THE ENACTMENTS OF JUSTINIAN.

BOOK II.

TITLE I.

CONCERNING THE DIVISION OF THINGS.

We explained the rights of persons in the preceding Book, now let us consider things; which are either included in our patrimonial estate or are outside of it. Some things are by natural law common to all persons, some are public, some belong to a corporate body, some to no one, the greater part are the property of individuals, and these are acquired in various ways as will appear hereafter.

(1) By natural law the following things belong to all men, namely: air, running water, the sea, and for this reason the shores of the sea. No one, therefore, is prohibited from approaching the seashore if he avoids damaging houses, monuments, and other structures, because they are not, like the sea, subject to the Law of Nations.

(2) All rivers and ports are also public, and therefore the right of fishing in a harbor or in streams is common to all.

(3) The shore of the sea extends to the point attained by the highest tide in winter.

(4) The public use of the banks of rivers is also subject to the Law of Nations, just as the use of the river itself is; and hence anyone has a right to secure a vessel to them, to fasten ropes to trees growing there, or to deposit any cargo thereon, just as he has to navigate the river itself; but the ownership of the same is in those whose lands are adjacent, and therefore the trees growing there belong to them.

(5) The public use of the sea-shore is also subject to the Law of Nations in like manner as that of the sea itself, and therefore any person has as good a right to build a house there in which he can take refuge, as he has to dry his nets or to draw them out of the sea. The ownership of the shores, must, however, be considered as belonging to no one, but to be subject to the same law as the sea itself and the earth or sand underneath it.

(6) Such property as theatres, race-courses, and other things of this kind which are situated in towns, as well as such as are the common property of cities, belong to corporate bodies and not to individuals.

(7) Moreover, things which are sacred, religious, and holy, belong to no one, for that which is subject to Divine Law is not the property of any person.

(8) Those things are sacred which have been formally consecrated to God by the Pontiffs, for example, sacred edifices, and donations regularly dedicated to the service of God, which We have also by one of Our Constitutions prohibited from being alienated or encumbered except for the purpose of redeeming captives. Where, however, anyone by his own authority makes anything as it were sacred, so far as his efforts are concerned, it is not sacred, but profane. The ground on which a sacred edifice has been constructed still continues sacred after the edifice has been demolished, which was also the view of Papinian.

(9) Any person voluntarily renders a place religious when he buries a corpse on his own land. He is not permitted, however, to bury it on land which is held in common and still is pure, without the consent of the other owner; but he may make the interment in a tomb which is owned in common, even though the other owner does not consent. Again, where the usufruct belongs to someone else, it has been decided that if the usufructuary does not consent the owner cannot make the place religious. It is lawful to make an interment upon land belonging to another if the latter grants permission to do so, and the place becomes religious even if the owner did not ratify the act until after the corpse was buried there.

(10) Such things are city walls and gates are also holy, and being to some extent subject to Divine Law, are, for that reason, not included in the property of anyone. We mention walls as holy, because the punishment of death has been fixed against those who commit any injury to them; and for this reason We designate as "sanctions" those parts of laws in which We establish penalties to be imposed upon such as are guilty of violation of the laws.

(11) Things become the property of individuals in many ways, for by natural law we obtain the ownership of certain things which, as We have already stated, is called the Law of Nations, and we obtain the ownership of others by the Civil Law. It is more convenient, therefore, to begin with the more ancient law; for it is evident that natural law is the older because in the course of nature it originated at the same time with the human race; and civil laws only came into existence when states were founded, magistrates appointed, and laws committed to writing for the first time.

(12) Therefore, wild beasts, birds, and fishes, that is to say all creatures that exist on the earth, in the sea, or in the air, as soon as they are taken by anyone immediately become his property by the Law of Nations, since whatever formerly belonged to no one is conceded by natural reason to the first person obtaining possession of the same.[1] Nor does it make any difference whether anyone takes wild beasts and birds on his own ground or on that of another, although it is evident that if anyone enters upon the land of another for the purpose of hunting animals or birds, he may be prohibited from entering by the owner, if he is aware of it. Any of these things which you may have taken is understood to be your property as long as it is retained in your custody; but after it has escaped from your custody and recovered its natural liberty, it ceases to be yours, and belongs to the first person who secures it. It is understood to have recovered its natural liberty when it has escaped out of your sight, or, if still in your sight, its pursuit is difficult.

(13) The question has arisen as to whether when a wild animal which has been wounded so severely that it can be taken immediately, it becomes your property; and it has been declared by some that this is the case, and that it is to be considered yours as long as you follow it; but that if you desist from following it, it ceases to be yours, and becomes the property of the first occupant. Others hold that it is not yours until you have actually seized it, and We confirm the last opinion because many things may occur to prevent you from seizing it.

(14) Bees are also wild by nature. Therefore, if they settle upon your tree, they are not understood to be your property until you have enclosed them in a hive, any more than birds which have made a nest in your tree; and for this reason if anyone else shuts them up in a hive he will become their owner, and anyone else can remove their honeycombs if they have made any. It is certain that if you see a person entering upon your land before anything has been touched, you have a legal right to forbid him to enter. A swarm of bees which has escaped from your hive is understood to be yours as long as you can see it and the pursuit of the same is not difficult; otherwise, it becomes the property of the first occupant.

(15) The nature of peacocks and pigeons is also wild, and it does not matter if they have the habit of flying away and returning, for bees act in the same way, and it is established that their nature is wild; and certain persons have so far tamed deer that they are accustomed to go into the woods and return, and no one denies that they are wild by nature. However, with reference to animals which are accustomed to go away and return, the rule has been established that they are considered yours as long as they intend returning; but if they cease to have that intention, they likewise cease to be yours, and belong to the first person who secures them; and they are deemed to have lost the intention to return when they abandon the habit of doing so.

(16) Chickens and geese are not of a wild nature, and this we may ascertain from the fact that there are other fowls which we call wild, and also other geese to which we give this appellation. Therefore, if your geese or chickens are frightened for any reason and fly away, they are still regarded as yours, wherever they may be, even though they may have fled beyond

your sight; and anyone who retains possession of these animals for the purpose of gain is deemed to have committed theft.

(17) Whatever We take from the enemy immediately becomes ours by the Law of Nations; to such an extent, indeed, that even freemen are reduced to slavery for our benefit, although, nevertheless, if they escape from our control, and return to their own people, they regain their former condition.

(18) Again, stones, gems, and other things found upon the shore of the sea immediately become the property of the finder by natural law.

(19) In like manner, the increase of animals under your control is by the same law acquired by you.

(20) Moreover, whatever a river adds to your land by alluvial soil belongs to you under the Law of Nations, for this deposit is an indiscernible increase; and that which is added in this manner is held to have been added so gradually that you cannot ascertain how much is added at any moment of time.

(21) But if the force of the river removes any portion of your field and conveys it to that of your neighbor, it is evident that it still remains yours; although it is clear that if it continues joined for a long time to the land of your neighbor, and the trees carried away with it have fastened their roots in his soil, from that time forth they are considered as belonging to the land of your neighbor.

(22) When an island arises in the sea, which rarely happens, it becomes the property of the first person who occupies it, for before that it is considered as belonging to no one. But when an island arises in a river, which often occurs, if it be situated in the middle of the stream it is the common property of those who own land on the bank on either side of the river, in proportion to the extent of the land of each one measured along the bank. But if it is nearer to one side than it is to the other, it is the property of those alone who own land on that side near the bank.

Where, however, the river is divided in a certain place, and then farther down the divisions reunite, and thus turn a man's property into an island, the land still belongs to the party who formerly owned it.

(23) Moreover, if the stream, having left its natural bed, commences to flow elsewhere, the original channel belongs to those persons who hold land near the bank, manifestly in proportion to the extent of the property of each one as measured along the said bank; and the new channel begins to be of the same nature as the stream itself, that is to say public. If, however, the stream returns after a time to its original bed, the new channel at once begins to belong to those who own land along its bank.

(24) The case is otherwise, however, where anyone's land is entirely inundated, for a flood does not change the nature of the land; and, on this account, when the water recedes, it is evident that the land belongs to the party who originally owned it.

(25) When anyone has changed the form of property belonging to another, it is customary to make the inquiry which of them is the owner of the same according to natural reason, whether it is he who made the article, or he who was formerly the owner of the material; as for instance, when anyone has made wine, oil, or grain out of the grapes, olives, or ears of another; or has made a vessel out of the gold, silver, or copper of another; or has made mead by mixing wine and honey which belonged to another; or has made a plaster or an eyewash out of drugs belonging to another; or a garment out of his wool; or a ship, a chest, or a bench out of boards belonging to another person. After many disputes between the Sabinians and Proculians, an intermediate opinion was adopted, to the effect that if the new article could be restored to its original materials, he should be regarded as the owner to whom the same

formerly belonged; but if it could not be restored, the party who made the article should be considered its owner; for example, a vessel which has been cast can be restored to the rough mass of copper, silver, or gold, but neither wine, oil, nor grain can be reconverted into grapes, olives, or ears, nor can mead be resolved into wine and honey.

Where, however, anyone has made an article partly out of materials belonging to himself and partly out of those belonging to another; for example, mead out of his own wine and someone else's honey; or a plaster or eye-wash out of drugs belonging to both himself and others; or a garment out of wool belonging to himself and another; there is no doubt that the article in this case belongs to the party who made it, for he not only bestowed his labor but also furnished a portion of the materials.

(26) Where, however, anyone has interwoven purple thread belonging to another person into a garment of his own, the thread, though more precious, is added to the garment by way of accession, and the party who was the owner of the thread can bring an action of theft, as well as one to recover the value of the property, against him who purloined it, whether he himself, or someone else made the garment; but although property which has been destroyed cannot be recovered by a suit, still an action can be brought for it against thieves and any other parties in possession.

(27) If materials belonging to two persons are mingled together with the consent of the owners, the entire mass formed by the said mingling is the common property of both; as, where they mix their wine, or melt together masses of silver or gold — even if the materials are not similar — and for this reason a peculiar kind of substance is created, as, for instance, mead from wine and honey, or electrum from gold and silver, the same rule applies; for in this instance also there is no doubt that the newly formed substance is common property. Again, if the articles are mixed by accident, without the consent of the owners, whether the materials are different or identical the same rule applies.

(28) If, then, the grain of Titius should be mixed with yours, and this be done with his consent and yours, the grain will be common property; because the individual portions, that is to say the single grains, which belong to each of you have been rendered common property by your consent. Where, however, the mixture took place accidentally, or if Titius made it without your permission, the grain is not considered to be common property because the individual parts exist in their own substance; and, under such circumstances, the grain no more becomes common property than a herd would be considered common if the cattle of Titius should become mixed with yours. If, however, all the grain is kept by either of you, an action for recovery can be brought by the other for his portion of the same; although it is in the discretion of the judge to make an estimate of the value of the grain which belongs to each.

(29) When anyone erects a building with another party's materials upon his own ground, he is understood to be the owner of what he has built, because all structures belong to the soil. Still, the former owner of the materials does not for this reason cease to be their owner, but for a certain time he cannot bring suit to recover their value or for their production, on account of a law of the Twelve Tables by which it is provided that no one can be compelled to remove the materials of another which have been used in his own building, but must pay him double the value of the same, by means of the action designated *de tigno injuncto;* (and under the term "*Tignum*" is included all kinds of materials of which edifices are constructed). This rule has been adopted to avoid the necessity of demolishing buildings; but if for any reason the building should be destroyed, the owner of the materials, provided he has not already obtained double their value, can then bring suit for recovery, and to require the production of the same.

