the time had expired, you sell your land without having ascertained that the servitude had been bequeathed to you, the right of way will belong to the purchaser, if he should make use of it for the remaining time, because, in fact it had already commenced to be yours, and it might happen that you would never have the right even to reject the legacy, as the land would not belong to you.

20. *Scaevola, Rules, Book I.*

A servitude is retained by use when it is made use of by the party entitled to it or who is in possession of the same, or by his hired servant, his guest, his physician, or anyone who comes to pay him a visit, or his tenant, or an usufructuary:

21. *Paulus, Sentences, Book V.*

Even though the usufructuary should enjoy it in his own name;

22. *Scaevola, Rules, Book I.*

In fine, whoever makes use of the right of way just as if he is entitled to do so,

23. *Paulus, Sentences, Book V.*

Whether he uses it in order to approach our land or to leave it,

24. *Scaevola, Rules, Book I.*

Even though he may be a possessor in bad faith, the servitude will be retained.

25. *Paulus, Sentences, Book V.*

A party is not held to use a servitude except when he believes that he is exercising a right which belongs to him; and therefore where anyone makes use of it as a highway or as a servitude belonging to another, he will not be entitled to an interdict or to any other legal proceeding.

THE DIGEST OR PANDECTS.

BOOK IX.

TITLE I.

CONCERNING THE COMMISSION OF DAMAGE BY A QUADRUPED.

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

Where a quadruped is said to have committed damage, an action which has come down from a Law of the Twelve Tables may be brought; which Law prescribes that either whatever caused the damage must be given up, that is, that the animal that committed it shall be surrendered, or an amount of money equivalent to the damage shall be paid.

(1) The term "*noxia*" means the offence itself.

(2) This action has reference to every kind of quadruped.

(3) The prætor says "*pauperiem fecisse*", which signifies the damage caused without wrong by the animal which commits it, for an animal cannot be guilty of wrong in law, because it is deficient in reason.

(4) Therefore, as Servius states, this action is available where an animal commits damage after its ferocity has been aroused; for example, where a horse which has the habit of kicking, kicks, or an ox which is accustomed to butt, does so; or a mule commits damage by reason of extreme savageness. But if an animal should upset a load on anyone on account of the inequality of the ground, or the negligence of the driver, or because the animal was overloaded; this action will not lie, but proceedings must be instituted for wrongful injury.

(5) Where, however, a dog, while he is being led by someone, breaks away on account of his viciousness, and inflicts injury upon another; then if he could have been held more securely by some one else, or if the party should not have led him through that place, this action will not lie, and the party who had charge of the dog will be liable.

(6) Moreover, this action will not lie if the savage animal causes any damage through the instigation of another.

(7) And, generally speaking, this action can be brought whenever a savage animal does any damage which is contrary to its nature, and, therefore, if a horse irritated by pain, kicks, this action will not lie; but the party who struck or wounded the horse will be liable rather to an action *in factum*, than under the *Lex Aquilia*, for no other reason than that the party did not commit the injury with his own body. But where anyone caresses a horse, or pats him, and he is kicked by it, there will be ground for this action.

(8) Where one animal provokes another and causes it to commit some damage, the action must be brought with reference to the one that caused the provocation.

(9) This action is available whether the animal committed the damage with its own body or through something else with which it was

in contact; as for instance, where an ox bruises someone by means of a wagon or by anything else that is upset.

(10) This action will not be available in the case of wild beasts, on account of their natural ferocity; and therefore if a bear should escape and commit damage, its former owner cannot be sued, because when the animal escaped he ceased to be the owner; and therefore, even if I should kill it, the carcass will be mine.

(11) Where two rams or two bulls fight and one kills the other, Quintus Mucius makes a distinction; for he holds that the action will not lie if the one that was the aggressor is killed, but if the one not guilty of the provocation is killed, the action may be brought; and therefore the owner must either pay the damage or surrender the animal in lieu thereof.

(12) Also, in the case of quadrupeds, the offence follows the animal; and this action can be brought against the party to whom the animal belongs, and not against him to whom it belonged when it committed the damage.

(13) It is evident that if the animal should die before issue is joined, the right of action will be extinguished.

(14) To surrender the animal by way of reparation is to give it up while it is alive. If it belongs to several parties, an action for damages can be brought against them individually, just as in case of a slave.

(15) Sometimes, however, the owner will not be sued to compel him to give up the animal by way of reparation, but an action will be brought against him for the entire amount; as for instance, where having been asked in court whether the animal belongs to him he answers that it does not, and if it should be proved that it was his, judgment shall be rendered against him for the entire amount.

(16) If the animal should be killed by anyone after issue has been joined, since an action will lie against the owner under the *Lex Aquilia,* consideration of the *Lex Aquilia* will be taken in court, because the owner has lost the power to surrender the animal by way of reparation; and therefore, in the case which has been stated, he must tender the estimated amount of damages, unless he is ready to assign his right of action against him who killed the animal.

(17) There is no doubt whatever that this action will pass to an heir and the other successor of the party injured; and also that it can be brought against heirs and other successors, not by the right of succession but on the ground of ownership.

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

This action will lie, not only in favor of the owner of the damaged property, but also in favor of any party in interest; as for instance, of one to whom the property was loaned, and also of a fuller, because those who are liable are held to have sustained damage.

(1) Where anyone who is trying to escape from another, for example, from a magistrate, betakes himself to a neighboring shop and is bitten there by a ferocious dog, certain authorities hold that he has no right of action on account of the dog; but that he would have one if the dog was loose.

3. *Gaius, On the Provincial Edict, Book VII*.

There is no doubt that an action can be brought under this law in behalf of persons who are free; as, for instance, where an animal wounds the head of a family, or the son of a family, provided no account is taken of disfigurement, since anyone who is free does not admit of appraisement; but account may be taken of the expenses incurred for the cure of the injury and of the loss of labor which the party could not perform for the reason that he was disabled.

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

An equitable action will be available under these circumstances where the damage was committed, not by a quadruped but by some other animal.

5. *Alfenus, Digest, Book II*.

While a groom was leading a horse to the stable of an inn, the horse sniffed at a mule, and the mule kicked and broke the groom's leg. An opinion was requested whether suit could be brought against the owner of the mule, on the ground that it had caused the injury, and I answered that it could.

TITLE II.

ON THE LEX AQUILIA.

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

The *Lex Aquilia* annulled all laws previously enacted with reference to the reparation of unlawful damage, whether these were the Twelve Tables or any others; which laws it is not necessary to specify at present.

(1) The *Lex Aquilia* is a plebiscite; whose enactment Aquilius, a tribune of the people, proposed to the populace.

2. *Gaius, On the Provincial Edict, Book VII.*

It is provided by the first section of the *Lex Aquilia* that, "Where anyone unlawfully kills a male or female slave belonging to another, or a quadruped included in the class of cattle, let him be required to pay a sum equal to the greatest value that the same was worth during the past year".

(1) And then the law further provides that, "An action for double damages may be brought against a person who makes a denial".

(2) It therefore appears that the law places in the same category with slaves animals which are included under the head of cattle, and are kept in herds, as, for instance, sheep, goats, oxen, horses, mules, and asses. The question arises whether hogs are included under the designation of cattle, and it is very properly decided by Labeo that they are. Dogs, however, do not come under this head; and wild beasts are far from being included, as for instance, bears, lions, and panthers. Elephants and camels are, as it were, mixed, for they perform the labor of beasts of burden, and yet their nature is wild, and therefore they must be included in the first Section.

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

Where a male or a female slave has been unlawfully killed, the *Lex Aquilia* is applicable. It is added with reason that it must be unlawfully killed, as it is not sufficient for it to be merely killed, but this must be done in violation of law.

4. *Gaius, On the Provincial Edict, Book VII.*

Therefore, if I kill your slave who is a thief and is attacking me at the time, I shall be free from liability, "For natural reason permits a man to protect himself from danger".

(1) The Law of the Twelve Tables permits anyone to kill a thief who is caught at night, provided, however, that he gives warning by an outcry; and it permits him to kill the thief in the day-time, if he is caught and defends himself with a weapon, provided always, that he calls others to witness with an outcry.

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

Where, however, anyone kills another who is attacking him with a weapon, he is not held to have killed him unlawfully; and where anyone kills a thief through fear of death, there is no doubt that he is not liable under the *Lex Aquilia*. But if he is able to seize him, and prefers to kill him, the better opinion is that he commits an unlawful act, and therefore he will also be liable under the *Lex Cornelia*.

(1) We must here understand the term "injury" to mean not some insult, as we do with reference to an action for injury, but something done illegally, that is to say contrary to the law; for instance, where anyone kills by negligence, and hence sometimes both actions can be brought, namely, that under the *Lex Aquilia*, and that for injury; but, in this case there will be two assessments, one for damage, and the other for insult, consequently, we must here understand the term "injury" to signify damage committed through negligence, even by a party who did not intend to do wrong.

(2) Therefore we ask whether an action under the *Lex Aquilia* will lie where an insane person causes damage? Pegasus denies that it will, for how can anyone be negligent who is not in his right mind? This is perfectly true. Hence an action under the *Lex Aquilia* will not lie; just as where an animal causes the damage, or where a tile falls from a roof.

Again, if a child causes any damage the same rule applies. If, however, a boy who has not

reached puberty causes it, Labeo says that he is liable under the *Lex Aquilia*, because he would be liable for theft; and I think this opinion is correct, if he is capable of committing a breach of the law.

(3) Where a teacher wounds or kills a slave while instructing him, will he be liable under the *Lex Aquilia* on the ground that he committed unlawful damage? Julianus says that a person was held liable under the *Lex Aquilia*, who blinded a pupil in one eye while instructing him; and much more would he have been liable, if he had killed him. He supposes the following case. A shoemaker, while teaching his trade to a boy who was freeborn and the son of a family, and who did not properly perform the task which he had given him, struck him on the neck with a last, and the boy's eye was destroyed. Julianus says that, in this instance, an action for injury will not lie because he inflicted the blow, not for the purpose of causing him injury, but of warning and teaching him. Still, he is in doubt as to whether an action on a contract will lie, because only moderate punishment is conceded to a person who imparts instruction. I do not doubt, however, that an action can be brought under the *Lex Aquilia;*

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

As extreme severity on the part of an instructor is attributed to negligence.

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

By this action the father will obtain damages to the amount of the value of the services of his son which he lost on account of the destruction of his eye, as well as the expenses he incurred for his medical treatment.

(1) We must understand the term "kill" to mean where this was done either with a sword, a club, or some other weapon, or with the hands if strangulation was used, or with a kick, or by striking him on the head, or in any other way whatsoever.

(2) The *Lex Aquilia* will apply where anyone who has been too heavily laden throws down his load and kills a slave; for it was in his power not to be overloaded in this manner. Pegasus says that if anyone should slip and crush with his load a slave belonging to another, he will be liable under the *Lex Aquilia*, if he loaded himself more heavily than he should have done, or walked carelessly over a slippery place.

(3) In like manner, where anyone injures another because of someone pushing him, Proculus holds that neither he who gave the push is liable, because he did not kill him, nor he who was pushed either, because he did not commit wrongful injury; according to which opinion an action *in factum* should be granted against the party who gave the push.

(4) Where anyone in a wrestling match or in a wrestling and boxing contest or where two boxers are engaged, kills another; and he does so in a public exhibition, the *Lex Aquilia* will not apply, because the damage must be considered to have been committed for the sake of renown and courage, and not with the intent to cause injury. This, however, is not applicable to the case of a slave, since freeborn persons are accustomed to take part in such contests, but it does apply where the son of a family is wounded. It is evident that if one party inflicts a wound while the other was retiring, the *Lex Aquilia* will be applicable; or if he kills a slave where there is no contest, unless this is done at the instigation of the master; for then the *Lex Aquilia* will not apply.

(5) Where anyone lightly strikes a slave who is sick, and he dies; Labeo justly holds that he will be liable under the *Lex Aquilia*, for a blow that is mortal to one man, often will not be so to another.