(30) On the other hand, where anyone builds a house with his own materials on the land of another, the house becomes the property of the party owning the land. In this instance, however, the owner of the materials loses his property, because it is understood that he voluntarily alienated them and he does so, at all events, if he was not ignorant that he was

building the house on another's land; and, therefore, even though the house should be destroyed, he cannot bring suit for the materials. It is well established, however, that if the party who built the house has obtained entire possession, and the owner of the land claims the house as belonging to him, and refuses to pay the value of the materials and the wages of the workman, he can be barred on the ground of fraud, that is, if the party in possession who built the house acted in good faith; for if he knew that the land belonged to someone else, he can be considered to blame because he rashly built on ground which he was aware was the property of another.

(31) If Titius sets a plant belonging to another in his own soil, it will belong to him; and, on the other hand, if Titius sets his own plant in the soil of Mævius, the plant will belong to Mævius, if in either case it has taken root, but before it does so it is the property of its former owner. Moreover, from the time that a plant takes root ownership in it is changed to such an extent that if even the tree of a neighbor encroaches upon the land of Titius so that it throws out roots therein, We hold that the tree is the property of Titius, for reason does not admit that a tree should belong to anyone else than to him in whose soil it has taken root; and therefore if a tree planted near a boundary line extends its roots into the soil of a neighbor, it becomes the common property of both parties.

(32) Under the same rule, according to which plants growing on land are attached to the soil, grain after it is sown is also understood to belong to the soil. But just as he who builds upon the land of another has, as We have stated, the right to protect himself by an exception on the ground of fraud, if the owner of the land demands the building of him; so likewise, can a man protect himself by means of the same exception after he has in good faith sowed grain at his own expense upon the land of another.

(33) Writing, also, even though it be of gold, belongs as much to papyrus and parchment as edifices or crops do to the soil; and, therefore, if Titius has written a poem, a history, or a speech, upon your papyrus or parchment, you, and not Titius, are considered to be its owner. But if you demand your books or parchments from Titius, and are not ready to pay the expense of the writing, Titius can defend himself by the exception on the ground of fraud; at all events, he can do so if he obtained possession of the said papyrus or parchments in good faith.

(34) Where anyone has painted a picture upon the tablet of another, some persons think that the tablet should belong to the picture; and others are of the opinion that the picture, no matter what kind it may be, is a part of the tablet. It appears to Us preferable that the tablet should belong to the picture, for it is ridiculous that a painting by Apelles or Parrhasius should be considered an addition to a wretched tablet. Wherefore, if the owner of the tablet be in possession of the painting, and the artist who painted it demands it, but is unwilling to pay the value of the tablet he can be barred on the ground of fraud; but if he who painted the picture is in possession of the same, it follows that an action can be brought against him by the owner of the tablet; in which instance if he does not pay the expense of the painting, he can be barred by the exception on the ground of fraud, at all events if he who painted the picture obtained possession of it in good faith; for it is evident that if the artist or anyone else acquired the tablet surreptitiously, the owner of the same is entitled to an action of theft.

(35) If any person in good faith purchases real property from someone who is not the owner of the same, but whom he thought to be such, or receives it as a gift or in any other way in good faith, it is founded on natural reason that any crops which he has gathered shall belong to him, on account of his cultivation and care; and therefore, if the owner of the property afterwards appears and claims it, he cannot bring suit for the crops which have been consumed by the former. The same indulgence is however not conceded to a party who knowingly kept possession of the land of another; and therefore he is obliged to account for the crops along with the land, even though they may have been consumed.

(36) He to whom the usufruct of land belongs is not entitled to the crops unless he himself has gathered them; and therefore, although they may be ripe, if he dies before they are gathered they do not belong to his heir, but are acquired by the owner of the property, and the same rule, generally speaking, applies to serfs.

(37) The young of cattle is also classed as their fruit, just as their milk, hair, and wool are; and therefore lambs, pigs, calves, and colts immediately, by natural law, become the property of the usufructuary. The offspring of a female slave is, however, not fruit, and hence belongs to the owner of the property, for it seems absurd that a man should be classed as fruit, when nature has provided the fruits of all things for the benefit of the human race.

(38) Where any person has the usufruct of a flock, he is required, according to the opinion of Julianus, to replace from the young any of the original flock that die, and is also required to replace any dead vines or trees which may have died; for it is his duty as the good head of a household to cultivate the land in a proper manner.

(39) The Divine Hadrian, in compliance with the principles of natural justice, conceded to the finder any treasure which he found on his own land; and established the same rule where anyone accidentally discovered treasure in a sacred or religious place. But where anyone found treasure on the land of another, not devoting himself to that purpose, but by accident, he conceded half of it to the owner of the land; and, in accordance with the same principle, where anyone found something on the land of the Emperor, he decreed that half of it should belong to whoever found it, and the other half to the Emperor. Agreeably to this rule, if anyone finds treasure on land belonging to the Treasury, or in a public place, half of it belongs to him and half to the Treasury, or the city.

(40) Things are likewise obtained by us by natural law through delivery; for nothing more accords with natural justice than to confirm the desire of an owner to transfer his property to another. And, therefore, corporeal property, of every description whatever can be transferred, and as soon as delivery has been made by the owner of the same it is alienated. For this reason stipendiary and tributary lands are alienated in this manner. Lands situated in the provinces are designated stipendiary and tributary, but among these and Italian lands according to Our Constitution no difference at present exists.

(41) Thus, if anything is bestowed by way of gift or dowry, or for any other reason, it is unquestionably transferred; nevertheless, things sold and delivered are not acquired by the purchaser unless he has paid the price to the vendor, or made him secure in some way, for example, by giving him a surety or pledge. This regulation was provided by a Law of the Twelve Tables, and also may properly be said to have been derived from the Law of Nations, that is, natural law. If the party who sold the article trusted the purchaser, it must be held that the subject of the sale at once becomes the property of the latter.

(42) It makes no difference whether the owner of the property himself delivers it to another, or someone else does this with his consent.

(43) For this reason when the free control of the entire property has been entrusted by the owner to another party, and the latter sells or delivers a portion of it, he makes the person receiving it the owner of the same.

(44) Sometimes even the bare desire of the owner, without delivery, is sufficient to transfer the title to the property; for example, if anyone sells or presents you with anything which he has already lent or hired to, or deposited with you; as, even if he did not deliver it to you for that purpose, nevertheless, by the very fact that he allowed it to become yours, the ownership of the same is acquired by you, just as if it had been delivered with that very intention.

(45) Again, if anyone sells merchandise stored in a warehouse, he delivers the property in the said merchandise to the purchaser at the same time that he delivers him the keys of the warehouse.

(46) In like manner, sometimes the intention of the owner, when manifested towards an uncertain person, transfers ownership in an article; as, for example when Prætors and Consuls who throw presents into a crowd are ignorant what each individual will obtain, and still, for the reason they wish that what each one secures shall belong to him, they at once render him the owner of the same.

(47) For this reason it seems to be right that anyone who takes possession of property which has been abandoned by its owner immediately acquires the title to it; and that is considered to be abandoned which the owner has designedly cast aside with the intention that it shall no longer be included among his possessions, and therefore has immediately ceased to be its owner.

(48) The case is different where articles are thrown overboard during a storm at sea for the purpose of lightening the vessel; as these remain the property of the owner, because it is evident that they are not thrown overboard with the idea that the owner no longer wishes to have them, but that he and the vessel may the more readily escape the danger of the sea; for which reason, if anyone takes them away with the expectation of profiting by them, whether they have been cast on shore by the waves, or he has obtained them in the sea itself, he commits theft. Such things do not greatly differ from those which fall from a moving carriage without the knowledge of their owners.

TITLE II.

CONCERNING INCORPOREAL PROPERTY.

Again, some property is corporeal, and some incorporeal.

(1) Corporeal property is such as by its nature is tangible; as, for instance, land, a slave, clothing, gold, silver, and in short, innumerable other things.

(2) Incorporeal property is that which cannot be touched, and is such as consists of rights; for instance, an inheritance, an usufruct, or obligations contracted in any way. Neither is it necessary that corporeal property should be included in an estate, for the crops gathered from land are corporeal, and what is due to us by reason of any obligation is ordinarily corporeal, for example, land, a slave, or money; while the right of inheritance itself, the right to make use of the crops, as well as the right of the obligation are incorporeal.

(3) To the same class belong rights attaching to urban and rustic estates, which are also called servitudes.

TITLE III.

CONCERNING SERVITUDES.

The rights attaching to rustic estates are the following, namely: those of passage, driving, of way, and of conducting water. Passage is the right to walk, but not to drive a beast of burden or a vehicle; driving is the right to conduct either a beast of burden or a vehicle; therefore he who has the right of passage does not possess that of driving; while he who has the right to drive has also the right of passage and can make use of it even without a beast of burden. The right of way is the right of going and either driving or walking; for it includes both of the former rights. The right of conducting water is that of bringing water through the land of another.

(1) Servitudes attaching to urban estates are those belonging to buildings and estates are styled "urban" because we call all buildings "urban", even though they are built in the country. The servitudes of urban estates are the following: that a neighbor shall sustain the weight of his neighbor's house; that he can place a beam in the wall of his neighbor; that he shall either permit, or not permit water to drop or flow into his house, his courtyard or his drain; and that no one shall raise his house to such a height as to obstruct the lights of his neighbor.

(2) Some persons think that the right of drawing water, driving cattle to water, pasture, burning lime, and digging sand, are justly included among the servitudes of rustic estates.

(3) These are designated servitudes of estates because without the latter they cannot exist, for no one can acquire a servitude over an urban or rustic estate unless he himself has an estate; nor can anyone who does not possess an estate owe a servitude of this description.

(4) When anyone wishes to establish some right for the benefit of his neighbor he should do so by means of contracts and stipulations. Anyone may also bind his heir by will not to raise his house to such an extent as to interfere with the lights of his neighbor's house; or to permit his neighbor to insert a beam into his wall; or to allow the water to fall upon his premises; or to permit him to walk or drive through his property, or to conduct water from the same.

TITLE IV.

CONCERNING USUFRUCT.

Usufruct is the right to use and enjoy the property of others without injuring its substance; for it is a right over the essential matter, and if it should be destroyed, the right would necessarily also be extinguished.

(1) Usufruct is susceptible of separation from property, and this happens in many ways. For example, where anyone bequeaths the usufruct to another, as in this instance the heir would have the bare property and the legatee the usufruct; and, on the other hand, if he should bequeath the land, omitting the usufruct, the legatee would have the bare property and the heir the usufruct; and also he can leave the usufruct to one person and the land with the usufruct deducted to another; but if anyone wishes to create an usufruct except by will, he must do so by means of agreements and stipulations. However, in order that property may not be rendered useless for the reason that the usufruct has been perpetually deducted, it has been decided that the usufruct may, under certain circumstances, be extinguished and revert to the owner.

(2) Moreover, an usufruct may be created not only over land and buildings, but also over slaves, beasts of burden and all other property, except such as is consumed by use; for things of this kind are not susceptible of usufruct either by natural reason or according to the Civil Law. In this category are included wine, oil, grain, and clothing, and that of coin greatly resembles these, because money is, to a certain degree, worn away by constant interchange; but, on account of public convenience, the Senate decreed that usufruct could be established even over such property if sufficient security for it were given to the heir. Therefore, where the usufruct of money is bequeathed, it is given to the legatee in such a way that it becomes his property, and the latter must give security to the heir to return the same amount of money, if he should die or be deprived of civil rights.

The other property is also delivered to the legatee in such a way as to belong to him, but he must furnish security for the appraised value of the same, that if he dies or is deprived of civil rights a sum of money equal to the appraised value of said property shall be repaid. The Senate, therefore, did not in fact create an usufruct in such property, for it had not power to do so, but by means of the bond it established a quasi-usufruct.

(3) An usufruct is ended by the death of the usufructuary, or by the two kinds of loss of civil rights designated the greatest and the intermediate, or by not using it according to the manner or time prescribed; all of which matters have been decided by one of Our Constitutions. An usufruct is also terminated when it is surrendered by the usufructuary to the owner of the property (for a transfer to a third party is void); or, on the other hand, if the usufructuary acquires the ownership of the property, which is called consolidation. Furthermore, it has been settled that if a house has been consumed by fire, or destroyed by an earthquake, or falls down from decay, the usufruct is extinguished, and not even the usufruct of the ground is due.

(4) When, therefore, the usufruct is terminated, as a matter of course it clearly reverts to the ownership, and from that time the owner of the bare land begins to have full power over the property.

TITLE V.

CONCERNING USE AND HABITATION.

A bare use is established in the very same ways as a usufruct, and is also terminated in exactly the same ways as the usufruct ceases to exist.

(1) As a matter of fact, the right of use is inferior to that of usufruct; for he who has the bare use of land is not regarded as entitled to anything but such herbs, fruits, flowers, hay, straw, and wood, as he requires for his daily necessities; and he is only allowed to remain on the land in such a way as not to molest the owner of the same, or hinder those engaged in farm labor; nor has he authority to sell, hire, or give what he has to any other party without compensation, while he who enjoys the usufruct can do all these things.

(2) Moreover, he who has the use of a house is considered only to have the right to live there himself, and he cannot transfer this right to another, and it seems scarcely to have been admitted that he could even entertain a guest. He has, however, the right to live there with his wife and children, and with his freedmen as well, and also with such other freeborn persons as he employs along as his slaves; and, in like manner, if the use of the house belongs to a woman, she can reside there with her husband.

(3) Moreover, he who has the use of a slave can only himself, employ both the labor and services of the slave, but he is not allowed, under any circumstances, to transfer his right to another, and undoubtedly the same rule applies to a beast of burden.

(4) If the use of cattle or sheep is bequeathed, the party entitled to it can neither use the milk, lambs, or wool, because they are included in the increase, but it is clear that he may use the cattle for the purpose of manuring his land.

(5) But where the right of habitation has been bequeathed to anyone or established in any other way, this is classed as neither use nor usufruct, but a certain peculiar right, as it were; therefore according to an opinion of Marcellus, and for the sake of public expediency We have permitted, by a decision which We have promulgated, that persons who enjoy the right of habitation may not only reside there themselves, but also lease the property to others.

(6) What We have stated concerning servitudes, usufruct, and habitation must suffice; with reference to inheritance and obligations We shall discuss them in their proper places. We have stated briefly in what ways property is acquired by the Law of Nations, let us now examine how it is acquired by legal enactment and the Civil Law.

TITLE VI.

CONCERNING USUCAPTION AND POSSESSION FOR LONG TIME.

It was established by the Civil Law that where a person purchased property, or obtained it by gift or in any other lawful manner from one who was not the owner, but whom he believed to be the owner, if the said property was a chattel, he would acquire it by use after a year; and if it was immovable, after two years — in case it was on Italian soil; in order that the ownership of property might not be uncertain. And since this had been decided because the ancients thought that the aforesaid terms were sufficient for the owners to inquire after their property, a preferable opinion occurred to Us in order to prevent owners from being deprived of their property too soon, and that this advantage might not be restricted to any certain locality. Hence, We have promulgated a Constitution with reference to this matter, by which it has been provided that personal property shall be acquired by use for three years, but real-estate by possession for a long time, (that is after ten years, where the parties are present, and after

twenty where they are absent); and that by these provisions the ownership of property shall be acquired not only in Italy, but in all countries subject to Our Imperial jurisdiction, where a just ground of possession has previously existed.

(1) In some cases, however, although a party may have possession in good faith, usucaption will not profit him during any period of time; for instance, where anyone has possession of a freeman, sacred or religious property, or a fugitive slave.

(2) Title to stolen property and that of which possession has been obtained by force cannot be acquired by use, even if held in good faith for the terms aforesaid; for the Law of the Twelve Tables and the *Lex Atinia* prohibit the acquisition of stolen property, and the *Lex Julia et Plautia* that of property obtained by force.

(3) When it is stated that usucaption of property which has been stolen or acquired by force is forbidden by law, it does not mean that the thief himself or the party who obtained possession by force cannot acquire ownership by usucaption (for it does not run in favor of such persons for another reason, that is because they are guilty of bad faith) but that no one else has that right, even though he may purchase the property from them, or obtain it in any other way in good faith. Therefore, with reference to personal property, usucaption does not really benefit a possessor in good faith, because he who sold the property of another, or transferred it in any other way, is guilty of stealing it.

(4) Sometimes, however, the case is different, for if an heir be- , lieving that property which has been loaned, hired, or deposited with the deceased, is a portion of the estate, sells it to another party, or bestows it as a dowry on another in good faith, there is no question that he who receives it can acquire title to it by use, since it is not vitiated by theft, as the heir who alienated it in good faith, as his own, was not guilty of theft.

(5) Again, if he to whom the usufruct of a female slave belongs, believing her offspring to be his own, sells, or gives it away, he does not commit theft, for a theft is not committed without the intention of stealing.

(6) This can also happen in other ways, as where anyone, without the defect of theft, transfers property belonging to another to a third party, and causes the title to it to be acquired by the latter through usucaption.

(7) Ownership of property attached to the soil is, however, more easily obtained; as, for instance, where anyone gains possession of land which is unoccupied on account of the absence or negligence of the owner, or because the latter died without leaving a successor; for although the former acts in bad faith, (because he knows that he has taken possession of land belonging to someone else) nevertheless, if he conveys it to a third party who accepts it in good faith, the latter can obtain the ownership of the same by long possession, because he did not accept it either as being stolen or acquired by force; for the opinion entertained by certain ancient authorities, who believed that there could be a theft of land and place, is abrogated; and by certain Imperial Constitutions the rights of those in possession of real property are protected, so that no one can be deprived of them after long and undisputed possession.

(8) Sometimes, however, property can be obtained by use even if it has been stolen or acquired by force; for example, if it is returned to the control of the owner, for then the defect in the title to said property having been removed its usucaption proceeds.

(9) Property belonging to Our Treasury is not subject to usucaption. Papinian, however, held that when property without ownership has not yet been brought to the notice of the Treasury, a purchaser in good faith can acquire by usucaption any portion of the same which has been transferred to him; and the Divine Pius as well as the Divine Severus and Antoninus promulgated this rule in Rescripts.

(10) Finally, it should be noted that for property of this kind to be obtained by a purchaser in good faith, or acquired in any other lawful way, must be such that it is free from any defect.

(11) The error of a false title does not bring about usucaption; for example, where a man who has not made a purchase, but thinking that he has done so holds possession; or when anyone to whom property was not given believes that he holds it by virtue of a gift.

(12) Long possession which has begun to run in favor of a deceased person is continued for the benefit of his heir and the possessor of the estate, even though the latter may know that the land belongs to someone else. If, however, the deceased did not have a legal title in the beginning, possession does not profit the heir and the possessor of the estate, even though they may not be aware of the fact; and this Our Constitution has declared shall also be observed in the case of usucaptions, in order that the time may be continued.

(13) The deceased Divine Severus and Antoninus stated in a Rescript that the times with reference to the possession of buyer and seller should be continuous. It was provided by an Edict of the Divine Marcus, that anyone who has purchased property belonging to another from the Treasury, can, where five years have elapsed since the sale, successfully defend the case against the owner of the property by alleging this fact. Still, a Constitution of Zeno, of sacred memory, has very properly provided in case of such as have obtained any property from the Treasury by sale, donation, or any other title, that they shall at once be secure, and be victorious whether they sue or are sued; and, on the other hand, that where persons think they have any cause of action arising out of the ownership or hypothecation of the property alienated, they may sue the Imperial Treasury within the term of four years. A divine Constitution of Ours which We have recently promulgated, is made applicable to those who have received anything from Our palace, or from that of the venerated Empress; the provisions embraced in the aforesaid Constitution of Zeno having reference to alienations made by the Treasury.

TITLE VII.

CONCERNING GIFTS.

A gift is also another kind of acquisition. There are two kinds of gifts, that is one made in expectation of death, and one that is not so made.

(1) A *donatio mortis causa* is one made with the prospect of death, as when anyone makes such a gift with the understanding that the party who accepts shall retain what is given if any calamity should come upon the donor, but if the latter should survive, or repent of having made the donation, or if the party to whom it is given should die first, the donor shall in that case receive it again. These donations' *mortis causa* are, in every respect, governed by the same rules as legacies; for as a doubt existed among men learned in the law as to whether it was proper to class such a donation as a gift or a legacy, because it possessed some of the distinctive features of both; and as some of the authorities assigned it to one class, and some to the other, We promulgated a Constitution that it should, in almost every instance, be included in the category of legacies, and be treated in the way which Our Constitution prescribes. On the whole, a *donatio mortis causa* is made when the donor prefers that he himself should have the gift rather than the party to whom it is given, and that the donee should have it rather than his heir. And in this way, in Homer, Telemachus makes a gift to Piræus:

"Piræus, as we do not know in what way these things will end, if the haughty suitors secretly kill me in the palace, and divide among themselves all the property derived from my ancestors; I desire that you shall possess and enjoy it rather than any of them; but if I plant slaughter and death among them, that you shall then gladly bring it to me rejoicing at my house."

(2) Another kind of gifts are such as are made without any thought of death, and which we call *inter vivos*. These can in no way be compared to legacies, and where they are perfected cannot rashly be revoked. They are perfected as soon as the donor has indicated his intention, whether in writing or verbally, and, as in the case of a sale, Our Constitution has imposed upon such gifts the necessity of delivery, so that even if they are not delivered at once they have the most full and perfect effect, and the obligation of delivery is placed upon the donor. And, as formerly the decrees of certain Emperors compelled such gifts to be publicly recorded if they exceed the value of two hundred *solidi*, Our Constitution has increased the amount to five hundred *solidi*, and has prescribed that such a gift shall be valid without being recorded; and has also designated certain gifts which require no record whatever to be made, but of themselves are perfectly valid.

In addition to this We have prescribed many other rules for the better completion of gifts, all of which are to be ascertained from the Constitutions which We have promulgated with reference to this matter. It must be remembered, however, that even after gifts have been thoroughly perfected, We have by one of Our Constitutions granted permission to the donors to revoke them in certain cases where persons on whom the benefit was conferred are ungrateful; so that those who have transferred their property to others may not suffer any injury or loss from them, as set forth in Our Constitution.

(3) There is another kind of donation *inter vivos* which was entirely unknown to the ancient legal authorities but was afterwards introduced by later Emperors. This was formerly designated *ante nuptias*, and was based upon the tacit condition that it was only to be valid when marriage took place; for the reason that such a gift was always bestowed before marriage, and was never given after the nuptials had been solemnized. The Divine Justin, Our father, was the first who, by one of his Constitutions, permitted gifts to be increased after marriage and where anything of this kind took place, a gift *ante nuptias* could also be increased, even after the marriage had been celebrated; nevertheless, the unsuitable name survived, as the gift was still called "*ante nuptias*", although it was increased after marriage. But We, desiring to provide rules in the most perfect manner, and wishing names to bear some relation to things, have decreed that donations of this description may not only be increased but may be instituted during marriage, and that they shall not be called *ante nuptias*, but *propter nuptias*, and be classed with dowries in this respect, and that just as dowries can not only be increased but also created during marriage, so gifts of this kind introduced "on account of marriage" may not only antedate the ceremony, but may also be increased or originated after it has been performed.