(6) Celsus says that it makes a great deal of difference whether the party actually kills, or provides the cause of death, as he who provides the cause of death is not liable under the *Lex Aquilia*, but is to an action *in factum*. With reference to this, he cites the case of a party who administered poison as medicine, and who he says provided the cause of death; just as one who places a sword in the hands of an insane person, for the latter would not be liable under

the *Lex Aquilia*, but would be to an action *in factum*.

(7) But where anyone throws another from a bridge, whether he is killed by the blow which he received, or is submerged and drowned, or, overcome by the force of the current, dies exhausted; the culprit, Celsus says, is liable under the *Lex Aquilia*, just as if he had dashed a boy against a rock.

Proculus holds that if a physician should operate upon a slave unskillfully, an action will lie either on the contract, or under the *Lex Aquilia*.

8. *Gaius, On the Provincial Edict, Book VII*.

The same rule is applicable where he wrongfully makes use of a drug; but if a surgeon operates properly, and does not employ any further curative measures, he will not be free from responsibility, but is considered to be guilty of negligence.

(1) Moreover, where a muleteer, through want of skill, is unable to restrain the course of his mules, and they crush a slave belonging to another, it is ordinarily said that the driver is liable on account of negligence. The same view is held if he cannot control his mules because of want of strength; nor does it seem to be unjust that want of strength should furnish ground for negligence, because no one ought to undertake anything which he knows, or ought to know, will be dangerous to others on account of his weakness.

The law is the same in the case of a person who, through want of skill or want of strength, cannot manage the horse on which he is riding.

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

Moreover, where a midwife administers a drug to a woman and she dies in consequence, Labeo makes a distinction, namely: that if she administered it with her own hands she is held to have killed the woman, but if she gave it to the latter in order that she might take it, an action *in factum* should be granted, and this opinion is correct; for she rather provided the cause of death, than actually killed the woman.

(1) Where anyone, either by force of persuasion, administers a drug to another, either by the mouth, or by injection, or anoints him with some poisonous substance; he will be liable under the *Lex Aquilia*, just as the midwife who administers a drug is liable.

(2) Where anyone kills a slave by starvation, Neratius *says* he is liable to an action *in factum*.

(3) If my slave is riding on horseback, and by frightening the horse you cause the slave to be thrown into a river, and he loses his life in consequence, Ofilius writes that an action *in factiim* should be granted; just as if my slave had been drawn into ambush by one man and killed by another.

(4) Again, where a slave is killed by parties who are practicing with javelins for amusement, the *Lex Aquilia* is applicable; but where others are practicing with javelins, and a slave crosses the place the *Lex Aquilia* will not apply, because he should not have rashly crossed the field where this practice was going on; but still, if anyone intentionally casts a javelin at him, he will be liable under the *Lex Aquilia*.

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

For a dangerous game should be classed as an act of negligence,

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

Mela also says that if, while several persons are playing ball, the ball having been struck too violently should fall upon the hand of a barber who is shaving a slave at the time, in such a way that the throat of the latter is cut by the razor; the party responsible for negligence is liable under the *Lex Aquilia*. Proculus thinks that the barber is to blame; and, indeed, if he had the habit of shaving persons in a place where it is customary to play ball, or where there was much travel, he is in a certain degree responsible; although it may not improperly be held that

where anyone seats himself in a barber's chair in a dangerous place, he has only himself to blame.

(1) Where one party holds a slave and another kills him, the party who held him is liable to an action *in factum*, since he provided the cause of death.

(2) But where several persons struck the slave, let us consider whether all of them will be liable, just as if they had all killed him? And, if it is known by whose blow he lost his life, the former will be liable for having killed him; but if this is not known, Julianus says all of them can be held liable for his death, and if proceedings are instituted against only one, the others cannot be discharged; for under the *Lex Aquilia*, where one man pays he does not release another, as the action is a penal one.

(3) Celsus states that where anyone strikes a slave a mortal blow, and another deprives him of life, the former will not be held liable for having killed him, but only for having wounded him, for the reason that he died from a wound inflicted by another, but the latter will be liable because he killed him; and this opinion is held by Marcellus, and is the more reasonable one.

(4) It was decided by the ancient authorities that where several persons throw down a beam which crushes a slave, all are equally liable to an action under the *Lex Aquilia*.

(5) Proculus also gave it as his opinion that a party who provoked a dog, and caused him to bite some one, would be liable to an action under the *Lex Aquilia*, even though he did not have hold of the dog. Julianus, however, says that, in this instance, he is liable under the *Lex Aquilia* only if he held the dog, and caused him to bite the other party; but if he did not hold him, an action *in factum* should be brought against him.

(6) An action under the *Lex Aquilia* can be brought by the master, that is, by the owner.

(7) Where wrongful damage is done to a slave that I was about to return to you on delivery of the price, Julianus says that I have a right to an action under the *Lex Aquilia*, and that when I begin to return the slave I must assign it to you.

(8) But if the slave is serving in good faith some person who is not his owner, will the latter have a right of action under the *Lex Aquilia*? The better opinion is that an action *in factum* should be granted.

(9) Julianus says that where clothing is loaned to anyone and it is torn, the latter cannot bring an action under the *Lex Aquilia*, but the owner of the clothing can do so.

(10) Julianus discussed the point whether an usufructuary or a party entitled to the use of property has a right of action under the *Lex Aquilia?* I think the better opinion is that in a case of this kind, a prætorian action should be granted.

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

Where the mere owner of property wounds or kills a slave in whom I have the usufruct, an action should be granted me, as under the *Lex Aquilia,* for damages in proportion to the amount of my usufruct; and that portion of the year which elapsed previous to my usufruct must also be included in the assessment of said damages.

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

A freeman is entitled to a prætorian action, based on the *Lex Aquilia*, in his own name; but he cannot bring the direct action, because no one can be held to be the owner of his own limbs. A master, however, can bring an action on account of a fugitive slave.

(1) Julianus says that if a freeman serves me in good faith as a slave, he himself is liable to me under the *Lex Aquilia*.

(2) Where a slave belonging to an estate is killed, the question arises who can bring suit under the *Lex Aquilia*, since there is no owner of said slave? Celsus says, that it is the intention of the law that all damages should be made good to the owner, and therefore the estate will be

considered the owner; hence when the estate is entered upon, the heir can institute proceedings.

(3) Where a slave who was bequeathed is killed after the estate has been entered upon, the right of action under the *Lex Aquilia* belongs to the legatee, unless he did not accept the legacy until after the death of the slave; because if he rejected it, Julianus says that the result will be that the right of action must be said to belong to the heir.

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

But where the heir himself kills the slave, it has been established that an action against him must be granted to the legatee.

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

In consequence of what was written it must be stated that, if the slave who was bequeathed is killed before the estate is entered upon, the right of action under the *Lex Aquilia* must remain with the heir, on account of having been acquired through the estate. If, however, the slave was wounded before the estate was entered upon, then, in fact, the right of action remained as a portion of the assets of the estate, but the heir is obliged to assign it to the legatee.

(1) Where a slave is mortally wounded and afterwards loses his life through the fall of a building, or through shipwreck, or through some blow, sooner than he otherwise would have done; an action cannot be brought on the ground of his death, but only for wounding him. If, however, he was manumitted or sold, and afterwards died of the wound, Julianus says an action can be brought as for having killed him. This difference exists because he was killed by you at the time you wounded him, although this only became apparent when he died; but in the former instances the fall of the building did not permit it to appear whether he was killed or not. Where a slave is mortally wounded and you order him to be free, and appoint him your heir, and he then dies, his heir cannot bring suit under the *Lex Aquilia.*

16. *Marcianus, Rules, Book IV.*

Because the affair has come to such a pass that the right to bring suit could not have originally existed.

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

Where an owner kills his own slave, he will be liable to an action *in factum* brought by a *bona-fide* possessor or a party who held the slave in pledge.

(1) (If Stichus has been bequeathed to two persons conjointly, and having been killed is rejected by one of the legatees; I think that one legatee alone can bring suit under the *Lex Aquilia*, because the ownership seems to have vested in him by retroactive effect.)

18. *Paulus, On Sabinus, Book X.*

Where, however, a party who has received a slave in pledge kills or wounds him, suit can be brought against him under the *Lex Aquilia* and also on the pledge, but the plaintiff must be content with one or other of these actions.

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

But where anyone kills a slave held in common he is liable under the *Lex Aquilia*, so Celsus says; and the same rule applies if he wounds him:

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

That is, with reference to the share for which he brings suit as plaintiff.

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

The law says: "The greatest value of the slave during that past year". This clause refers to an assessment of the amount of the damage which was inflicted.

(1) The year is to be calculated back from the day on which the slave was killed; but if he was only mortally wounded and died after a long interval had elapsed, then, according to Julianus, we must compute the year from the day on which he was wounded; although Celsus holds a different opinion.

(2) Must we, however, only appraise the value of the body of the slave when he was killed, or shall we not rather estimate what our interest was in his not being killed? The present rule is that an estimate shall be made of what our interest was worth.

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

Hence if you have killed a slave whom I had contracted to deliver to some party under a penalty, the benefit to be derived by me must be considered in the hearing of the case.

(1) The personal qualities of the slave must also be taken into consideration in making the estimate, as for instance, where someone kills a slave who belonged to a troop of actors or singers; or one of twins; or one of a team of four horses; or the male or female of a pair of mules; for, under such circumstances, not only should an estimate be made of the value of the animal that is destroyed, but the depreciation of those that remain must also be taken into account.

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

Hence Neratius states that if a slave who has been appointed an heir is killed, the value of the estate must also be taken into consideration.

(1) Julianus says that if a slave who had been liberated and appointed heir is killed, neither the substituted heir nor the heir at law can recover the appraised value of the estate by an action under the *Lex Aquilia*, as the slave had not yet obtained it; and this opinion is correct. Therefore, the sole estimate which can be made is that of the value of the slave, since this is held to be the only thing in which the substitute is interested; but I think that even the estimate of his value should not be made, because if he had been the heir he would also have been free.

(2) Julianus further says that if I am appointed an heir under the condition that I will manumit Stichus, and Stichus is killed after the death of the testator, the appraised amount that I will be entitled to will likewise include the value of the estate; for the condition was not fulfilled on account of the death of the slave; but if the slave was killed during the lifetime of the testator, the estimated value of the estate cannot be considered, because the greatest value of the slave during the preceding year was retroactively taken into account.

(3) Julianus also says that the appraisement of the value of the slave who was killed can only be made with reference to the time when he was worth the most during that year; and, therefore, if the thumb of a valuable artist was cut off, and within a year of the time when this was done he was killed; his owner can bring an action under the *Lex Aquilia*, and his value must be estimated at the amount he was worth before he lost his skill along with his thumb.

(4) Where, however, a slave is killed who had committed great frauds in my accounts, and whom I had intended to put to torture in order to extract from him the names of his accomplices in the frauds, Labeo very properly holds that the value of the slave should be estimated at the amount of the interest I had in detecting the frauds committed by him, and not on the basis of the loss caused by the slave himself.

(5) If, however, a well-behaved slave should change his habits, and be killed within a year; the estimate of his value should be made upon the basis of what he was worth before the change took place.

(6) In short, it must be held that whatever advantage rendered the slave more valuable at any time within the year during which he was killed, should be included in the appraisement of his actual value.

(7) Where an infant slave who is not yet a year old is killed, the better opinion is that the

appraisement of his value should be referred to that part of the year during which he was living.

(8) It is established that this action is granted to the heir and other successors; but it will not be granted against the heir and the successors of the other party, as it is a penal one; unless the said heir should have become more wealthy through the damage which was caused.

(9) Where a slave is killed through malice, it is established that his owner can also bring suit under the *Lex Cornelia*, and if he proceeds under the *Lex Aquilia*, his suit under the *Lex Cornelia* will not be barred.

(10) This action can be brought for civil damages where the party confesses his guilt, and for double damages where he denies it.