(4) There was formerly still another method of acquiring property under the Civil Law, that is to say, by the right of accretion, which is the following: where anyone owns a slave in common with Titius and he himself alone gave him his freedom either before a magistrate, or by will; in a case of this kind his share in him was lost and vested in his partner. However, as it established a very bad precedent for the slave to be defrauded of his freedom and on this account loss be suffered by the more humane owner, and for those who are more cruel to profit by it, We have considered it necessary by means of one of Our Constitutions to correct a condition full of injustice, by having recourse to a merciful remedy; and We have found a way by which both the manumitter, his partner, and he who receives freedom may enjoy Our kindness, and the gift of liberty become effective (in favor of which it is perfectly clear that the ancient legislators prescribed many things in opposition to ordinary rules), so that he who bestowed the freedom may rejoice in the security of his liberality, and his partner be indemnified by receiving the price of the slave in proportion to his interest in him, in accordance with the scale of ownership which We have established.

TITLE VIII.

WHO IS PERMITTED TO ALIENATE, AND WHO IS NOT.

It sometimes happens that the owner cannot alienate, and, on the other hand, he who is not the owner has the power to alienate; for, by the *Lex Julia*, a husband is forbidden to alienate land given as a dowry without the consent of his wife, although when it is given to him as a dowry it belongs to him; but We, having amended the *Lex Julia*, have placed it in a better condition, for, as this law applied only to property in Italy and prohibited alienations made against the wife's consent, as well as hypothecations even when she was willing, have applied a remedy to both cases, so that alienations and encumbrances are forbidden even where the property is situated in the provinces, and neither of these transactions shall take place even with the consent of wives; lest the weakness peculiar to the female sex might be taken advantage of to the detriment of their property.

(1) But, on the other hand, a creditor can, where an agreement has been made to do so, alienate a pledge even though it does not belong to him. This may perhaps appear to have been done because it is understood that the pledge is alienated with the consent of the debtor, who in the beginning agreed that the creditor could sell it if the money were not paid. However, to prevent creditors from being obstructed in the prosecution of their rights, or debtors from seeming to lose the ownership of their property too readily, this has been provided for by Our Constitution, and a certain method has been prescribed by which a sale of pledges can be made, and by the tenor of which sufficient and abundant security has been furnished for all parties, both creditors and debtors.

(2) In the next place we must remember that no male or female ward can alienate anything without the consent of his or her guardian. Therefore, if anyone lends money to either without the consent of the guardian, he does not contract any obligation, for the reason that he does not make the money the property of the recipient; and hence it can be recovered by an action if it is still in the hands of the party to whom it was given; but if the said money has been expended by the recipient in good faith, an action for its value will lie; and if in bad faith, an action for its production can be brought.

On the other hand, any kind of property may legally be given to a ward of either sex without the consent of the guardian. Therefore, if a debtor pays a ward, the consent of his guardian is requisite; otherwise he will not be released, and this which is evidently most consonant with reason, We have promulgated in a Constitution addressed to the advocates of Cæsarea, at the suggestion of Tribonian, that most eminent man, the Quæstor of Our Sacred Palace, in which it is stated that the debtor of a ward may pay his guardian or curator, in case permission has been obtained from a judge to do so, without any expense; so that when this has been done, and the judge has granted his permission, and the debtor has paid his debt, the most ample security attaches to a payment of this description.

Where, however, payment has been made in any other manner than We have prescribed, and the ward has the money in his possession, or has become more wealthy through the payment of the same, and again, claims the amount he can be barred by the exception on the ground of fraud; and even though he may have squandered it, or lost it by theft, the plea of fraud will be of no advantage to the debtor, but he must, nevertheless, be condemned because he rashly made the payment without the authority of the guardian, and in contravention of Our Decree. On the other hand, however, male and female wards cannot make payment without the authority of their guardians, because whatever they pay does not belong to the recipient, as it is clearly evident that no alienation of property can be made by them without the consent of their guardian.

TITLE IX.

THROUGH WHAT PERSONS PROPERTY CAN BE ACQUIRED FOR US.

Property is acquired for us not only by ourselves but also through those whom we have under our control, as well as through slaves in whom we have the usufruct, and also through freemen and the slaves of other persons of whom we hold possession in good faith. Let us with care examine these cases separately.

(1) Formerly, your children of either sex, of whom you had control, acquired for the benefit of their ascendants without any distinction, everything that came to them with the exception of the *peculium castrense,* and it became the property of their ascendants to such an extent that they could give or sell to a stranger, or make any disposition they pleased of whatever they acquired through either a son or a daughter; a provision which seemed to Us to be inhuman, and therefore, by a general Constitution which We promulgated, We have brought relief to the children, and reserved for the parents that to which they were entitled; for it has been decreed by Us that if any advantage accrues to a child from the property of his father, it shall be entirely acquired by him for his ascendant in accordance with the ancient rule (for what injustice is there in property returning to an ascendant when it was originally derived from him?); but whatever the son of a family has acquired for himself in any other way he shall obtain the usufruct of for the benefit of his ascendant, although the ownership of the same remains in him; in order that any acquisition obtained by his own labor, or from good fortune may not be a cause of vexation to him by passing under the control of another.

(2) It has also been decreed by Us, in the case where an ascendant emancipated a child, and might, by former Constitutions reserve for himself, if he so desired, a third part of the property which could not be acquired by him, by way of the price of emancipation, as it were, and it resulted unjustly therefrom that the son, by means of this emancipation, was defrauded of the ownership of a part of the property; and thus, while there was an increase of honor conferred upon him by emancipation, through which he became his own master, this was lessened through the diminution of his estate. Hence, We have decreed that, instead of the third part of the ownership of the property which the ascendant could formerly retain, he shall now retain half, not of the ownership, but of the usufruct; so that the estate will remain intact in the son, and the father will have the benefit of a larger amount and obtain half instead of a third.

(3) Again, property is acquired by your benefit when your slaves obtain it by delivery, stipulate for it, or obtain it in any other manner; for this falls to you without your knowledge or consent, as a slave who is under the control of another can have nothing of his own. But if he should be appointed an heir, he cannot enter upon the estate unless by your order; and if he does so by your order you will be entitled to the inheritance, just as if you yourself had been appointed the heir; and, in like manner, a legacy is undoubtedly acquired by you through your slaves. And not only is the title to property acquired by you through those who are under your control, but possession of the same as well; for whatever property they may have obtained possession of, you are considered to possess. Therefore, usucaption or possession for a length of time also accrues to you through them.

(4) However, with reference to slaves in whom you have only an usufruct, it has been decided that whatever they acquire by means of your property or their own labor, is obtained for you; but whatever they earn by other means belongs to their owner. Therefore if a slave of this kind be appointed an heir, or any legacy or gift be bestowed upon him, the proprietorship of the same does not pass to the usufructuary but to the owner of the slave. The same rule is applicable to one of whom you hold possession in good faith, whether he be a freeman or the slave of another; for whatever applies to the usufructuary also applies to a possessor in good faith. Therefore, whatever is obtained by other means than those two belongs to the party himself, if he is free, or to his master, if he is a slave. But when a possessor has acquired the slave by usucaption, since in this way he becomes his owner, he can acquire property through

him under all circumstances; but an usufructuary cannot acquire a slave by usucaption; first, because he does not have possession but merely the right of usufruct; and second, because he knows that the slave belongs to another.

Moreover, not only ownership, but possession as well, is gained for you through slaves in whom you have the usufruct, or of whom you hold possession in good faith, or through a person who is free and serves you in good faith; but in each of these cases We speak with reference to the explanation which We have just given, that is to say, that it only relates to instances where they acquire possession by means of your property or their own labor.

(5) Therefore, from this it appears that under no circumstances can property be obtained for you through freemen whom you do not have lawfully under your control, or hold possession of in good faith; nor through the slaves of others in whom you have not the usufruct, nor of whom you have legal possession. For this reason it is stated on the authority of a Constitution of the Divine Severus that nothing can be acquired through a stranger, except it be done through a person who is free, as, for instance, through an agent, not only when you were aware of it but also without your knowledge; and by means of such possession ownership also may be obtained, if the party who delivered the property was the owner of the same; or usucaption or prescription may be acquired by lapse of time, if the party was not the owner.

(6) Sufficient has been said up to this time, as to the means by which particular kinds of property are acquired; for of the law of legacies, by which special kinds of property are acquired by you, and of that of trusts by which special property is left to you, We shall treat more appropriately elsewhere. Therefore let Us now examine in what ways property is acquired by you as a whole. Thus, if you have been made the heir of anyone; or if you lay claim to the possession of his property; or if you arrogate anyone; or if some person's effects are transferred to you for the purpose of preserving the advantages of freedom, his entire estate vests in you.

In the first place, let Us examine inheritances, of which there are two kinds, for they pass to you either by will or by intestacy.

First We shall treat of what comes to you by will, in discussing which subject it is necessary to begin by showing in what way wills should be executed.

TITLE X.

CONCERNING THE EXECUTION OF WILLS.

A testament is so called because it is an evidence of the intention of the mind.

(1) In order, however, that no regulation of antiquity may be entirely lost sight of, it must be remembered that formerly two kinds of testaments were in use; one of which was employed when peace and tranquillity prevailed, and was designated *testamentum in comitia calata;* the other was made use of when battle was imminent, and it was styled *testamentum in procinctu. A* third kind of testament was called *testamentum per æs et libram,* for the reason that it was brought about by emancipation, that is, through a fictitious sale in the presence of five witnesses and a balance-holder, who were required to be Roman citizens that had reached puberty, and another party, who was designated the "purchaser of the estate". The two first mentioned kinds of testaments have long since fallen into desuetude; and that which was brought about *per æs et libram*, although it lasted for a longer time is also, so far as a certain portion of it is concerned, no longer used.

(2) The forms of testaments above set forth are derived from the Civil Law, but subsequently another was introduced by an edict of the Prætor; for by his honorary law no emancipation was required, but the seals of seven witnesses were considered sufficient, while by the Civil Law the seals of witnesses were unnecessary.

(3) But when both by the custom of men and by the amendments of Constitutions, the Civil and Prætorian law began gradually to be brought into harmony, it was decided that testaments should be finished at one and the same time (which the Civil Law, to a certain extent exacted) in the presence of seven witnesses, and with the signatures of the latter (which was established by the Constitutions) and (as prescribed by the Edict of the Prætor) that their seals should be attached to wills; so that this regulation seems to be threefold, as witnesses and their continuous presence are required to render the execution of the will valid are derived from the Civil Law; the signatures of the testator and the witnesses are employed through observance of the Sacred Constitutions; while the seals and the number of witnesses are prescribed by the Edict of the Prætor.

(4) To all these formalities instituted for the purpose of establishing the genuineness of testaments that no fraud may be introduced, the following provision has been added from one of Our Constitutions, that the name of the heir must be written by the hand of the testator or a witness, and that everything must be done according to the tenor of the said Constitution.

(5) The witnesses can all seal the will with one signet ring (but what if the seven rings were engraved with one device?) and according to the opinion of Pomponius they can even impress their seals with a ring belonging to another party.

(6) Those also may act as witnesses who have testamentary capacity or are entitled to take under the will; but neither a woman, nor anyone who has not reached puberty, nor a slave, nor one who is dumb, deaf, or insane, nor a person deprived of the control of his property, nor he whom the laws have declared infamous and incapable of testifying, can be included in the number of witnesses.

(7) But when one of the witnesses to a will was supposed to be free at the time it was executed, but subsequently was shown to be a slave, the Divine Hadrian stated in a Rescript to Catonius Verus, (as also the Divine Severus and Antoninus did subsequently;) "that he would by his liberality sustain the will, so that it would be considered properly executed, since at the time when it was sealed the witness was, by the consent of all parties, classed in the number of freemen, nor was there anyone who raised a question as to his condition".

(8) A father and anyone under his control, or two brothers who are under the control of the same father, can both be witnesses to the same will; for the reason that no injury can result from several witnesses belonging to the same family acting in the business transaction of another person.

(9) A party under the control of the testator ought not to be a witness, but if a son after his discharge from the army makes a will disposing of his *castrense peculium*, neither his father nor anyone under the control of the latter can legally act as a witness; for in a matter of this kind the testimony of a member of the same family is rejected.

(10) Nor can he who has been appointed an heir nor anyone who is under his control, nor his father who has authority over him, nor his brothers, who are under the control of the same father, be allowed to act as witnesses; because the entire transaction relating to the execution of the will is at present considered to be carried on between the heir and the testator; for although the entire law on this point was formerly greatly confused, and the ancients who excluded the "purchaser of the estate" and those connected with him by paternal power from acting as witnesses to wills, permitted the heir and those connected with him by paternal power to testify respecting wills; and while conceding the right, advised them to abuse it as little as possible; We, nevertheless, for Our part, correcting this provision, and enacting into a legal obligation what was only recommended by the ancient authorities, have returned to the rule relating to the said "purchaser of the estate" as it was formerly employed, and have denied the heir, on account of his resemblance to the said "purchaser", as well as the persons who are connected with him as above stated, the right under any circumstances, to give evidence in their own behalf, and therefore We have not permitted the ancient Constitution relating to this

subject to be inserted into Our Code.

(11) We do not however deny this right of testifying to legatees and the beneficiaries of trusts, because they are not legal successors, nor do We deny it to other persons connected with them, — but on the contrary, We have especially granted it by one of Our Constitutions — and much more readily do We give such permission to those under whose authority they are, or who have them under their control.

(12) It does not matter whether a will be written on tablets, papyrus, parchment, or any other substance.

(13) Anyone can make several copies of a single will, provided they are all executed in accordance with the prescribed formalities; and this is sometimes necessary where a party is about to make a sea-voyage and desires both to take with him and leave at home the proof of his intentions, or for many other reasons arising from human necessities.

(14) These, therefore, are the regulations with reference to written wills. If, however, anyone desires to make an unwritten will according to the Civil Law, let him bear in mind that if seven witnesses are called in, and his intention verbally stated in their presence, this will constitute a thoroughly complete and valid testament in accordance with the Civil Law.

TITLE XI.

CONCERNING THE WILL OF A SOLDIER.

The rigorous necessity of compliance with the above stated formalities in the execution of wills, has been relaxed by certain Imperial Constitutions in the case of soldiers, on account of their great lack of knowledge; for although they may not have summoned a legal number of witnesses, or observed some other testamentary formality their wills are, nevertheless, valid, that is to say so long as they are in actual service; a rule which one of Our Constitutions has very justly established. Therefore, in whatever way the last will of a soldier can be ascertained, whether it is in writing or not, his testament is valid as the expression of his will. But during those times when they are living in their own homes or elsewhere exempt from the requirements of military service, they are, by no means entitled to the enjoyment of this privilege; but they are permitted, even though sons of a family, to make a will by reason of their connection with the army, but only in compliance with the same testamentary formalities and rules governing wills which We have recently prescribed with reference to the wills of civilians.

(1) The Divine Trajan stated clearly in a Rescript addressed to Statilius Severus, concerning the testaments of soldiers: "The privilege granted to those in actual service, that their testaments shall be considered valid in whatever way they have been executed by them, should be understood in this manner, namely: that it must first manifestly appear that a will was made, and one can be made without writing even by persons who do not belong to the army. If therefore the soldier, respecting the disposition of whose estate inquiry is made of you, having called men together for the purpose of making his will, spoke in such a way as to indicate whom he wished to be his heir, and on whom he desired to bestow freedom, he may be understood to have made an unwritten will in this manner, and it shall be considered binding. But if, (as frequently happens in conversation) he said to someone; 'I make you my heir'; or 'I leave you my property'; this must not be deemed a will, and it is to the interest of no one more than to that of those to whom this privilege is granted that a precedent of this description should not be admitted; otherwise, it would not be difficult, after the death of any soldier, to obtain witnesses who would state that they heard him say that he left his property to anyone they chose, and by this means his true intentions might be annulled."

(2) A soldier, even though he be dumb or deaf, can make a will.

(3) This is conceded by an Imperial Constitution to them only so long as they serve and live in camps, but veterans, after they have been discharged, and soldiers, still in service who make wills while absent from camp, must comply with the regulations common to all Roman citizens. A will which they have made in camp, where the usual formalities were not observed but in any way they may desire, shall only be valid for a year after their discharge. What then would be the case if the soldier died within the year, and the condition imposed upon his heir was not complied with until after the year had elapsed? Would the will, as that of a soldier, be valid? It has been decided that it would be valid as a military testament.

(4) Moreover, if anyone made an irregular will before joining the army, and, after he had become a soldier and was in service, he unsealed it and added something to, or omitted something from the same, or his intention to consider this as his valid will was disclosed in any other way; it must be held that the will is valid, because of his new intention as a soldier.

(5) Finally, where a soldier is adopted, or the son of a family is emancipated, his will is valid as that of a soldier by any new manifestation of intention, and is not deemed to be void through his loss of civil rights.

(6) It must also be borne in mind that, following the example of the *castrense peculium*, former laws as well as Imperial Constitutions bestowed upon certain persons a *quasi-castrense peculium;* and some of these were even permitted to make a will while they were under parental authority; which right one of Our Constitutions extending more widely, permits all of them to make a will merely disposing of such property, but observing the ordinary formalities. By examining the contents of this Constitution one cannot remain in ignorance of any of the matters which have reference to the right above mentioned.

TITLE XII.

WHO ARE NOT PERMITTED TO MAKE WILLS.

All persons, however, are not allowed to make a will, for, in the first place, those who are subjected to the control of another have not the right of testation; to such an extent, indeed, that even if their parents have given them permission they nevertheless cannot legally execute a will; with the exception of those whom We have previously enumerated, and this especially applies to soldiers who are under parental control, to whom permission is granted by Imperial Constitutions to make a will disposing of whatever property they may have acquired while in camp. This right was originally granted only to soldiers in active service, by the authority of the Divine Augustus as well as by that of Nerva, and also by that of the distinguished Emperor Trajan, and afterwards, by an indorsement of the Divine Hadrian it was conceded to soldiers who had been discharged, that is to say, to veterans. Therefore, if any of them have made a will disposing of their *castrense peculium*, it will belong to those whom they may have constituted their heirs, and if they died intestate, without any surviving children or brothers, the property will belong to their parents by the usual rule of succession.

We may learn from this that whatever a soldier who is under parental authority acquires while in camp, cannot be appropriated by his father, or sold, or otherwise interfered with by his father's creditors; nor, after his father's death, does it become the common property of his brothers, but that which is acquired while in camp absolutely belongs to the said soldier; although, according to the Civil Law, the private property of all those who are under parental authority is considered a portion of the father's estate, in the same manner as the private property of slaves is included in that of their masters; with the exception of such as, by the Sacred Constitutions of the Emperors, and especially by Ours, is not acquired for various reasons. With the exception of those who have a *castrense*, or a *quasi-castrense peculium*, if the son of a family makes a will, it is void, even though he dies after he becomes his own master.

(1) Moreover, persons who have not reached puberty cannot make a will, for the reason that

they have no discretion, neither can insane persons do so, because they are deficient in understanding.

Nor does it matter if a person who has not reached puberty should afterwards do so, or the insane person afterwards become sane, and then die. Where, however, insane persons make a will at a time when their insanity is interrupted they are considered legally competent, and certainly a will is valid which they may have made before becoming insane, for insanity appearing afterwards does not invalidate a will regularly executed or any other business matter properly transacted.

(2) Moreover, a spendthrift to whom the control of his property has been forbidden cannot make a will, but one which he made before the prohibition was issued will be valid.

(3) A person who is dumb and deaf cannot, at any time, make a will, (but, of course, when we refer to a deaf person one is understood who cannot hear at all, and not one who hears with difficulty; and by a dumb person is understood one who cannot speak at all, and not one who speaks with difficulty). As learned and educated men often lose the power of hearing and speech through various accidents, for this reason one of Our Constitutions comes to their relief; so that, in certain instances, and by certain means in accordance with its provisions, they can make a will, and do other things which are permitted to them.

But if anyone, after having made a will, becomes dumb or deaf from illness, or from any other misfortune his will, nevertheless, continues to be valid.

(4) A blind man cannot make a will, except by observing the formalities which a law of the Divine Justin, My father, introduced.

(5) A will made by a captive in the enemy's country is void, even though he should return; but one which he made in his own country is valid by the *jus postliminium*, and also by the *Lex Cornelia* if he should die there. -

TITLE XIII.

CONCERNING THE DISINHERITANCE OF CHILDREN.

The observation of the rules which We have set forth above is not however sufficient to render a will absolutely valid; but he who has a son under his control must be careful either to appoint him heir, or to disinherit him by name; otherwise, if he passes him over in silence the will will be void; so that even if the son should die while his father is still living, no one can become an heir under such a will, because it was of course void from the beginning. This, in ancient times, however, was not the rule with respect to daughters, or other descendants of either sex through the male line; but where the heirs were not appointed or disinherited, the will did not become void, but they were granted the right to a certain portion of the estate by accretion, and it was not necessary for the parents to disinherit these persons by name, but they were permitted to do this by including them with others.

(1) Anyone is deemed to be disinherited by name if this was done as follows: "Let my son Titius be disinherited"; or thus: "Let my son be disinherited"; without adding his proper name, that is, of course, if there is no other son.

Posthumous children, or other heirs, must also be either appointed or disinherited and, in this respect, the condition of all of them is the same; that is to say, where a posthumous son or any other descendant of either sex is passed over, the will is still valid; but after the birth of a male or female posthumous descendant it is broken, and for this reason becomes absolutely void. Therefore, if the woman from whom a posthumous son or daughter was expected, miscarries, no impediment exists to prevent the appointed heirs from entering upon the estate. Persons of the female sex can be disinherited expressly or generally, provided that, they are disinherited generally something is bequeathed to them, lest they appear to have been passed over through forgetfulness. It has been decided, however, that posthumous males, that is sons and others in

succession, cannot be legally disinherited unless this is done specifically, that is to say, in the following way: "Let any son who shall be born to me be disinherited".

(2) Those who by succeeding take the place of a proper heir are in the category of posthumous children, and become heirs to their relatives by *quasi-agnation*, as, for instance, where anyone has a son under his control and a grandson or granddaughter by him, the son alone has the right of a proper heir, for the reason that he has priority in degree, although the grandson and granddaughter by him are under the same authority; but if his son should die while he is still living, or should pass from under his control in any other way, the grandson or granddaughter immediately takes his place in the succession, and in that way obtains the rights of an heir by *quasi-agnation*. Therefore, to avoid having his will invalidated in this manner, the testator must either appoint his son his heir, or expressly disinherit him in order to avoid making an irregular will; and he must also either appoint or disinherit his grandson or granddaughter by his son, lest, if his son should die while he is still living, his grandson or granddaughter, by taking his place in the succession should break the will by *quasi-agnation;* and this is provided by the *Lex Junia Velleia*, in which also a method of disinheritance resembling that of posthumous children is set forth.

(3) By the Civil Law, it is not necessary either to appoint emancipated children heirs, or to disinherit them because they are not proper heirs. The Prætor, however, orders all, both of the female as well as the male sex to be disinherited if they are not appointed heirs, the males by name, and those of the female sex in general terms; and if they are neither appointed heirs nor disinherited in the way we have mentioned, the Prætor promises them possession of the estate in opposition to the provisions of the will.