(11) Where anyone confesses that he killed a slave who is still living, and afterwards is prepared to show that the said slave is still alive; Julianus says that the *Lex Aquilia* does not apply, even though the party confesses that he killed him; because where the suit is based on a confession the plaintiff is not required to prove that the party who killed the slave was the defendant, but it is essential that the slave should have been killed by somebody.

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

This point is more clearly shown where a slave is said to be wounded; but if the defendant should confess that he has wounded him, and this was not the case, upon what wound are we to base the appraisement, or to what date are we to refer?

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

Hence, if the slave was not killed, but died, the better opinion is that the defendant should not be liable for the dead slave, even though he may have confessed that he killed him.

(1) Where an agent, a guardian, a curator, or anyone else confesses that his absent principal wounded a slave, a prætorian action based upon the confession should be granted against said party.

(2) It should be noted that in this action which is granted against the person making a confession, the judge is appointed not for the purpose of rendering a decision, but to assess the damages; for no trial can take place for the conviction of persons who confess.

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

Suppose, for example, that the person against whom the action is brought should confess that he killed the slave, and be prepared to pay his appraised value, and his adversary makes a very high estimate of the same.

27. *Ulpianus, On the Edict, Book XVIII*.

Where one slave carries off another belonging to a different owner, and kills him, both Julianus and Celsus hold that an action based on theft as well as one on wrongful damage will lie.

(1) Where a slave is owned in common, that is to say, belongs to you and me, and he kills another slave belonging to me, a suit based on the *Lex Aquilia* can be brought against you, if the slave acted with your consent; and Proculus also held this opinion, as Urseius asserts. But if he did not commit the act with your consent, a noxal action will not lie, lest it might be in the power of the slave to belong to you alone. I think this to be correct.

(2) Moreover, if a slave who is held in common by you and me is killed by a slave belonging to Titius, Celsus says that if one of the owners brings suit, he will either obtain a proportionate amount of the damages assessed, or the slave must be absolutely surrendered by way of reparation, because this is a matter which is not susceptible of division.

(3) The owner is liable on account of the slave who committed the homicide, and he whom he is serving as a slave in good faith is not liable; but the question arises whether a party whose

slave is a fugitive, is liable on his account under the *Lex Aquilia*? Julianus says that he is liable. This is perfectly true, and Marcellus also holds the same opinion.

(4) The second Section of this law has fallen into desuetude.

(5) In the third Section the *Lex Aquilia* says, "If anyone damages the property of another except by killing slaves or cattle, whatever the value of the property burned, broken to pieces, or injured, was, within the preceding thirty days; the party must be compelled to pay the amount to the owner of the same".

(6) Hence, if a man should not kill a slave or an animal but should burn, break, or injure any other property, proceedings could undoubtedly be taken under this provision of the law. Therefore, if you throw a torch at my slave and burn him, you will be liable to me.

(7) Moreover, if you set fire to my trees, or to my farmhouse, I am entitled to an action under the *Lex Aquilia*.

(8) If anyone should intend to burn my house, and the fire spreads to the house of my neighbor, he will be liable also to the neighbor under the *Lex Aquilia;* and he will be not less liable to the tenants, on account of the burning of their personal property.

(9) If the slave of a tenant who has charge of a furnace goes to sleep in front of it, and the house burns down; Neratius says that where an action is brought on the lease the tenant must make good the loss, if he was negligent in the selection of persons in his service; but where one person kindled the fire in the furnace, and another was negligent in looking after it, will he who kindled the fire be liable? He who had charge of the fire did nothing, and he who kindled it properly was blameless; what then is the conclusion? I think that a prætorian action will lie both against him who fell asleep before the furnace and against him who neglected to attend to it, for no one should say with reference to the one who went to sleep that his failing was only human and natural, since he should either have extinguished the fire, or have protected it in such a way that it could not spread.

(10) If you have an oven against a party-wall will you be liable for wrongful damage? Proculus says that no action can be brought, because none will lie against a party who has a hearth. Therefore, I think it is more just that an action should be granted *in factum*, of course, if the wall is burned; but if you have not yet caused me any damage, but your fire is in such a place that I am afraid that you will do so, I think that a bond providing against threatened injury will be sufficient.

(11) Proculus says that where the slaves of a tenant burn down a farm-house, the tenant will be liable either under the lease or under the *Lex Aquilia*, so that he can surrender the slaves by way of reparation; and where the case has been decided under one of the actions, no further proceedings can be instituted under the other. This is understood only to apply where the tenant was not guilty of negligence; but if he owned slaves who were in the habit of committing criminal acts, he will be liable for wrongful damage for having slaves of this kind.

He states that the same rule must be observed with reference to persons who lodge in a building; and this opinion is reasonable.

(12) If my bees fly away to yours, and you burn them, Celsus says that I have a right of action against you under the *Lex Aquilia*.

(13) The law says "break to pieces". This word almost all ancient authorities understood to mean the same as "destroy".

(14) Therefore, Celsus makes the inquiry, if you sowed darnel or weeds in the wheat-field of another, the owner of the same can not only institute proceedings under the interdict *Quod vi aut clam*, (or if the land is leased, the tenant can do so) but he can also bring an action *in factum*; and if the tenant brings it he must give security that no other proceedings shall be instituted; this, of course, being done in order to prevent the owner from causing further annoyance, for it is one kind of damage to destroy or change something, for the purpose of

giving cause for a suit under the *Lex Aquilia*; and another, when, without changing the substance of the article itself, you mingle something with it, the separation of which would be troublesome.

(15) Celsus says, that it is evident that suit can be brought under the Aquilian Law where a party puts filth in wine, or spills it, or makes it sour, or spoils it in any other way; for both pouring it out and making it sour are embraced in the words "destroy".

(16) And he does not deny that "break to pieces", and "burn" are also included in the word "destroy"; but that there is nothing new where certain things are especially enumerated in the law, for it usually adds a general term including those specific things. This opinion is correct.

(17) We must, by all means, understand that the expression "break to pieces" is applicable where a party wounds a slave, or strikes him with a stick, or a strap, or with his fist, or with a weapon, or with anything else which would cut or raise a swelling upon the body of anyone, but only to the extent where wrongful damage is committed.

But where the act does not diminish the value of the slave or render him less useful, the *Lex Aquilia*, is not available, and an action for injury alone can be brought; for the *Lex Aquilia* only applies to such injuries as have caused loss. Therefore, if the value of the slave is not diminished, but expenses have been incurred to have him made well and sound again, it is held that I am damaged to that extent; and therefore an action can be brought under the *Lex Aquilia*.

(18) Where anyone tears, or soils the clothes of another, he is liable, just as if he had destroyed them.

(19) Moreover, if anyone throws my millet or wheat into a river, the action under the *Lex Aquilia* will be sufficient.

(20) Again, where anyone mixes sand or something else with my wheat, so that it will be difficult to separate it, proceedings can be brought against him just as if he had destroyed it.

(21) If anyone should knock coins out of my hand, Sabinus is of the opinion that an action for wrongful injury will lie, if they are lost in such a way that they cannot come into anyone's possession, as for instance, where they have fallen into a river, the sea, or a sewer; but where they come into someone's possession, proceedings must be instituted for theft caused by aid and advice. This was the opinion of the ancient authorities. Sabinus says that an action *in factum* can also be granted.

(22) If you strike a woman with your fist or a mare receives a blow from you, and a miscarriage results, Brutus says that you are liable under the *Lex Aquilia* for "breaking to pieces", as it were.

(23) And also, if anyone overloads a mule, and breaks one of its limbs, the *Lex Aquilia* will be available.

(24) Where anyone pierces the hull of a vessel loaded with merchandise, Viviannus says that an action will lie under the *Lex Aquilia* for "breaking to pieces", as it were.

(25) If a party picks olives that are not ripe, or reaps grain that is not mature, or gathers grapes that are green, he will be liable under the *Lex Aquilia;* but if the crops have reached maturity, the *Lex Aquilia* will not apply; for no wrong is committed, as the party has presented you with the expenses which would have been incurred by harvesting crops of this kind; if, however, he removes what has been gathered he will be liable for theft. Octavenus says with reference to grapes, "Unless he throws the grapes on the ground, so that they are scattered".

(26) The same writer states with reference to cutting wood, that if what is cut is immature, the party will be liable under the *Lex Aquilia;* but if he takes it away after it is mature, he will be liable for theft, as well as for cutting trees by stealth.

(27) Where you remove mature willows in such a way as not to injure the trunks of the trees,

the *Lex Aquilia* is not available.

(28) If anyone castrates a boy slave, and thereby renders him more valuable, Vivianus says that the *Lex Aquilia* does not apply, but that an action can be brought for injury, either under the Edict of the *Æ*diles, or for fourfold damages.

(29) If you entrust an artisan with a cup to be polished, and he breaks it through want of skill, he will be liable for wrongful damage; but if he does not break it through want of skill, but it had cracks which spoiled it, he will be excusable; and therefore artisans, when things of this description are entrusted to them, are generally accustomed to provide by an agreement that the work will not be at their risk; and this bars any right of action on the agreement, or under the *Lex Aquilia*.

(30) Where a husband gives loose pearls to his wife for her own use, and she perforates them without the consent or knowledge of her husband, in order that they may afterwards be worn upon a string, she will be liable under the *Lex Aquilia*, either after a divorce, or while she is still married.

(31) Where anyone breaks down or forces open the doors of my building, or demolishes the building itself, he is liable under the *Lex Aquilia*.

(32) Where anyone demolishes my aqueduct, although the materials of which it was composed are my property, still, because the land through which I bring the water is not mine, the better opinion is to say that a prætorian action should be granted.

(33) Where a stone falls from a wagon and destroys or breaks anything, it is held that the driver of the wagon is liable to an action under the *Lex Aquilia*, if he loaded the stones insecurely and for that reason they slipped off.

(34) Where anyone employs a slave to lead a mule, and places the mule in his care; and he ties the strap of the halter to his thumb, and the mule breaks loose and tears off the thumb of the slave, and then precipitates itself from a height; Mela says, that if a slave who was unskillful was hired as being skillful, an action can be brought against the owner of the slave on account of the mule which was destroyed, or disabled; but if the mule was excited by a blow, or by fright, the owner,

(that is to say, the owner of the mule as well as the owner of the slave) will be entitled to an action under the *Lex Aquilia*, against the person who frightened the mule. It seems to me, however, that even in a case where an action on contract will lie, one also can be brought under the *Lex Aquilia*.

(35) Moreover, if you entrust a vat full of wine to be repaired by a plasterer, and he breaks a hole in it so that the wine runs out, Labeo says that an action *in factum* will lie.

28. *Paulus, On Sabinus, Book X.*

Where persons dig pits for the purpose of catching bears or deer, and do this on the highway, and anything falls into them and is injured, they will be liable under the *Lex Aquilia;* but they will not be liable if they dug the pits in some other place where this is ordinarily done.

(1) This action, however, should only be brought where proper cause is shown; that is to say, where no notice was given, and the owner had no knowledge, and could not provide against the accident. And indeed, a great many instances of this kind are encountered, in which a plaintiff is barred if he could have avoided the danger;

29. *Ulpianus, On the Edict, Book XVIII.*

Just as if you set traps in a place where you have no right to set them, and the cattle of a neighbor are caught in them.

(1) If you cut off my roof which I have permitted to project over your house without any right; Proculus states that I am entitled to an action against you for wrongful damage, as you should have sued me, alleging that I had no right to have a projecting roof; and it is not just

that I should suffer damage through your cutting off my timbers.

A contrary rule is to be found in a Rescript of the Emperor Severus, who stated in said Rescript to a party through whose house an aqueduct was carried without any servitude existing, that he had a right to destroy it himself; and this seems reasonable, for the difference is that in one instance a man built the roof on land which belonged to him and in the other, the party built the aqueduct on the premises of someone else.

(2) If your ship collides with my boat and I am damaged, the question arises what action shall I be entitled to? Proculus says that if it was in the power of the sailors to prevent the accident, and it occurred through their negligence, an action can be brought against them under the *Lex Aquilia,* because it makes but little difference whether you cause damage by driving the ship at the boat, or by steering towards the ship, or inflict the injury with your own hands; as in all these ways I sustain damage through your agency, but where the ship ran against the boat on account of a broken rope, or because there was no one to steer it, an action cannot be brought against the owner.

(3) Labeo also says, that where a ship is impelled by the force of the wind against cables attached to the anchors of another ship, and the sailors cut the cables; and the ship cannot be extricated in any other way but by cutting the cables, no action should be granted.

Labeo and Proculus are of the same opinion with reference to the nets of fishermen in which a vessel belonging to others had become entangled; and it is evident that if this took place through the negligence of the sailors, an action under the *Lex Aquilia* should be brought. Where, however, suit is brought for wrongful damage to the nets, no estimate should be taken of the fish which were not caught on this account; since it is uncertain whether any would have been caught. The same rule is adopted in the case of hunters, and bird-catchers.

(4) If one ship collides with another approaching in the opposite direction, an action on the ground of wrongful damage will lie either against the steersman or the captain, so Alfenus says. Where, however, the ship was driven with too much force to be controlled, no action can be granted against the owner; still if the trouble occurred through the negligence of the sailors, I think that an action under the *Lex Aquilia* would be sufficient.

(5) Where anyone cuts a cable by which a vessel is secured, and the vessel is lost in consequence, an action *in factum* will lie.

(6) Under this Section of the law proceedings can be instituted by this action for the injury of any animals which are not classed as cattle, for instance, a dog; and the same rule will apply with respect to a wild boar, or lion, and other wild beasts and birds.

(7) Municipal magistrates who have committed wrongful damage can be held liable under the *Lex Aquilia;* for where any of them has taken cattle of yours in execution, and allows them to die of hunger, by not permitting you to give them food an action *in factum* should be granted. Moreover, where he thinks that he is levying an execution in accordance with law, but does not actually do so, and restores the property worn out and ruined, it is held that the *Lex Aquilia* will apply; and this, indeed, can also be stated where the execution was levied in compliance with the law. Where, however, a magistrate committed violence against a party who was resisting, he would not be liable under the *Lex Aquilia*, for when one took a slave in execution and the latter hanged himself, no action was granted.

(8) The words, "Whatever was the value during the last thirty days", although the greatest value is not expressly stated, still it is established that this should be understood.

30. *Paulus, On the Edict, Book XXII*.

Where anyone kills the slave of another who is caught in adultery he will not be liable under this law.

(1) Where a slave given by way of pledge was afterwards killed, an action will lie in favor of the debtor, whether the creditor is entitled to a prætorian action on account of his interest in

the slave, for the reason that the debtor is not solvent; or because he has lost his right of action by lapse of time, is a question. But it is unjust that the party should be liable to both the owner and the creditor, unless someone might hold that the debtor, in this instance, had not sustained any injury, since he had profited to the amount of the debt, and anything above that amount he could recover from the creditor; or, in the beginning, an action will be granted to the debtor for any amount in excess of the debt. Hence, in those instances in which an action should be granted to the creditor on account of the poverty of the debtor, or because he has lost his right of action, the creditor will be entitled to bring suit under the *Lex Aquilia* for the amount of the debt, and this will benefit the debtor to that extent; and an action under the *Lex Aquilia* will lie in favor of the debtor for the amount of legal damages over and above the debt.

(2) Where anyone consumes wine or grain belonging to another he is not held to have committed wrongful damage; and therefore a prætorian action should be granted.

(3) In the action which arises out of this Section, malice and negligence are punished. Therefore, where anyone sets fire to his stubble or thorns for the purpose of burning them, and the fire increases and spreads so as to injure the wheat or vines of another; we must ask whether this happened through his want of skill, or his negligence; for if he did this on a windy day he is guilty of negligence, as a person who affords an opportunity for the commission of damage is considered to have caused it; and he is equally guilty if he did not take precautions to prevent the fire from spreading. If, however, he took all necessary precautions, or a sudden, violent gust of wind caused the fire to spread, he is not guilty of negligence.

(4) Where a slave is wounded but not mortally, and dies from neglect, an action can be brought for wounding, but not for killing him.

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

Where a trimmer of trees throws down a branch, or a man working on an elevation kills a passer-by, he is only liable where he threw down the object in a public place, and did not give warning, that the accident might be avoided. Mucius, however, states that even if this happened on private property, an action could be brought for negligence; because it is negligence when provision was not made by taking such precautions as a diligent man would have done, or warning was only given when the danger could not have been avoided. On this principle it does not make much difference whether the party injured was traversing public or private ground, since it very frequently happens that many persons go through private ground. If there is no roadway there, the party is only liable for malice where he throws something down on anyone who is passing by; for he cannot be held accountable for negligence, as he would be unable to conjecture whether anyone is going to pass through that place or not.

32. *Gaius, On the Provincial Edict, Book VII.*

This question has been asked, namely: whether the same rule should be observed in an action for wrongful damage which is adopted by the proconsul in the case of theft committed by a number of slaves; (that is to say, whether the right to the collection of the penalty should not be granted with reference to every individual slave; but it will be sufficient for the amount to be made good which would have to be paid if a single freeman had committed the theft?) The better opinion seems to be that the same rule should be observed, and there is reason in this; for, as the principle which applies in an action for theft is that an owner should not be deprived of his entire body of slaves on account of one offence; the same principle should, in like manner, apply where an action is brought for wrongful damage, and the same kind of valuation should be made, especially since sometimes in an instance of this kind the offence is not of a serious character; for example, where the damage was committed through negligence and not through malice.

(1) Where the same person wounds a slave and then afterwards kills him, he is liable for both wounding and killing him; for there are two offences. It is otherwise where anyone in the same attack kills a slave by inflicting many wounds; for then only one action, that for killing

him, can be brought.

33. *Paulus, On Plautius, Book II.*

If you kill my slave, I do not think that my affection for him should be considered; as, for instance, if anyone should kill your natural son whom you would be willing to purchase at a high price if he belonged to someone else; but the question involved is what is he worth generally speaking? Sextus Pedius says that the price of property is not fixed by affection or by beneficial interest, but on general principles; so that a man who has possession of his natural son as a slave, is none the more wealthy because if someone else had possession of him he would be willing to purchase him for a considerable sum of money; and the party who has possession of the son of another has not property enough to be equal to what he could sell that son for to his father; for under the *Lex Aquilia*, we can recover damages, and we will be considered to have lost either what we could have obtained, or what we were compelled to pay out.

(1) An action *in factum* is granted with reference to damages which are not included in the *Lex Aquilia*.

34. *Marcellus, Digest, Book XXI.*

A party bequeathed Stichus to Titius and Seius, and while Seius was deliberating and after Titius had brought suit to recover the legacy, Stichus was killed, and then Seius rejected the legacy. In this instance Titius can bring an action just as if the legacy had been bequeathed to him alone.

35. *Ulpianus, On the Edict, Book XVIII.*

For the reason that the ownership is held to have accrued to him retroactively;

36. *Marcellus, Digest, Book XXI.*

For as where an heir is entitled to an action when a legatee rejects a legacy, just as if the slave had not been bequeathed; so Titius has a right of action, just as if the slave had been left to him alone.

(1) Where the owner of a slave, whom Titius mortally wounded, orders by his will that he shall be free and become his heir, and subsequently Mævius becomes the heir to the slave, Mævius will not be entitled to an action under the *Lex Aquilia* against Titius, according to the opinion of Sabinus, who held that the right of action was not transmitted to the heir where the deceased would not have been entitled to the right; but it would truly seem to be absurd that an heir should obtain damages to the value of the person killed, and whose heir he was. Where, however, the owner ordered that he should be free and also be his heir to a part of his estate, then, when he died, his co-heir can bring an action under the *Lex Aquilia*.

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

Where a freeman committed an injury with his own hands by order of another, an action under the *Lex Aquilia* can be brought against the party who gave the order; provided he had the right of commanding; but if he did not have it, proceedings must be instituted against the party who committed the act.

(1) Where a quadruped, on account of which a right of action exists against its owner because it has committed damage, is killed by another party against whom suit is then brought under the *Lex Aquilia*, the estimation of the value of said animal must be made, not with reference to what it is actually worth, but to the circumstances under which the right of action for damages exists; and the party who killed the animal must have judgment rendered against him in a suit under the *Lex Aquilia* to the amount of the interest the plaintiff had to settle the case through surrendering the animal by way of reparation, rather than by paying the damages which have been estimated.

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

If at the time when my slave whom you purchased in good faith is serving you, he is wounded by one of your slaves; it has been held that I have, in every instance, a right to institute proceedings against you under the *Lex Aquilia*.

39. *Pomponius, On Quintus Mucius, Book XVII.*

Quintus Mucius says that while a mare was pasturing on the land of another she lost her foal, when the owner of the land was driving her away; and the question was asked whether or not the owner of the mare could proceed under the *Lex Aquilia* against the party who had driven her away, because he had injured the mare by striking her? And it was held that if he struck her, or designedly drove her away with too much violence, he can bring suit.

(1) Pomponius. Even though anyone should find the cattle of another on his own land, he must drive them away in the same manner as he would his own; since, if he has sustained any damage on account of their being there he has a suitable right of action. Therefore, where anyone finds the cattle of another on his own premises, he cannot lawfully shut them up, nor should he drive them away in any other manner than if they were his own (as we stated above) but he must either drive them away without injuring them, or notify the owner to remove them.

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

Under the *Lex Aquilia*, if I allege that a note belonging to me, and in which it was stated that a sum of money was owing to me under a condition, has been defaced; and, in the meantime, I am able to prove this by witnesses who may be unable to testify at the time when the condition is fulfilled, and I state the facts in a few words in court and establish this to the satisfaction of the judge, I ought to succeed; but the payment of the sum for which judgment is rendered can only take place when the condition upon which the debt depended shall be complied with; and if it should fail, the judgment will have no force or effect.

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

Where anyone defaces a will, let us consider whether an action for wrongful damage will not lie? Marcellus states with some hesitation in the Fifth Book of the Digest, that the action cannot be brought; for he asks in what way can the amount of damages be ascertained? I made a note on Marcellus that this is indeed true with reference to the testator, because no estimate can be made of his interest in the matter; but with reference to the heir or legatees the case is different, since, so far as they are concerned, a will is almost the same as a written acknowledgment of a debt; and Marcellus also says that where a promissory note is defaced by erasure, an action under the *Lex Aquilia* will lie.

Moreover, if anyone should destroy a will deposited with him, or should read the same in the presence of several persons, it is more advisable for an action *in factum* — and for injury as well — to be brought if the party published the secret provisions of the will for the purpose of committing a wrong.

(1) Pomponius very properly states that it sometimes happens that a party by destroying a will does not become liable for theft, but only for the commission of injury, for instance where he did not destroy it with the intention of committing a theft, but only to cause damage; for then he will not be liable for theft, since theft involves not only the act of stealing but the intention also.

42. *Julianus, Digest, Book XLVIII.*

Where anyone so defaces a will which has been deposited with him (or any other instrument for the conveyance of property) so that it cannot be read, he will be liable to an action on deposit, and also to one for the production of an instrument in court, because he either returned or produced the document in a ruined condition. An action under the *Lex Aquilia* will also lie in a case of this kind, for where a party falsifies documents, he is very properly said to have ruined them.

43. *Pomponius, On Sabinus, Book XIX.*

You are entitled to an action under the *Lex Aquilia* on account of damage committed against an estate before you entered upon it as heir, even though this took place after the death of the party whose heir you are; for the *Lex Aquilia* designates as owner not merely the person who was so at the time when the damage was committed; for under these circumstances the right of action could not pass to him from the party whose heir he was, since this would be the same case as where you have been in the power of the enemy and, having returned, can not bring suit under the right of *postliminium* for what had taken place during your captivity; and no other rule than this can be established without great disadvantage to posthumous children who become the heirs of their parents.