(4) Adoptive children as long as they are under the control of their father are held to be subject to the same regulation as those who are the issue of legal marriage; and for this reason, they must be either appointed heirs or disinherited according to the rules which We have prescribed concerning ordinary children. But when they have been emancipated by their adoptive father, they are not included among children, either according to the Civil Law, or the Edict of the Prætor. By this rule it happens that, on the other hand, as long as they are in the adoptive family they are classed as strangers so far as their own parent is concerned; so that it is not necessary for him either to appoint them heirs or to disinherit them. When, however, they have been emancipated by their adoptive father, they then begin to be in the condition in which they would have been if they had been emancipated by their own father himself.

(5) The following are the rules which the ancients introduced. As one of Our Constitutions holding that no difference should exist between males and females in the exercise of this right because each sex equally performs its respective function in the procreation of the human race, and since, by an ancient law of the Twelve Tables all are equally called to the succession in case of intestacy — which opinion the Prætors appear to have subsequently adopted — introduced a simple and uniform rule both for sons and daughters and other persons descending through the male sex, whether born at the time or subsequently; that is, that all, whether proper heirs or emancipated, must either be appointed heirs or disinherited by name; and shall have the same effect in rendering the wills of their parents void and invalidating the inheritance, which privilege sons who are proper heirs or emancipated persons have whether they are already born, or still *in utero* at that time and born subsequently. With respect to adopted children, however, We have introduced a certain distinction which is contained in the Constitution which We have enacted with reference to those who have been adopted.

(6) But where a soldier in active service makes a will and does not disinherit by name his children already born, or those that are posthumous, but passes them over in silence, not being ignorant whether he has any or not; it has been established by certain Imperial Constitutions that his silence is equivalent to an express declaration of disinheritance.

(7) A mother, or a maternal grandfather, is not required to either appoint children heirs or disinherit them, but may simply omit mentioning them, for the silence of a mother, a maternal grandfather, or other ascendants on the mother's side has the same effect as disinheritance by a father; nor is it necessary for a mother to disinherit a son or daughter, nor for a maternal grandfather to disinherit a grandson or granddaughter by his daughter, where they do not appoint them heirs; whether We refer to the Civil Law, or to the Edict of the Prætor by which in opposition to the will, he promises the possession of the estate to children who have been passed over, but other relief has been provided for them which will soon be disclosed to you.

TITLE XIV.

CONCERNING THE APPOINTMENT OF HEIRS.

It is permissible to appoint either freemen or slaves heirs, and either your own slaves or those of others. In ancient times, however, in accordance with the opinion of many persons, you were not allowed by law to appoint your own slaves, unless this was done when their freedom was granted at the same time; but at present, it is permitted by Our Constitution to appoint them heirs without bestowing freedom upon them. This rule We have introduced, not by way of innovation, but because it was more just, and also because Paulus in the books which he wrote on the works of Masurius Sabinus and Plautius, states that it was accepted by Atilicinus. By "a person's own slave" is understood one in which the testator has the mere ownership, and another the usufruct. There is an instance, however, in which a slave is not legally appointed heir by his mistress, even if his freedom is given him, as is provided by a Constitution of the Divine Severus and Antoninus in the following words: "It is reasonable that a slave polluted by adultery shall not be considered legally manumitted by the will of his mistress, when she has been accused of the crime and liberates him before sentence has been passed; hence it follows that his appointment of heir by his mistress is considered to be of no effect." "The slave of another" is understood to be one in whom the testator has the usufruct.

(1) A slave appointed heir by his master becomes by the will a free and a necessary heir, if he remains in the same condition. If, however, he is manumitted by the testator during his lifetime he can enter upon the estate whenever he pleases, because he does not become a necessary heir, since he does not obtain both freedom and the inheritance by the will of his master. If he has been alienated, he must enter upon the estate by the order of his new master, and in this way the latter becomes the heir through him, for the alienated slave himself cannot be either free or heir even though he was appointed heir, and his freedom given him; becauses his master, when he alienated him is presumed to have revoked the grant of liberty.

Where the slave of another is appointed an heir, and he remains in the same condition, he must enter upon the estate by the order of his master; but if he has been alienated by him, either during the life of the testator or after his death and before he has entered upon the estate, he must enter upon it by the order of his new master. If, however, he has been manumitted during the testator's lifetime or after his death and before he has entered upon the estate, he can enter upon it at his own discretion.

(2) A slave belonging to another may be legally appointed heir after the death of his master, for the reason that testamentary disposition exists in the case of slaves forming part of an estate; for as long as the estate has not yet been entered upon, it represents the person, not of the future heir, but of the defunct, so that even the slave of an unborn child can legally be appointed heir.

(3) Where a slave belongs to several persons who have the power of testamentary disposition is appointed an heir by a stranger, he obtains the estate for each one of his masters by whose command he enters upon the same, in proportion to the share of ownership possessed by them individually.

(4) A person may appoint as heir one man, or as many as he wishes.

(5) An estate is usually divided into twelve *unciæ* which are included in the appellation, as, and these parts also have their peculiar names from the *uncia* up to the as as follows: *sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx, as.* It is, however, not necessary that there shall be twelve *unciæ*, for as many *uneiæ* compose an as as the testator wishes; and if anyone makes a party an heir to only a *semis*, the entire as will be included in the *semis;* for the same person cannot die partly testate and partly intestate unless he is a soldier, whose intention when he made his will is solely considered; and, on the other hand, a man can divide his estate into as many portions, or *unciæ* as he wishes.

(6) Where several heirs are appointed, the distinction of their shares is only necessary where the testator is unwilling for them to inherit on equal terms; for it has been sufficiently established that when no shares are mentioned the heirs are entitled to participate equally. Where the shares are specified with respect to certain persons, and another is mentioned without any share being stated, then if any part of the as remains undisposed of he will become heir to that part; and if several are appointed without their shares being designated they will all be entitled to that same portion. Where, however, the entire as has been disposed of they are entitled to share in half of the estate, and the party or parties will be entitled to share in the other half; nor does it make any difference whether the heir without a share is appointed first, between the others, or last, for that share is understood to be given him which has not been disposed of.

(7) Let us see what the rule is where a certain portion has not been disposed of and no heir has been appointed without a designated share; as, for instance, where three heirs are each assigned a fourth. It is settled that the part not disposed of belongs by implication to each in proportion to his share in the estate, and the condition is the same as if each was appointed heir to a third; and, on the other hand, if there should be too many for the number of shares, there is by implication a diminution of each; as for example, where four heirs are appointed for three shares, it is to be considered just as if each one had been assigned a fourth.

(8) Where more than twelve *unciæ* are disposed of, he who is appointed without any share shall have what is lacking of two asses; and the same rule applies where the double as is fully disposed of. All these shares are ultimately reduced to a single as, though they may include more than the ordinary number of *unciæ*.

(9) An heir may be appointed either unqualifiedly or under some condition, but not from or to a certain time, as, for instance: "After five years from my death"; or "From such-and-such *kalends";* or "To such-and-such *kalends*, let So-and-So be my heir". Indeed it has been decided that such matter is superfluous, and therefore it is just as if the heir had been absolutely appointed.

(10) An impossible condition in appointments and legacies, as well as in trusts and bequests of freedom, is considered as not written.

(11) Where several conditions are appended to an appointment if they are united as, for instance, "If this and that event should take place"; they must all be carried out; but if they appear separately, for example, "If this, or that event should take place"; it is sufficient if any of them be observed.

(12) Persons whom the testator has never seen may be appointed his heirs; for instance, where he appoints his brother's sons resident in a foreign country, he not knowing who they are; for the ignorance of the testator does not render their appointment void.

TITLE XV.

CONCERNING GENERAL SUBSTITUTION.

Anyone may establish several degrees of heirs in his will, for example: "If So-and-So will not be my heir, let So-and-So by my heir", and thus a testator can make such substitutions as he desires, and finally, as a last resource, appoint a slave his necessary heir.

(1) Several persons can be substituted in the place of one, or one in the place of several, or one for each, or the heirs who are appointed reciprocally for one another.

(2) Where a testator reciprocally substitutes heirs who have been left unequal shares, and in the substitution does not specify their shares, he is presumed to have given in the substitution the same shares which he mentioned in the original appointment, and this the Divine Pius stated in a Rescript.

(3) But where another party was substituted for an appointed heir and the latter was substituted for his co-heir, the Divine Severus and Antoninus declared in a Rescript, "that the party who was substituted should be entitled to both shares without distinction".

(4) If anyone should appoint a slave belonging to another his heir, under the impression that he is independent, and should then substitute Mævius for him, provided he did not become his heir and the said slave enters upon the estate by the order of his master, Mævius shall be permitted to have half of it; for the words, "If he does not become the heir", where the testator knows the party to be subject to the authority of another, are understood to mean: "If he should neither become heir himself nor cause another to do so"; while, in the case where he thinks someone is independent they signify, "If he does not obtain the estate for himself or for someone to whose authority he may subsequently be subjected"; and this interpretation Tiberius Cæsar established in the case of his slave Parthenius.

TITLE XVI.

CONCERNING THE SUBSTITUTION OF MINORS.

Anyone can make substitutions for his minor children who have not reached puberty, not only in the manner We have stated above; that is, if they do not become his heirs some other party may be his heir; but, in addition to this, in such a way that if they do become his heirs and die before attaining puberty, someone else can become their heir; as, for instance, if anyone were to make use of the following language, "Let Titius, my son, be my heir, and if my son does not become my heir, or if he does, and dies before he comes into his own tutelage, (that is before he arrives at puberty) then let Seius be my heir". In this case if the son does not become the heir, then the substitute becomes the heir of the father; but if the son becomes his heir and dies before reaching puberty, the substitute becomes the heir of the son himself; for it has been established by custom that when parties are of such an age that they cannot make a will for themselves their parents may make one for them.

(1) Induced by this doctrine We have inserted a Constitution into Our Code by which it is provided that where any persons have children, grandchildren, or great-grandchildren of either sex or any age, who are mentally weak, they may be permitted, on the principle of pupillary substitution, to substitute certain persons for them, even though they may have arrived at puberty. If, however, they recover their senses, this substitution is void, and this also resembles pupillary substitution in that it becomes void as soon as the minor grows up.

(2) Therefore, in pupillary substitution in the manner aforesaid, there are, as it were, two wills, one of the father, the other of the son; just as if the son himself had appointed an heir, or, at all events, there is one will, relating to two matters, that is to two estates.

(3) But if anyone is so timid as to fear that his son, being still a minor, may be liable to treachery after his death, because another person was openly substituted for him; he should

make the general substitution openly and in the first part of his will, but insert separately in the latter part of it the other substitution, by which the substitute is called to the inheritance where the minor becomes the heir and dies before reaching puberty; and he should seal up that part with a separate thread and wax, and provide in the first part of said will that the latter part shall not be opened while the son is alive and under puberty. It is evident, however, that a substitution for a child under puberty is none the less valid if written on the same tablet in which he is appointed heir, although it may be dangerous for the minor.

(4) Parents can not only substitute for their children who have not reached puberty and whom they have appointed their heirs, so that if they become their heirs and die before reaching puberty he whom they may select shall be their heir; but they can also make substitutions for children who have been disinherited. In this instance, therefore, if anything has been obtained by the minor from estates, legacies, or the gifts of relatives and friends, it all belongs to the substitute. What We have stated with reference to the substitution of children who have not reached puberty, whether they have been appointed heirs or disinherited, We understand to be also applicable to posthumous children.

(5) No one, however, can make a will for his children unless he also makes one for himself; for a will relating to minors is a part and sequel of the paternal will, to such an extent that if the latter is not valid, the will of the son will not be valid either.

(6) Substitution can be made for each child separately, or for the one who dies last without having reached puberty; for each separately, if the testator desires that none of them shall die intestate; for the last survivor, if he wishes that the right of legal inheritance shall be preserved intact among them.

(7) Substitution is made specifically, for a child who has not reached puberty as, for instance: "Let Titius be my heir", or generally, as: "Let anyone be my heir"; by which words, where the child dies before reaching puberty those are appointed substitutes who have both been appointed and have become heirs, which they do in proportion to their respective shares in their father's estate.

(8) Substitution can thus be made for a male up to the age of fourteen years, for a female up to the age of twelve; but if made after this the substitution is void.

(9) Where a stranger or a son who has arrived at puberty is appointed an heir, no one can make a substitution for him in such a manner that if he becomes an heir and dies within a designated time, someone else will become his heir; for the testator is only allowed to bind him by a trust to surrender all or a portion of the estate to the other, and what this right is We shall state in its proper place.

TITLE XVII.

IN WHAT WAYS WILLS ARE RENDERED INVALID.

A will properly made is valid until it is broken, or becomes of no effect.

(1) A will is broken when the will itself is vitiated, although the condition of the testator may remain unaltered; for if anyone after having made a will should adopt a son, either one who is his own master by authority of the Emperor, or one who is under parental control, by order of the Prætor, in accordance with Our Constitution; his will is broken by the *quasi-agnation* of a proper heir.

(2) A former will is broken by a later one legally executed, and it makes no difference whether anyone becomes an heir under the later one or not; the only thing to be considered is whether in any event there could have been an heir. Therefore, if anyone refuses to be the heir, and dies even during the lifetime of the testator, or after his death and before he enters upon the estate, or does not fulfill some condition under which he was appointed heir, under these circumstances the head of the family dies intestate; for the first will is not valid having been

broken by the second one, and the latter equally is without effect because by it no one becomes the heir.

(3) But where anyone, after having legally executed a will, makes another also with all proper formalities, the Divine Severus and Antoninus stated in a Rescript that the first will was revoked, even though the testator had appointed an heir only to certain property by the second will. We have ordered the words of this Constitution to be inserted because there is another matter expressed therein. "The Emperors Severus and Antoninus to Cocceius Campanus. There is no doubt that a second will, even though the heir is mentioned in it only with respect to certain property, is valid in law just as if no such mention of property had been made; but the heir thus appointed shall be bound to be content with the property given him or with the fourth portion authorized by the *Lex Falcidia*, and must surrender the estate to those mentioned in the first will, on account of the words inserted in the second by which it is stated that the first will shall remain valid". Hence a will can be broken in this manner.

(4) Wills properly executed are rendered void in another way, for instance, where the testator suffers a loss of civil rights; and We have explained in the First Book how this takes place.

(5) In this instance We declare that wills become of no effect and that also those are of no effect which are broken; although, on the other hand, those which have been broken are also void, and such as are not legally executed are void from the beginning; and those likewise which have been regularly executed and have subsequently become of no effect on account of a loss of civil rights, We can, nevertheless, designate as broken. But as it is certainly more convenient to distinguish particular instances by particular names, some are said to have been illegally executed, and some to have been broken or to have become of no effect, although they have been executed in accordance with the law.

(6) Wills which have been properly executed in the first place and have afterwards become invalid through a forfeiture of civil rights are not entirely worthless; for if they are sealed with the seals of seven witnesses the appointed heir can claim possession of the estate according to the terms of the will. If the deceased was a Roman citizen, and his own master at the time of his death; for where a will becomes of no effect because the testator lost his citizenship or his liberty, or because he allowed himself to be adopted and at the time of his death was under the control of his adoptive father, the appointed heir cannot in this instance demand possession of the estate in accordance with the terms of the will.

(7) A will cannot be rendered void because the testator afterwards was unwilling that it should remain valid; and this rule is applicable where anyone, after having made one will begins to make another, but having been prevented by death, or because he changed his mind, did not finish it; for, as was stated in an address of the Divine Pertinax the first will, if properly executed, would not become inoperative unless the subsequent one had been legally drawn up and perfected, for an unfinished will is without doubt worthless.

(8) In the same address he stated, "That he would not accept an inheritance from a party who made the Emperor his heir on account of an action-at-law; nor would he legalize an instrument which was not properly executed in which he himself was appointed heir for the purpose of making it good; nor would he accept the title of heir bestowed upon him verbally; nor receive anything by a document which lacked the sanction of legal authority". The Divine Severus and Antoninus issued many Rescripts in compliance with these utterances, "For although," as they said, "We are exempt from the operation of the laws, nevertheless, We live under the laws".

TITLE XVIII.

CONCERNING AN INOFFICIOUS WILL.

As parents frequently disinherit, or pass over their children without cause, it has become the practice for children who complain of being unjustly disinherited or passed over, to be

permitted to bring an action *de inofficioso testamento*, on the assumption that the parties were not of sound mind when they executed the will. This statement, however, does not imply that the party was actually insane, but that he made his will in compliance with the law but not in accordance with the obligation of affection; for if he was actually insane his will is void.

(1) Not only are children allowed to bring the charge that the will of their parents is inofficious, but also parents can do this in the case of their children; a sister and a brother, likewise, by certain Imperial Constitutions, are preferred to testamentary heirs if the latter are infamous, and for this reason they cannot proceed against all heirs. Relatives further removed than brothers and sisters can, in no way, either bring suit, or if they do so, successfully prosecute it.

(2) Both natural and adopted children, as classified by Our Constitution, can only bring an action *de inofficioso testamento* when they can reach the property of the deceased by no other legal means; for those who can acquire the entire estate or a portion of the same by any other lawful method cannot bring an action *de inofficioso*. Posthumous children can also bring such an action if they cannot reach the property by any other legal method.

(3) These measures are applicable where absolutely nothing has been left them by the testator, which provision, one of Our Constitutions has introduced through reverence for nature. Where, however, any share whatever of the estate or anything at all has been left to the parties, a complaint of inofficiousness does not lie; and what is lacking to them must be made good to the amount of the fourth part of their legitimate share, and this is the case even though the testator did not direct that this amount should be made up according to the estimate of a reliable citizen.

(4) Even though a guardian may in the name of the ward of whose business he had charge have accepted a legacy bequeathed by the will of his father, nothing being left to the guardian himself by his father, he can, nevertheless, attack his father's will as being inofficious.

(5) On the other hand, if he brings an action *de inofficioso* in the name of his ward to whom nothing was left, and is beaten, he himself does not lose a legacy left him by the same will.

(6) Therefore, a party must be entitled to a fourth part in order not to be able to bring an action *de inofficioso testamento*, either by hereditary right, or by way of a legacy or trust, or by a *donatio mortis causa* of the fourth being bestowed upon him, or by a *donatio inter vivos*, but only in those instances mentioned by Our Constitution, or under other circumstances set forth in other Constitutions.

(7) But where We mention a fourth, it must be understood that whether there be one, or several parties who can bring an action *de officioso testamento*, a fourth is to be given them so as to be distributed *pro rata*, that is to say a fourth of his full share to each individual.

TITLE XIX.

CONCERNING THE DIFFERENT KINDS OF HEIRS.

Heirs are called either necessary, or proper and necessary, or foreign.

(1) A necessary heir is a slave appointed an heir, and he is so called because, whether he is willing or unwilling, in every instance after the death of the testator he immediately becomes free, and a necessary heir. Wherefore those who have a suspicion that they are insolvent usually appoint one of their slaves the heir, in the first, second, or a more distant degree; so that, if their creditors cannot be satisfied, the property can be taken possession of by them and either sold or divided among them as if it belonged to the heir rather than to the testator himself. As a recompense for this inconvenience, however, he enjoys the advantage that any property that he acquires for himself after the death of his patron is reserved for his own benefit; and even though the assets may not be sufficient to pay the creditors of the deceased, whatever he may have acquired for himself is not subject to sale on this account.

(2) Proper and necessary heirs are, for instance, a son or a daughter, a grandson or a granddaughter by a son, and other descendants in succession, provided they are under the control of the deceased. But in order to constitute a grandson or a granddaughter proper heirs, it is not sufficient for them to have been under the control of their grandfather at the time of his death, but it is necessary that their father should have ceased to be a proper heir during the lifetime of his father, having been freed from his control either by death or in some other manner; for then the grandson or granddaughter succeeds in the place of his or her father.

Proper heirs are so called because they are heirs of the house and even during the lifetime of their father they are, to a certain extent, considered its owners; and therefore, if anyone dies intestate, the first rank in the succession belongs to the children. They are styled necessary heirs because they become heirs in every instance whether they are willing or unwilling, or whether they take by intestacy or under a will; but the Prætor allows them to reject the estate if they wish to do so; in order that the property may, in like manner, be taken possession of by creditors as that of their ascendant rather than as belonging to them.

(3) Others who are not subject to the control of a testator are called foreign heirs. Thus, even Our children who are not under Our authority, if considered heirs by Us, are considered foreign heirs. For this reason those who are appointed heirs by a mother are in the same category, because women do not have control of their children. A slave also who has been appointed heir by his master, and manumitted by him after the execution of his will, is included in the same class.

(4) The following rule with reference to foreign heirs is in force, namely; that there must be competency to take under the will whether they themselves, or others who are under their authority, are appointed heirs; and this must be applicable at two different times, that is when the will is executed so that the appointment may stand; and also at the death of the testator, in order that it may take effect. In addition to this whenever an heir enters upon an estate competency to take under the will must also exist, whether he be appointed absolutely or under some condition; for the right of the heir must be carefully examined at the time when he acquires the estate. A change affecting the right does not prejudice the heir if it takes place in the interval between the execution of the will and the death of the testator, or the carrying out of the condition of appointment; for the reason, as We have already stated, that the three periods aforesaid are those to be considered.

Not only is a person deemed competent if he can make a will, but also if he himself can take under the will of another or acquire the estate for a third party, even though he cannot make a will. For this reason an insane person, one who is dumb, a posthumous child, an infant, a son under paternal authority, and a slave belonging to another, are said to possess competency, for even though they cannot make a will, still, they can acquire property by a will either for themselves, or for others.

(5) Foreign heirs have also the right to deliberate as to whether they will enter on the estate or not, but if one who has the power to refuse meddles with the property of the estate: or if a foreign heir who is permitted to deliberate as to accepting the same enters upon it, he has not afterwards the right to relinquish it unless he is under twenty-five years of age; for as the Pra3tor comes to the relief of persons of this age in all other instances where they have been deceived, so he also does if they have rashly accepted an injurious inheritance.

(6) It must be borne in mind, however, that the Divine Hadrian granted the same indulgence to a person over twenty-five years of age when after he had entered upon an estate a large debt came to light, whose existence was not known at the time the estate was entered upon. This Hadrian granted as a particular favor to an individual; the Divine Gordian, however, subsequently extended it, but only to include soldiers. Now We, in our benevolence, have granted this privilege to all persons even when subject to Our Imperial authority, and have drawn up a Constitution as just as it is excellent; and if men observe the tenor of the same

they are permitted to enter upon an estate and be liable for only so much as the property of the estate is worth; and under such conditions the aid of deliberation does not become necessary for them, unless they neglect to observe the provisions of Our Constitution, and deciding to deliberate, prefer to subject themselves to the ancient risk of entering upon the estate.