We hold that the same rule applies with reference to trees which have been cut by stealth during the same time. I am of the opinion that this also applies to the proceeding *Quod vi aut clam*, provided the party committed the act after he had been notified not to do so, or it is apparent that he should have known that he would have been notified by the parties to whom the estate belonged if they had been aware of what he was going to do.

44. *Ulpianus, On Sabinus, Book XLII.*

Under the *Lex Aquilia* the slightest negligence is taken in consideration.

(1) Whenever a slave wounds or kills anyone, there is no doubt that his owner is liable under the *Lex Aquilia*.

45. *Paulus, On Sabinus, Book X.*

In this instance we understand knowledge to signify sufferance, so that where the party is able to prevent the act, and does not do so, he will be liable.

(1) Proceedings can be brought under the *Lex Aquilia* where a wounded slave is cured.

(2) If you kill my slave being under the impression that he is free, you will be liable under the *Lex Aquilia*.

(3) Where two slaves leap over burning straw and collide with one another, and both fall and one is burned to death; in this instance an action cannot be brought where it is not known which of them was overthrown by the other.

(4) Where parties commit damage because they could not otherwise protect themselves, they are guiltless; for all laws and all legal principles permit persons to repel force by force. But if I throw a stone at an adversary for the purpose of defending myself, and I do not hit him but do hit a passer-by, I will be liable under the *Lex Aquilia;* for you are only permitted to strike a person who is attacking you, and this solely where you do so in defending yourself, and not where it is done for the purpose of revenge.

(5) Where a party removes a wall which is useful, he is liable to the owner of the same for wrongful damage.

46. *Ulpianus, On Sabinus, Book L.*

If, where a slave is wounded, an action is brought under the *Lex Aquilia*, and the slave afterwards dies of the wound, an action can still be brought under the *Lex Aquilia*.

47. *Julianus, Digest, Book LXXXVI.*

But if in the first suit an estimate of his value was made, and afterwards the slave should die, his owner can bring an action for killing him, and if he is met with an exception based on malicious fraud, measures should be taken to prevent the plaintiff from recovering more by both suits than he would have obtained if he had in the beginning brought an action for killing the slave.

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

If a slave should commit damage to an estate before it had been entered upon, and, after having been liberated, he should cause other damage to the property, he will be liable to both actions, because these things have reference to two different acts.

49. *Ulpianus, Disputations, Book IX.*

Where anyone drives away bees belonging to another or even kills them by means of making smoke, he is held rather to have furnished the cause of their death than to have actually killed them, and therefore he will be liable to an action *in factum*.

(1) Where it is stated that wrongful damage can be prosecuted under the *Lex Aquilia*, this must be understood to mean that wrongful damage was committed when wrong was done together with damage, unless the act was committed under the compulsion of overpowering force; as Celsus states with reference to a party who destroyed an adjoining house for the purpose of controlling a fire; for in this instance he says that no action will lie under the *Lex Aquilia*, because the man destroyed the adjoining house being impelled by a just apprehension that the fire might reach his premises, and whether the fire did so or whether it was previously extinguished, he thinks that an action under the *Lex Aquilia* cannot be brought.

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

Where a party demolishes the house of another without the consent of the owner, and builds baths on the site, then, irrespective of natural law, which declares that the surface belongs to the owner of the soil, the aggressor will be liable to an action on account of damage caused.

51. *Julianus, Digest, Book LXXXVI.*

A slave was so seriously wounded that it was certain that he would die from the blow; but, in the meantime, he was appointed an heir, and afterwards died from a blow inflicted by another. I ask whether an action for causing his death can be brought under the *Lex Aquilia* against both the parties who injured him? The answer was that anyone is ordinarily said to have killed who in any way furnished the cause of death; but under the *Lex Aquilia* he alone is held to be liable who furnished the cause of death by actual violence, and, as it were, with his own hand, the interpretation of the word "*occidere*" being derived from the terms "*cædere*" and "*cædes*".

Moreover, not only those who have wounded a slave so badly as to immediately deprive him of life are held to be liable under the *Lex Aquilia,* but also those who have inflicted such a wound that it is certain that the slave will die hereafter. Therefore, where anyone inflicts a mortal wound upon a slave, and another, before his death, strikes him in such a way that he dies sooner than he otherwise would as the result of a first wound, it should be held that both offenders are liable under the *Lex Aquilia*.

(1) This agrees with the opinion of the ancient authorities, who, where a slave was badly wounded by several persons and it was not ascertained by whose blow he died; it has been decided that all of them are liable under the *Lex Aquilia*.

(2) The damages for causing death will not be the same for both parties in this instance; for the one who first wounded him must pay an amount equal to the greatest value of the slave during the past year; and this is ascertained by computing three hundred and sixty five days from the date of the wound. The second one would be liable for an amount equal to the largest sum which the slave would have brought during the year before the day on which he died, and this will also include the value of the estate. Hence one of them will pay a larger amount and the other a smaller amount for having killed the same slave; and there is nothing surprising in this, since both parties are held to have killed the slave in different ways and at different times.

If anyone should think that this decision of ours is absurd, let him reflect that it would be still more absurd for it to be held that neither of the parties was liable under the *Lex Aquilia*, or that one of them was more liable than the other; since offences must not go unpunished; nor is it easy to determine which one is more liable under the law. For numerous rules have been

established by the Civil Law for the public welfare which are at variance with the principles of reasoning, as can be proved by innumerable examples; and I shall be content with referring to only one of them. Where several persons carry away a beam belonging to another with the intention of stealing it, which they could not have done singly, they are all held to be liable to an action for theft; although by an ingenious argument not one of them can be said to be liable because it is true that not one of them carried off the beam.

52. *Alfenus, Digest, Book II.*

Where a slave dies from the effect of blows, and this is not the result of the ignorance of a physician or of the neglect of the owner, an action for injury can be brought for his death.

(1) The keeper of a shop placed his lantern on a stone in a street at night, and a passer-by took it away; the shopkeeper followed him and demanded the lantern, and detained the party as he was trying to escape. The latter began to strike the shopkeeper with a whip which he held in his hand and to which an iron was attached, in order to compel him to release his hold. The struggle having become more serious, the shopkeeper knocked out the eye of the party who had taken away his lantern, and he asked for an opinion whether he could not be considered not to have inflicted unlawful damage, as he had been first struck with a whip? I answered that unless he had knocked out his eye designedly he would not be considered to have caused unlawful damage, because the party who first struck him with the whip was to blame; but if he had not first been beaten, but had fought with the party who is trying to take the lantern from him, the shopkeeper must be held to be responsible for the act.

(2) Mules were hauling two loaded wagons up the Capitoline Hill, and the drivers were pushing the first wagon which was inclined to one side in order that the mules might haul it more easily; in the meantime the upper wagon began to go back, and as the drivers were between the two wagons they withdrew, and the last wagon was struck by the first and moved back, crushing a slave boy who belonged to someone. The owner of the boy asked me against whom he ought to bring an action? I answered that it depended upon circumstances, for if the drivers who had hold of the first wagon voluntarily got out of the way, and the result was that the mules could not hold the wagon and were pulled back by its weight, then no action would lie against the owner of the mules, but an action under the *Lex Aquilia* could be brought against the men who had hold of the wagon; for if a party, while he was supporting something, by voluntarily releasing his hold enabled it to strike someone, he, nevertheless, committed damage; as for instance, where anyone was driving an ass and did not restrain it; or where anyone were to discharge a weapon, or throw some other object out of his hand.

But if the mules gave way because they were frightened, and the drivers, actuated by fear of being crushed, released their hold on the wagon, then no action can be brought against the men but one could be brought against the owner of the mules. And if neither the mules nor the men were the cause of the accident, but the mules could not hold the load, or while striving to do so slipped and fell, and this caused the wagon to go back, and the men were unable to support the weight when the wagon was inclined to one side, then no action could be brought either against the owner of the mules or the men. This, however, is certain, that no matter what the circumstances were, no action would lie against the owner of the mules which were in the rear, as they did not go back voluntarily, but because they were struck.

(3) A certain man sold some oxen under the condition that he would permit the purchaser to try them, and he afterwards delivered them to be tried; and a slave of the purchaser while trying them was struck with the horn of one of the oxen. The question arose whether the vendor must pay damages to the purchaser? I answered that if the purchaser held the oxen as already purchased, he would not be compelled to pay; but if he had not obtained them with that understanding, then, if through the slave's negligence he was wounded by the ox, damages would not have to be paid, but if it was due to the viciousness of the ox, they would be.

(4) Where several persons were playing ball, one of them pushed a small slave while he was

trying to pick up the ball, and the slave fell and broke his leg. The question arose whether the owner of the slave could bring suit under the *Lex Aquilia* against the party who, by pushing him, had caused him to fall. I answered that he could not, as this seemed to have been done rather through accident than through negligence.

53. *Neratius, Parchments, Book I.*

You drove oxen belonging to another into a narrow place which caused them to be thrown to the ground and injured. An action resembling that brought under the *Lex Aquilia* will be granted against you.

54. *Papinianus, Questions, Book XXXVII.*

A debtor is entitled to an action under the *Lex Aquilia* where a party who stipulated for delivery, and before default of the debtor, wounds the animal which was promised; and the same rule applies if he should kill it. But where the party who stipulated kills the animal after the default of the promisor, the debtor will undoubtedly be discharged; but in this instance he will not have a right to institute proceedings under the *Lex Aquilia,* since the creditor must be held rather to have injured himself rather than another.

55. *Paulus, Questions, Book XXII.*

I promised Titius to give him either Stichus or Pamphilus, Stichus being worth ten thousand sesterces and Pamphilus twenty; and the stipulator killed Stichus before I was in default. The question arose as to whether an action could be brought under the *Lex Aquilia*? I answered that as it has been stated that the least valuable slave has been killed, what is to be discussed in this case does not in any way differ from that between a creditor and a stranger. What then will be the measure of damages? Must it be ten thousand sesterces which is the value of the slave that was killed, or must it be the amount which I must pay, that is the amount of my interest? And what shall we say if Pamphilus were to die without any default on my part? Will the price of Stichus be diminished since the promisor is discharged? It will be sufficient to state that the value of the slave was greater when he was killed, or within the year. On this principle Stichus must be considered to have been worth more, even if he were killed after the death of Pamphilus, but within the year.

56. *The Same, Sentences, Book II.*

If a woman damages the property of her husband, an action can be brought against her according to the terms of the *Lex Aquilia*.

57. *Javolenus, On the Last Works of Labeo, Book VI.*

I lent you a horse and while you were riding it several others were riding with you, and one of them ran against your horse and threw you off, and the legs of your horse were broken in consequence of the accident. Labeo states that no action can be brought against you, but if the accident took place through the negligence of the rider he can be sued, but suit cannot be brought against the owners of the horse; and I think this is correct.

TITLE III.

CONCERNING THOSE WHO POUR ANYTHING OUT OR THROW ANYTHING DOWN.

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

The prætor says with reference to those who throw down or pour out anything: Where anything is thrown down or poured out from anywhere upon a place where persons are in the habit of passing or standing, I will grant an action against the party who lives there for twofold the amount of damage occasioned or done. If it is alleged that a freeman has been killed by a blow from anything that fell, I will grant an action for fifty *aurei.* If the party is living, and it is said that he is injured, I will grant an action for an amount which would seem to be just to the judge that the party against whom suit is brought should be directed to pay. If

it is alleged that a slave committed the act without the knowledge of his master, I will add to the petition in the case the words, "Or surrender the slave by way of reparation".

(1) No one will deny that this Edict of the Prætor is of the greatest advantage, as it is for the public welfare that persons should come and go over the roads without fear or danger.

(2) It makes, however, very little difference whether the place is public or private, so long as persons ordinarily pass there; because the Prætor had in view persons who were going their way, and particular attention was not paid to highways; for those places through which people ordinarily pass should have the same security. If, however, there was a time when persons did not ordinarily pass that way, and anything is then thrown down or poured out while the place was enclosed, but only after that it began to be used for travel; the party will not be liable under this Edict.

(3) Where something falls down while being hung up, the better opinion is that it should be held to have been thrown down; hence, where something is poured out of a vessel which is suspended, even without the agency of anyone, it must be said that the Edict is applicable.

(4) This action *in factum* is granted against the party who lodged in the house at the time when something was thrown down or poured out, and not against the owner of the house, because the blame attaches to the former. Mention of negligence or that the defendant denies the fact is not made, in order to authorize an action for double damages, although both of these matters are stated to afford good ground for an action for wrongful damage.

(5) Where a freeman is killed, the assessment of damages is not made for double the amount, because in the case of a freeman no valuation of his person is possible, but the judgment will be for the sum of fifty *aurei.*

(6) There words "If he is living and it is said that he is injured," have no reference to the damage which has been committed against the property of a freeman; as, for instance, if his clothing or anything else should be torn or spoiled, but only to those injuries inflicted upon his body.

(7) Where the son of a family has rented an upper chamber and something is thrown down or poured out from it, an action *De peculio* is not granted against his father, because no claim arising from contract exists, and therefore the action must be brought against the son himself.

(8) Where a slave occupies the house, will a noxal action be granted, since one does not lie on the ground of business transacted: or can one *De peculio* be brought because no claim can be made on account of an offence of the slave? We cannot properly say that the damage was committed by the slave, since the latter committed no injury. I think, however, that the slave should not be unpunished, but that he should be corrected under the extraordinary authority of the judge.

(9) We say that a party occupies a house whether he resides in his own or one which is leased to him, or which he obtains gratuitously. It is evident that a guest will not be liable, because he does not live there, but is only entertained, but the party is liable who entertains him; and there is as much difference between him who lives in a house and a guest, as there is between one who has a domicile and the traveller who has none.

(10) Where several persons occupy the same room and something is thrown down from it, this action will be granted against any one of them;

2. *Gaius, On the Provincial Edict, Book VI.*

(Since it is absolutely impossible to know which of them threw it down or poured it out) :

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

And suit can be brought for the entire amount, but where it is brought against one of the parties the others will be discharged:

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

If the money has not been received on joinder of issue, the others will be compelled by a partnership or by an equitable action to pay their shares to the party who has made the settlement.

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

Where several persons occupy an apartment divided up among themselves, an action will be granted against him alone who occupied that part from which the pouring out was done.

(1) Where anyone gives gratuitous lodgings to his freedman and his clients or to those of his wife, Trebatius says that he is liable on their account; and this is correct. The rule is the same where a man distributes small lodgings among his friends, for if anyone rents lodgings and he himself occupies the greater portion of the same, he alone will be liable; but if he rents lodgings and retains for himself only a small part, leasing the remainder to several persons, they will all be liable as occupying the lodging from which the throwing down or pouring out took place.

(2) Sometimes, however, when no disadvantage results to the plaintiff, the Prætor, influenced by equitable motives, ought rather to grant an action against the party from whose bedroom or entry the object was thrown down, even though several persons occupy the same lodging; but if anything should be thrown down from the middle of the apartment, the better opinion is that all are liable.

(3) Where the keeper of a warehouse throws down or pours out anything, or some one who has leased a storeroom, or has rented the place merely for the performance of some labor or for purposes of giving instruction does so, an action *in factum* will lie; even if one of the workmen or scholars threw it down or poured it out.

(4) Where, however, a party has judgment rendered against him under the *Lex Aquilia* (because his guest, or anyone else, threw something down from the apartment) it is reasonable, as Labeo says that an action *in factum* should be granted against the party who did the throwing, and this is true. It is evident, if he had leased the room to the party who threw it down, that he will also be entitled to an action on the ground of contract.

(5) This action which can be brought for things which are poured out and thrown down is a perpetual one, and is available by an heir but is not granted against an heir; but the one which will lie where a freeman is said to have been killed, can only be brought within a year, and is not granted against an heir nor in favor of an heir or similar persons, for it is a penal and a popular action, and we must always remember that where several persons desire to bring a suit of this kind it should preferably be granted to someone who has an interest in it, or was allied to the deceased either by marriage or by blood.

Where, however, injury was inflicted upon a freeman he will have a perpetual right of action; but if anyone else desires to institute proceedings, the right will not extend beyond a year; nor are heirs entitled to it as an hereditary privilege; since, where any bodily injury is inflicted upon the freeman, no claim can be transmitted by hereditary right to his successors, as no pecuniary loss is involved, for the action is based on justice and equity.

(6) The Prætor says, "No one shall have anything deposited upon a projecting roof above a place which is ordinarily used as a passage-way or where people are accustomed to stand; if it can injure anyone by its fall. I will grant an action *in factum* for ten *solidi* against any person who violates this law; and if a slave is said to have done this without the knowledge of his master, I will order this amount to be paid, or the said slave to be surrendered by way of reparation."

(7) This provision is a part of the Edict previously referred to; for it was only consistent that the Prætor should provide for this case as well, so that if anything should be placed on any part of the house which would be dangerous, it might not cause any injury.

(8) The Prætor says, "No one," "on a projecting roof." These words "No one" have reference

to all persons, whether they occupy the house as lodgers or as owners and whether they live there or not, so long as they have anything exposed in these places.

(9) "Who have anything deposited above a spot which is ordinarily used as a passage-way or where people are accustomed to stand." We must understand the term "deposited" to be applicable to a lodging or apartment, or to a ware-house or any other building.

(10) A person may properly be held to have something "deposited," even if he did not place it himself but allowed this to be done by someone else, and therefore if a slave should place it, and the owner allow it to remain in that position, he will be held liable not to a noxal action, but on his own account.

(11) The Prætor says, "If it can injure anyone by its fall." It is manifest from these words that the prætor only provides against injury being done, not by everything which may be placed in such a position, but by whatever is placed so that it may possibly cause injury, for we do not wait until the injury is done, but the Edict is applicable if injury can result at all; and the party who kept the object in its position is punished whether it caused any damage by being placed there or not.

(12) Where the object that was placed falls down and causes damage, an action will lie against the party who put it there, but not against the occupant of the house, as this action is not sufficient, because the party who placed the object cannot certainly be held to have kept it in its position, unless he was either the owner or a resident of the house. For when an artist had a shield or a picture on exhibition in a booth, and it fell down and injured a passer-by, Servius was of the opinion that an action corresponding to this one should be granted; for he said that the latter evidently could not be brought, since the picture had neither been placed on the eaves nor on the projecting roof.

He stated that the same rule should be observed where a jar which was suspended in a net had fallen down and caused damage; for the reason that both a legal and an equitable action was wanting.

(13) This action is open to everyone, and lies in favor of an heir and his successors, but it does not lie against heirs, because it is a penal one.

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

This Edict is not limited to cities and villages, but also has reference to all roads along which persons ordinarily pass.

(1) Labeo says that this Edict only applies where an object is thrown down in the daytime, and not at night; still, in certain places people also pass at night.

(2) A person who occupies the premises is also responsible for the negligence of his family.

(3) Where anything is thrown out of a ship, an equitable action will be granted against the party in charge of the ship.

7. *Gaius, On the Provincial Edict, Book VI.*

Where the body of a freeman has been injured by something which has been thrown down or poured out, the judge must take into consideration the fees paid to a physician, and the other expenses incurred by the cure of the individual, as well as the value of any occupation which the party lost, or is liable to lose on account of having been disabled; but no estimate will be made of scars or of any other disfigurement, because the body of a freeman does not admit of appraisement.

TITLE IV.

CONCERNING NOXAL ACTIONS.

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

Those actions are called noxal which are brought against us, not with reference to any

contract, but as the result of some injury or delinquency committed by slaves; and the force and effect of such actions is that, if judgment is rendered against us, we can avoid the payment of damages by the surrender of the body of him who committed the offence.

2. *Ulpianus, On the Edict, Book XVIII.*

Where a slave kills anyone with the knowledge of his owner, he renders the latter liable for the full amount of damages, for it is held that the owner himself committed the homicide; but where this was done without the owner's knowledge, a noxal action will lie, as the owner should not be held liable, on account of the offence of the slave, for any more than to surrender him by way of reparation.

(1) Where he did nothing to prevent the crime, whether he remains the owner or ceases to be such, he will be liable to this action; for it is sufficient if he was the owner at the time when he did not prevent the act; and to such an extent is this the case, that Celsus thinks if the slave should be alienated in whole or in part or manumitted, the damage does not follow the person, for the slave did not commit any offence, as he obeyed his owner's orders. And this may be truly said, if the latter did order him, but if he only did not prevent him, how can we excuse the act of the slave? Celsus, however, makes a distinction between the *Lex Aquilia* and the Law of the Twelve Tables, for, under the ancient law, if a slave committed a theft or caused any other damage with the knowledge of his owner, a noxal action would lie on account of the slave, and the owner would not be directly liable; but he says that under the *Lex Aquilia* the owner would be directly liable, and not liable on account of the slave. He then states the principle of each of the two laws; the intention of that of the Twelve Tables being that, in an instance of this kind, slaves should not obey their masters, but in the case of the *Lex Aquilia* the law excused a slave who obeyed his master, as he would have been put to death if he had not done so. But if we consider as established what Julianus states in the Eighty-sixth Book, that, "Where a slave commits a theft or causes some injury," this has also reference to more recent laws; it may be said that a noxal action can be granted against the owner on account of his slave; so that because an Aquilian action is granted against the owner this does not excuse the slave, but is a burden to the owner. We approve of the opinion of Julianus, which is reasonable, and is supported by Marcellus as is stated by Julianus.

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

In all noxal actions where the knowledge of the owner is required, this must be understood to mean that the owner could have been able to prevent the wrong but did not do so; for it is one thing to cause a slave to commit an offence, and another to suffer him to do so.

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

With reference to the offences of slaves what are we to understand by the "Knowledge of the owner"? Does it mean that the act was done by his advice, or that he merely saw it done, although he could not prevent it? For suppose that a slave who was taking measures to obtain his freedom commits the act, with the knowledge of his owner, or pays no attention to his owner; or suppose that the slave is on the opposite side of a river and commits an injury while his master sees him, but does it contrary to his will? It is better, however, to say that we must understand the term "knowledge" to signify that a party is able to prevent the deed, and this must be understood through the entire Edict so far as the term "knowledge" is concerned.

(1) Where a slave belonging to a stranger commits an illegal act with my knowledge, and I purchase him; a noxal action will be granted against me, because it cannot be held that he acted with the knowledge of his owner as at that time I was not his owner.

(2) Where an owner is liable on account of his knowledge, it should be considered whether an action should be granted also with reference to the slave; unless the Prætor intended that a single penalty only should be exacted from the owner. Therefore should the malice of the slave be unpunished? This would be unjust, for indeed the owner is liable in both ways, still when one penalty, that is, whichever one the plaintiff selects, is exacted, the other cannot be

collected.

(3) If the surrender of the slave by way of reparation is not mentioned, and proceedings are brought against the owner on account of his being aware of the offence, when, as a matter of fact, he was not aware of it, and the case is dismissed and the trial terminated; the plaintiff will be barred by an exception on the ground of *res judicata*, if he attempts to proceed further in order to obtain the surrender of the slave; for the reason that the matter was previously brought to an issue in the former trial and is now at an end. But, while the first trial is proceeding, the plaintiff has the right to change his mind, if he is attempting to prove the knowledge of the owner, and have recourse to a noxal action.

On the other hand also, if he has proceeded with the noxal action against the party who had knowledge, no other action will be granted him against the owner if he left out the surrender of the slave by way of reparation; but if, during the trial, he still wishes to prove the knowledge of the owner, he cannot be prevented from doing so.

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

Where a slave belonging to several persons commits an offence of which they are all ignorant, a noxal action will be granted against any one of them. But if they were all aware of it, any one of them will be liable without consideration of the surrender of the slave by way of reparation, just as if they had all committed the offence; nor will one of them be liberated if the other should be sued. Still, where one of the owners knew and the other was ignorant of the fact, the one who knew will be sued without the surrender of the slave being considered, and the one who did not know will be sued with the right to surrender him.

(1) The difference between these two proceedings is not merely that the owner who knows is liable for the entire amount, but also that if he who knows should sell the slave or manumit him, and the slave should die, the said owner will be liable; but if the owner himself should die, his heir will not be liable.

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

But the slave himself, if manumitted, will also be liable.

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

A noxal action, however, is not granted unless the slave is under my control, and if he is, although he was not under my control at the time he committed the offence, I will be liable, and my heir will be liable, if the offending slave was living.

(1) Pomponius says that if a purchaser of the slave is sued in a noxal action, the vendor who had knowledge of the act can no longer be sued.

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

Where a slave owned in common commits a theft, any one of his masters is liable to a noxal action for the entire amount, and this is the rule at the present time. But the party against whom suit is brought cannot avoid payment of the damages unless he surrenders the slave entirely; for if he should be ready to surrender only a share in him, this will not be tolerated. It is evident that if, on account of this, the other owners are not prepared to surrender the slave, he should then be required to pay the entire amount, and he can institute proceedings against the other owner in partition, or for a division of the interest in the slave. He can, however, before issue is joined in the noxal action, obtain immunity by surrendering his share in the slave so that it will not be necessary for him to make a defence; although someone may state that it might happen where a share in said slave is transferred to the party he loses his right of action; for when he becomes the owner of a share he cannot institute proceedings against a joint-owner by means of a noxal action; and perhaps he could not bring an action in partition on account of an offence which was committed before the joint-ownership began, and if he cannot do this he will evidently suffer injury. It, however, seems to me best to hold that an action for the division of common property will lie in his favor.

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

Where a number of slaves held in common, or one alone commits a theft, with the knowledge of one of his owners the latter will be liable in the name of both, and if suit is brought against him this will release the others from liability; nor can he obtain anything from his joint-owner, as he deserved the penalty on account of his own act. But where one who was ignorant of the commission of the offence pays double damages, he can recover simple damages from his joint-owner.

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

Moreover, anyone can bring suit against his joint-owner on the ground that he has depreciated the value of the slave; just as he could against anyone else who depreciated the value of property owned in common. If, however, he held nothing in common after the surrender of the slave, he can bring an action on partnership, or if they were not partners he can bring an action *in factum.*

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

The *bona fide* possessor of a slave will be liable to an action for theft on account of the slave, but the owner will not be liable. He cannot, however, by surrendering the slave make him the property of the plaintiff, and if the owner should bring suit to recover the slave, he will be barred by an exception on the ground of fraud, for the other party can be made secure by application to the court.

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

Where a *bona fide* possessor dismisses a slave who was in his possession under these circumstances, in order to avoid proceedings being taken against him in a noxal action, he will be liable to the action which is granted against parties who have a slave in their power or commit fraud in order to avoid having him under their control, because in this instance they are held to be still in possession.

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

A noxal action is granted not only against a possessor in good faith, but also against those who have possession in bad faith; for it seems absurd that parties who are *bona fide* possessors should be compelled to defend an action, and that depredators should be secure.

14. *Ulpianus, On the Edict, Book XVIII.*

Where anyone is sued by several persons on account of an offence committed by his slave, or by one person on account of several offences, then it will not be necessary for him to tender the amount of damages assessed to those to whom he cannot surrender the slave, since he cannot surrender him to all of them. What then is the rule if he is sued by several parties? If, indeed, one of them has anticipated the others, is his position better, and shall the slave be surrendered to him alone? Or shall he be surrendered to all of them, or must the defendant furnish security that he will defend his adversary against the other parties?

It is the better opinion that the position of the party who has anticipated the others is preferable. Therefore the slave should be surrendered, not to the plaintiff who first instituted proceedings, but to the one who first obtained judgment; and hence an action to enforce the judgment will be refused to a party who gains his case subsequently.

(1) If a slave is entitled to his freedom conditionally, and the condition is fulfilled before the surrender; or if he should obtain his freedom under the terms of a trust, or a condition is complied with in accordance with which the ownership of the slave was bequeathed as a legacy and transferred, the defendant must be discharged by an order of court; and it is part of the duty of the judge to provide that the party to whom he is surrendered shall give security against the recovery of the slave by eviction on account of an act of the defendant.

15. *Gaius, On the Provincial Edict, Book VI.*

The Prætor should order the action to be transferred so as to be conducted against the said former slave, but if, at the time of the trial, the freedom of the slave is still in suspense, Sabinus and Cassius are of the opinion that the heir is released from liability by giving up the slave, since he has thereby assigned all of his own rights; and this is true.

16. *Julianus, Digest, Book XXII.*

If the heir, through malicious fraud, should relinquish his authority over said slave, and by reason of this should join issue in an action not permitting the noxal surrender of the slave, judgment should be rendered against him, just as if the slave was dead; even if the condition on which the slave was entitled to his freedom should have been fulfilled.

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

Where a slave who belongs to two owners commits an offence with the knowledge of one of them but without that of the other, if suit is brought against the one who is ignorant of the fact and he surrenders the slave by way of reparation, it is unjust that by the surrender of a worthless slave the other owner should be free from liability; hence suit can be brought against the latter also, and if in the attempt to collect damages anything more is obtained, the plaintiff will be entitled to it after calculation of the value of the slave surrendered has been made.

The joint-owners, however, should divide their claims in an action for the division of common property in such a way that if the one who had knowledge of the act should make payment, he will not be entitled to a portion of all of it, but to a portion of the amount that the slave was worth; and if the other paid anything, he will be entitled to credit for his share. It is not just that the owner who ordered the slave to commit the offence should obtain anything from his fellow-owner, since the loss that he sustains is the result of his own misconduct.

(1) Where several persons wish to bring a noxal action against me on account of the same slave, or one party brings suit in several actions with reference to the same slave, he being one in whom you have an usufruct and I the mere ownership, it is part of the duty of the judge, when I surrender the slave by way of reparation, to provide that I transfer to the plaintiff the usufruct in him also; but I, as the mere proprietor, can apply to the prætor to have him compel you to contribute to the estimated damages in proportion to the value of the usufruct, or to assign the usufruct, if this is more expedient. But if I, the mere owner, refuse to defend the action brought with reference to the slave, you should be permitted to defend it, and if, having lost it, you deliver the slave, you will be protected against me.

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

A party who has an usufruct in a slave has for this reason a right of action for theft against the mere owner, just as if he were any other person, but no right of action exists against him although the slave is in his service; and therefore, if judgment is rendered against the owner, he will be discharged from liability by surrendering the slave to the usufructuary.

19. *Paulus, On the Edict, Book XXII.*

Where a slave of Titius does some damage to property owned by you and me in common, and we institute proceedings against Titius, a noxal action under the *Lex Aquilia* will lie; and if he loses the suit he will be compelled to surrender the entire slave to us separately. It may be stated, however, as in the case where both the damage and the claim for it are acquired by one person alone, either the money should be tendered to both of us, or the slave be surrendered to both of us at the same time by order of court. Nevertheless, if the slave is surrendered to either of us without division of ownership, and on this account the owner is released from liability to both of us, it is very properly held that he to whom a surrender was made is liable to the other in an action for the division of common property, to compel him to transfer a share of the slave that was surrendered, since this is something which has come into the hands of the joint-owner through property held in common.

(1) Where the mere owner of a slave leases the services of the latter in whom someone else has the usufruct, the words of the Edict indicate that if judgment is rendered against him he will have the choice of surrendering the slave by way of reparation.

(2) Where your slave has charge of a ship, and his underslave, who is also a sailor on said ship, causes some damage, an action should be granted against you, just as if the party in charge was free, and the slave belonged to him; so that you will be ordered by the court to surrender the said slave by way of reparation as part of the *peculium* of your slave; although if the second slave committed the damage by order of your slave or with his knowledge and sufferance, a noxal action should be brought against you on account of your slave. The result will be the same if your slave should order a sailor to commit the act.

20. *Gaius, On the Provincial Edict, Book VII.*

Where anyone brings several actions at different times, on account of distinct offences, and he obtains ownership of the slave on account of one of said offences, he will not be entitled to any other action against the party who was formerly the owner, since a noxal action follows the individual; but, if the owner at the time the former case was tried, preferred to pay the damages assessed, he will, nevertheless, be liable to the same plaintiff, or to anyone else, if he brings suit on the ground of some other wrong.

21. *Ulpianus, On the Edict, Book XXIII.*

Whenever an owner is sued on the ground of damage committed, and does not wish to defend the action, he is in such a condition that he must surrender by way of reparation the slave on whose account he refuses to defend the suit, or, if he does not do so, he is absolutely obliged to make a defence; but judgment will not be rendered against him unless he has the slave in his power, or has managed to relinquish possession of him by fraud.

(1) Where proceedings are instituted by a noxal action on account of slaves, it is established that they can be defended even though they are absent, but this only shall be done where the said slaves belong to the defendant, for if they belong to another they must be present; and this is also the case where any doubt exists whether they are the property of the defendant or of another party. I think that this ought to be understood to be the rule if it is proved that they are serving the defendant merely as *bona fide* slaves, even if they are absent.

(2) The Prætor says, "If he in whose power the slave is said to be denies that he has him in his power, I shall either order him to swear that the slave is not in his power, or that he has not fraudulently maneged that he should not be, or I will grant an action without surrender by way of reparation, whichever the plaintiff desires."

(3) We should understand the words "In his power" to mean that the defendant has the opportunity and the power to produce the slave; but if the latter should be a fugitive, or out of the country, he will not be held to be in his power.

(4) If the defendant refuses to make oath, his position is the same as that of a party who will neither defend an absent slave or produce him in court; and persons of this kind should have judgment rendered against them as being contumacious.

(5) Where there is a guardian or a curator, he must swear that the slave is not in the power of his owner; but where there is an agent, it is necessary for the owner himself to be sworn.

(6) Where the plaintiff has exacted an oath and the defendant has taken it, and afterwards the plaintiff desires to bring a noxal action, it should be considered whether an exception on the ground of "an oath taken" should not be granted against the plaintiff? Sabinus is of the opinion that it should not be granted, since the oath was taken with reference to a different matter; that is to say, the party swore that the slave was not in his power at the time, but now, since he is found to be in his power, suit can be brought on account of his act.

Neratius, also, states that after the oath has been required, the plaintiff can proceed omitting the surrender by way of reparation, provided he claims that the defendant began to have the

slave in his power only after he was sworn.

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

Where a slave is deposited with someone or loaned to him, a noxal action can be brought against the owner, for the slave is understood to still serve him, and as far as relates to this Edict, he is in his power; and especially is this the case if he has the means of recovering him.

(1) He who has received a slave in pledge or holds him by sufferance of his owner is not liable in a noxal action, for even though parties may have lawful possession, nevertheless, they have not possession as owners; hence those slaves are understood to be in the power of their owner, if the said owner has the means of recovering them.

(2) What is the meaning of the words, "Has the means of recovering them"? It signifies that he has the money by which to release them, for he ought not to be compelled to sell his property in order to pay the money and recover the slave.

(3) Where an owner confesses that a slave is in his power he must either produce him in court or defend him, if he is absent; and if he does neither, he will be punished just as if the slave had been present and he had not surrendered him.

(4) Where the owner denies that the slave is in his power, the Prætor permits the plaintiff to choose whether he will decide the matter by means of an oath, or whether judgment shall be rendered without the surrender of the slave; by which means he will succeed if he proves that the slave is in the power of the defendant, or that he has acted fraudulently so that he may not be; but a party who does not prove that the slave is in the power of his adversary loses his case.

23. *Gaius, On the Provincial Edict, Book VI.*

But if his adversary should afterwards come into possession of the slave, he will be liable on account of the new possession and an exception will be denied him.

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

It must be considered whether a noxal action can be brought only against the party who fraudulently managed to prevent the slave from being in his power if it should happen through his fraud that a noxal action will not be available; for instance, where he ordered his slave to take the flight; or whether an action cannot, nevertheless, be brought against some other party; which would be the case if the slave were sold or manumitted? The latter is the better opinion, as in this instance the plaintiff has the choice of proceeding against either party. Julianus, however, says that if the manumitted slave is ready to defend his case, an exception should be granted to the person who manumitted him; and this is also the opinion of Labeo.

25. *Gaius, On the Provincial Edict, Book VI.*

The rule is the same where the new owner of the slave is made defendant in the suit.

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

The choice of one defendant releases the other; for the Prætor introduced this right to prevent the plaintiff from 6eing thwarted, and not that he might obtain any profit; and therefore he will be barred by an exception if he brings the other suit.

(1) It follows as a result that where several persons fraudulently manage to avoid having the slave in their power, the plaintiff must select which one he would rather sue.

(2) Again, if of several joint-owners, some, through malicious fraud, relinquish possession of their shares; the plaintiff has the choice as to whether he will proceed directly against the party who was in possession, or whether he will bring a prætorian action against him who has ceased to be in possession.

(3) Where a party answers in court that a slave who belongs to another is his, then, if either one should pay, the other will be discharged.

(4) If a slave of whom you have fraudulently relinquished possession dies before this action is brought against you, you will be discharged because this action takes the place of the direct one.

We hold that the case is different where you are in default in joining issue.

(5) An action will not be granted to an heir, or against an heir, on the ground that the deceased stated what was false, nor against the party himself, after the lapse of an indefinite time; for anyone is free to assume the defence of an absent slave in order to avoid the penalty prescribed by this Edict, that is to say, to be sued without the right to surrender the slave by way of reparation. Therefore, if you deny that the slave is in your power, you can afterwards confess that he is, unless joinder of issue has already taken place in the case against you; for then you ought not to be heard; as Labeo says.

Octavenus, however, says that you are entitled to relief even after issue has been joined, if cause is shown, at all events if your age is such that indulgence should be granted you.

(6) Where a slave is taken away during the absence of his master, or even in his presence, and matters are still in such a condition that complete restitution is possible, a defence is permitted on account of the slave that was taken away; for if a request was made for him to be produced in court for the purpose of making a defence, the Prætor ought to grant it.

The same relief should be afforded an usufructuary or one to whom the slave was pledged on account of a debt, where the owner is present and refuses to make a defence, in order that the malice or negligence of one man may not injure others. The same relief must also be afforded where a slave is held in common and one of his owners, who is present, refuses to make a defence. In these instances the plaintiff is also entitled to relief because it is established that the right of action is extinguished by the acquisition of ownership; for when the slave is removed by order of the Prætor, he becomes the property of the party who led him away.

27. *Gaius, On the Provincial Edict, Book VI.*

Where a noxal action is brought with reference to a slave who is held by way of pledge, or with reference to one in whom another party has the usufruct; we must remember that if either the creditor or the usufructuary is present and is unwilling to undertake the defence, the Proconsul must intervene, and refuse the sale of the pledge or an action to be brought for the usufruct. In this instance it may be said that the pledge is released by operation of law, since that is no pledge upon which the money cannot be collected by suit; but an usufruct remains as a matter of right, even though an action to recover it may be refused, until the time established by law has elapsed, and it is lost by non-user.

(1) From what we have stated with reference to a slave who was held by anyone in pledge, or a slave who is to be free upon a certain condition, or one in whom another party has an usufruct; it is evident that where a defendant states in court that his slave in reality belongs to another; then, even though he is liable to a noxal action, he cannot, nevertheless, be free from liability by operation of law through the surrender of the slave by way of reparation; for as the party is not the owner he cannot transfer the ownership to the plaintiff.

It is, however, certain, that where a slave has been delivered for this reason, and his owner afterwards brings suit to recover him, but does not tender the damages assessed in the case; he can be opposed by an exception on the ground of malicious fraud.

28. *Africanus, Questions, Book VI.*

Generally speaking, if I bring a noxal action against you on account of the slave of a third party, who is serving you in good faith, and you surrender him to me by way of reparation; and then if, while I am in possession of him, his owner brings suit to recover him, I can bar him with an exception on the ground of malicious fraud, unless he tenders the damages which have been assessed; but if the owner himself should be in possession, I am entitled to the Publician Action, and if the defendant makes use of the exception, "Unless the defendant is

his owner," a replication based on malicious fraud can be interposed for my benefit. In accordance with this I can acquire ownership by use, although I am aware that I am in possession of the property of another, and, in fact, if it had been otherwise established, the result would be that a *bona fide* possessor would be subjected to the greatest injustice; since while, as a matter of law, he would be liable in a noxal action, the necessity is imposed upon him to submit to the payment of the damages assessed in the case. The same principle applies where no defence is made with reference to the slave, and I take him away by order of the Prætor; since, in this instance also, I have a legal ground of possession.

29. *Gaius, On the Provincial Edict, Book VI.*

Not only can a person who has not the slave in his power refuse to answer in a noxal action, but he is also free to avoid the action even when he has him in his power, if he leaves the person undefended; but in this instance he must transfer his right to the plaintiff, just as if judgment had been rendered against him.

30. *The Same, On the Edict of the Urban Prætor, Under the Head of the "Prevention of Threatened Injury."*

In noxal actions, the rights of those who are absent in good faith are not lost, but, on their return, power is given them to make a defence in accordance with what is proper and just, whether they are the owners or have some right in the property in dispute, such as creditors and usufructuaries.

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

Where the Prætor *says*, "When a number of slaves commit a theft an action will only be granted to enable the plaintiff to obtain as much as he would have done if a freeman had committed the crime," the question arises whether this has reference to the payment of money as damages, or to the surrender of the slave by way of reparation; as, for instance, where double damages are collected out of the value of the slaves that have been surrendered, whether other actions will be prohibited?

Sabinus and Cassius both think that the defendant should be credited with the value of the slaves surrendered. This Pomponius approves, and it is true; for if a slave is taken away because no defence was offered, the owner must receive credit for what he was worth. Julianus thinks that it is certain that an account must be taken, not only of the double damages, but also of what might be recovered by a personal action; and where theft has been committed by a number of slaves, the time when this was done must be investigated, in order to determine whether they belonged to the same band; for the Edict is not applicable where those slaves who belong to different owners afterwards becomes the property of one alone.

32. *Callistratus, Monitory Edict, Book II.*

Where the slave is in the power of one who is not his owner, and is said to have committed an offence, if he is not defended he will be taken away; and if his owner is present, he should deliver him up and give security against malicious fraud.

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

No one can, against his will, be forced to defend another in a noxal action, but he must be deprived of him whom he refuses to defend, if he is his slave; but where the party who is in the power of another is free, he ought to be permitted to defend himself under all circumstances.

34. *Julianus, On Urseius Ferox, Book IV.*

For whenever no one will undertake the defence of the son of a family on account of a breach of the law, an action is granted against him,

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

And if judgment is rendered against the son he must comply with it, for he is held by the

decision. Moreover, it must be stated that his father also is liable to an action *De peculio*, after judgment has been pronounced against the son.

36. *The Same, On the Edict, Book XXXVII.*

Where anyone purchases from a debtor a slave who has been pledged and then stolen by him, the purchaser will be liable on the ground of theft, after he has acquired the ownership of the slave; and no objection can be made that the slave can be recovered by him, by means of the Servian Action. The rule is the same where a party makes a purchase from a minor under twenty-five years of age, or knowingly for the purpose of defrauding creditors; as, although the latter can be deprived of their ownership, still, in the meantime, suit can be brought against them.

37. *Tryphoninus, Disputations, Book XV.*

Where a slave belonging to another steals my property and afterwards comes into my hands as owner, the right of action for theft to which I was entitled is extinguished, if it has not yet been made use of; and if I should afterwards dispose of the slave whom I bought before issue was joined, the right of action for theft will not be renewed; but if I purchase him after issue has been joined, the vendor can have judgment rendered against him.

38. *Ulpianus, On the Edict, Book XXXVII.*

Just as he would if he had sold him to another party, for, indeed, it makes little difference to whom he sells him, whether to his adversary or to someone else; and it will be his own fault if he has to submit to the payment of the damages assessed, since by selling him he deprived himself of the power of surrendering him by way of reparation.

(1) Julianus, however, states in the Twenty-second Book of the Digest, that if I abandon the slave who stole your property, I am released from liability, because he at once ceased to belong to me; otherwise an action for theft could be brought on account of him who has no owner.

(2) Where my slave steals your property and sells it, and you deprive him of the money in his possession which he obtained as part of the price of said property, there will be ground for an action of theft on both sides; for you can bring a noxal action of theft against me on account of the slave, and I can bring one against you on account of the money.

(3) Moreover, where I pay money to the slave of my creditor in order that he may give it to his master, there will also be ground for an action of theft, if the slave appropriates the money he received.

39. *Julianus, Digest, Book IX.*

Where a slave belonging to several persons commits a theft and all his owners fraudulently manage to avoid having him in their power, the Prætor ought to follow the form of the civil action, and allow the equitable action which he promises in an instance of this kind to be brought against whichever owner the plaintiff may select; and he should not afford the plaintiff any greater advantage than to enable him to bring an action, without the defendant having the right to surrender the slave by way of reparation; since he would have been able to institute proceedings in a noxal action if the slave had been produced in court.

(1) Where anyone acknowledges that a slave is his own who really belongs to another; then, although he is liable to a noxal action, nevertheless, where proper cause is shown, he can be compelled to give security; but where a party is sued on account of his own slave, he should not be burdened with security, as he is not volunteering in the defence of a slave belonging to another.

(2) Where anyone states that the owner of a slave had acted fraudulently to avoid having said slave in his possession, and the owner contends in court that the suit should be defended by someone else who would furnish security; there is ground here for an exception on the ground

of malicious fraud.

(3) But if, after issue has been joined with the owner, the slave should appear, and because he was not defended is taken away; the owner will be discharged if he interposes an exception on the ground of malicious fraud.

(4) Where, however, the slave dies before issue is joined, the owner will not be held liable in this action at all.

40. *The Same, Digest, Book XXII.*

Where a slave is bequeathed as a legacy and steals the property of the future heir before the estate is entered upon; the heir can bring an action of theft against the legatee if he accepts the legacy. But where the same slave appropriates property which belongs to the estate, an action of theft will not lie, because there can be no theft of property of this description; but an action can be brought to compel him to produce the property in court.

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

Where a slave owned in common causes unlawful damage to one of his owners, an action under the *Lex Aquilia* will not lie on that account; because if he had caused the damage to a stranger, an action could be brought against the other joint-owner for the entire amount under the *Lex Aquilia;* just as where a slave owned in common committed theft an action for theft cannot be brought against the other joint-owner, but proceedings in partition must be instituted.

42. *Ulpianus, On the Edict, Book XXXVII.*

Where a party, on account of whom issue has been joined in a noxal action, claims his freedom, proceedings should be stayed until his condition is determined; hence if he should be declared to be a slave, the noxal action will proceed, but if he is decided to be free it will be held to be of no effect.

(1) Where a party undertakes to defend a noxal action on account of a slave who is dead, and he is ignorant of the fact, he should be discharged from liability, because it has ceased to be true that he should surrender anything on account of said slave.

(2) These actions are not barred by lapse of time, and are available as long as we have the power of surrendering the slave; for they can be brought not only against us but also against our successors, as well as against the successors of the party liable in the first place, not because they succeed to his liability, but on the ground of ownership. Hence, if a slave has come into the hands of another party, his new owner can be sued in a noxal action on the ground of ownership.

43. *Pomponius, Epistles, Book VIII.*

Slaves, in cases where liability for reparation follows the individual, should be defended in the place where it is alleged that they committed the offence, and therefore the owner is obliged to produce said slaves in the place where they are said to have committed the violence and he may lose the ownership of all of them if he does not defend them.