(7) Moreover, a foreign heir, whether appointed by will or called to legal inheritance by intestacy, can become an heir either by acting as such, or by merely expressing a desire to accept the estate. Anyone is considered to act as heir if he uses the property of the estate as an heir either by selling it, or by cultivating or leasing land; or if in any way by deeds or words he manifests his wish to enter upon the estate; provided that he knows that the party whose property he handles as heir has died either testate or intestate, and that he himself is his heir, since to act as heir is the same as to act as owner; for the ancients designated heirs as owners. But just as a foreign heir becomes such by his mere will, so by a contrary resolution he is at once excluded from the inheritance. There is nothing which prohibits a person who is dumb or deaf, who was either born so or became so subsequently, from acting as heir and acquiring an estate for himself, if he only understands what is done.

TITLE XX.

CONCERNING LEGACIES.

Let Us next examine legacies. This part of the law appears in fact to be outside the subject now under consideration, for we are discussing the legal measures by means of which property is acquired by Us as a whole; but since We have spoken of all questions concerning wills and heirs appointed by will, this matter of law may, not without reason, be treated of in the next place.

(1) A legacy, therefore, is a certain gift left by a party who is dead.

(2) Formerly, in fact, there were four kinds of legacies, namely, *per vindicationem, per damnationem, sinendi modo*, and *per præceptionem;* particular terms being devoted to each kind of legacy by which the different classes were indicated. But by the Constitutions of preceding Emperors formality of this kind in the use of words has been entirely abolished; and one of Our Constitutions — to which We have devoted much deliberation, being desirous that the intentions of deceased persons should receive greater consideration, and being disposed to favor their intentions rather than their words — have provided that all legacies should be of one nature, and no matter what the words may be by means of which anything is bequeathed, the legatee, may institute proceedings to recover it either by a personal action, a real, or an hypothecary one. The carefully weighed arrangement of this Constitution may be readily comprehended by an examination of its contents.

(3) We did not think, however, that We ought to stop at the said Constitution, for when We found that in ancient times legacies were strictly limited, and that greater indulgence was shown to trusts because they proceed more directly from the desires of the deceased; We have deemed it necessary to place all legacies on the same footing with trusts, so that no difference may exist between them, but whatever is lacking in legacies may be supplied from their nature as trusts; and the nature of trusts may be benefited by anything advantageous which attaches to legacies. But that We may not introduce any difficulty for young men who are studying the first principles of the law by explaining these matters together, We have deemed it advisable to now first discuss legacies, and afterwards trusts, so that they may become familiar with the nature of both these subjects, and may with keener ears, by means of the information afforded, readily comprehend the mingling of the two.

(4) A testator can not only bequeath his own property or that of his heir, but also what belongs to others; and, under such circumstances, his heir is compelled to purchase and deliver it, or if he cannot purchase it pay its appraised value. But if the property is of such a character that it cannot be an object of commerce, the heir shall not be required to pay its value; as, for

instance, if anyone bequeaths the *Campus Martius*, basilicas, temples, or anything destined for public use; as such a legacy is of no importance.

When We stated that the property of another could be bequeathed, it must be understood to mean if the defunct knew that it belonged to someone else, and not if he was merely ignorant of the fact; for perhaps if he had known that it belonged to someone else he would not have bequeathed it. With reference to this, the Divine Pius stated in a Rescript: "It is also true that the party who brings the suit, that is to say the legatee, is obliged to prove that the deceased knew that he was bequeathing the property of another, but the heir is not bound to prove that he was ignorant that it belonged to some one else, for the necessity of proof is always incumbent on the party who brings the action".

(5) If anyone bequeaths property which has been encumbered to a creditor, the heir is obliged to redeem it; and, in this instance also the same rule applies as with respect to the property of another, so that the heir is only obliged to redeem it in case the deceased knew that the property was pledged; and this the Divine Severus and Antoninus published in a Rescript. If, however, the deceased wished the legatee to redeem the property and expressed himself to that effect, the heir is not compelled to redeem it.

(6) Where property belonging to another party is bequeathed, and the legatee becomes the owner of the same during the lifetime of the testator; than if he obtained it by purchase he can recover his price by an action based on the will; but if he obtained it by a lucrative title, as for instance, by gift, or by any other similar title he cannot bring suit, for it has been decided that two lucrative titles to the same property cannot be united in the same person. According to this rule, where the same property is due to the same person by two wills, it must be determined whether he acquired it or its value under the first will; for if he obtained the property, he cannot bring an action because he already possesses it by a lucrative title, but if he has obtained its value, he can bring the action.

(7) Property which does not, as yet, in the nature of things exist can be legally bequeathed, if it afterwards comes into existence; as, for instance, crops which are to be produced on certain land, or a child to be born of a female slave.

(8) If the same property is bequeathed to two persons either conjointly or disjointly, and both of them accept the legacy, it shall be divided between them; and if one of them fails to accept it, either because he rejects the legacy, or dies during the lifetime of the testator, or does not take it for some other reason, the entire legacy belongs to his co-legatee.

A legacy is bequeathed conjointly, where, for instance, anyone says: "I give and bequeath the slave Stichus to Titius and Seius"; disjointly, where the following words are used, "I give and bequeath the slave Stichus to Titius; I give and bequeath Stichus to Seius"; and even if he says plainly that he gives, "the same slave Stichus", the legacy is understood to be disjointly bequeathed.

(9) Where land belonging to another is left as a legacy, and the legatee buys the ownership of the same less the usufruct, and the usufruct comes to him and he afterwards brings suit under the will, Julianus says that his suit and claim for the land are just because the usufruct is considered in his petition as a servitude; and it is the duty of the judge to order that the value of the property be paid after deducting the usufruct.

(10) But where anyone bequeaths to a legatee the property of the latter, the legacy is void because what is a person's individual property cannot be made his any more his own; and even though he may alienate it, neither the property nor its value is due to him.

(11) If anyone bequeaths his own property thinking that it belongs to another, the legacy will be valid, for what actually exists is of greater value than that merely based upon opinion; but if he thought that the property belonged to the legatee, the legacy is also valid, because the will of the deceased can be carried out.

(12) If a testator bequeaths his property and afterwards alienates it, Celsus holds that if he did not sell it with the intention of revoking the bequest, it is still good; and this opinion the Divine Severus and Antoninus confirmed by a Rescript. They also established by another Rescript that anyone who, after he had made his will, encumbered certain land which he had bequeathed, did not by doing so revoke the legacy; and for that reason the legatee could bring suit against the heir to have the land redeemed from the creditor. But where any person alienates part of the property bequeathed, the part which is not alienated is certainly due, and that which is alienated is only due when this was done without the intent to revoke the legacy.

(13) If anyone bequeaths a release from his debt to his debtor, the legacy is valid, and the heir of the creditor cannot demand payment either from the debtor himself, his heir, or anyone who occupies the place of his heir; but an action can be brought by the debtor to compel him to give him a release. Anyone can also order his heir not to demand payment within a specified time.

(14) On the other hand, if a debtor leaves to his creditor what he owes him, the legacy is void, if it does not include any more than the debt, for the reason that he gains nothing more by the legacy. But if he absolutely bequeaths to him a debt which is due at a future time, or under some condition, the bequest is valid on account of the anticipation of payment; but if the time should arrive, or the condition should be fulfilled during the life of the testator, Papinian wrote that the legacy is nevertheless valid, because it was so in the beginning, which is true; for We have not adopted the opinion of those who thought that the legacy was extinguished because a situation had arisen in which it could not have originated.

(15) Moreover, if a husband bequeaths to his wife her marriage-gift, the bequest is valid because a legacy is of greater value than a suit to recover the marriage-gift; but if he bequeaths a marriage-gift which he has never received, the Divine Severus and Antoninus stated in a Rescript that the legacy is void if he bequeathed it in general terms; but if a certain sum of money, or a certain object, or an instrument of dower is mentioned in making the bequest, it will be valid.

(16) If the property bequeathed is destroyed without the act of the heir, the loss must be borne by the legatee; and if the slave of another is bequeathed, and is manumitted without the act of the heir, the latter will not be liable. But where the slave of the heir is bequeathed, and he himself manumits him; Julianus held that the heir was liable, and that it made no difference whether he knew, or was ignorant that the slave had been bequeathed away from him; and also if the heir presented the slave to another party, and he to whom he was given manumitted him, the heir will be liable, even though he was ignorant of the fact that the slave had been bequeathed away from him.

(17) Where anyone bequeaths his female slaves and their children, the children belong to the legatee, even though the slaves die. The same rule applies where ordinary slaves are bequeathed with their own slaves, and even though the ordinary slaves may be dead, still the under-slaves pass as a legacy. But if a slave is bequeathed along with his *peculium*, the bequest of the *peculium* is extinguished by the death, the manumission, or the alienation of the slave. The same rule applies where land provided with implements is left, for if the land is disposed of, the bequest of the implements is extinguished.

(18) Where a flock is bequeathed, and afterwards but one sheep survives, a suit can be brought for what is left. Julianus says, that where a flock is bequeathed, even sheep which were added to it after the will was executed form part of the legacy; for a flock is one body composed of so many distinct head, just as a house is one body composed of different stones joined together.

(19) For this reason, when a house is bequeathed, any columns and pieces of marble which have been added to it after the execution of the will constitute a portion of the legacy.

(20) Where *peculium* is the subject of a legacy, any addition to or diminution of the same which takes place during the lifetime of the testator undoubtedly is to the gain or loss of the legatee. Where, however, a slave acquires property after the death of the testator and before the estate is entered upon, Julianus says that when his *peculium* is bequeathed to the slave who is manumitted, everything that has been added before the heir entered upon the estate belongs to the slave as legatee, because the time when the legacy vests begins at the moment when the heir enters upon the estate; but where the *peculium* is left to a stranger, what has been acquired is not included in the legacy, unless the increase was made by means of a portion of the said *peculium.* The latter, however, does not go to the manumitted slave unless it was left to him, although if his master manumitted him while he was living, it is sufficient if he is not deprived of it; and this the Divine Severus and Antoninus established by a Rescript. They also declared in another Rescript that when his *peculium* was left to him it does not appear that he can demand money which he has expended for the benefit of his master. They also stated in still another Rescript, that his *peculium* is deemed to have been bequeathed to him when he is ordered to be free after his accounts have been rendered, and he has made good any deficit out of his *peculium*.

(21) All property, whether corporeal or incorporeal, can be bequeathed, and therefore a debt owing to a deceased person can be left to anyone else, so that the heir must transfer to the legatee his rights of action, unless the testator while living had collected the money, for in this case the legacy is extinguished. A legacy like the following is also valid: "Let my heir be required to repair the house of So-and-So, or release him from debt."

(22) If a slave or any other kind of property is bequeathed in general terms, the legatee has a right to make a choice unless the testator stated otherwise.

(23) A legacy of option, that is where the testator orders the legatee to select one of his slaves, or some of his other property, formerly included a condition; and therefore unless the legatee made a choice while living, he did not transmit the legacy to his heir. By one of Our Constitutions, however, this matter has been corrected, and permission is given to the heir of the legatee to make a choice, although the latter did not do so during his lifetime. And extending the doctrine still farther, We have added the following in Our Constitutions, namely, where there are several legatees to whom an option is given, and they do not agree in making a choice, of there are several heirs of one legatee and they differ with one another with respect to the choice, one wishing to select one article, and another another; then, to prevent the legacy from becoming invalid (which the majority of lawyers would hold it to be, contrary to a liberal ruling) fortune must be the judge of such a choice, and the dispute must be determined by lot; so that in making the selection the opinion of him shall be adopted who is designated by the lot which is cast.

(24) Those persons alone are entitled to receive a legacy who are legally competent to do so.

(25) Formerly neither legacies nor trusts could be left to persons who are uncertain, and not even a soldier could leave property to an uncertain person, as the Divine Hadrian stated in a Rescript. An uncertain person was one that the testator had in his mind without any definite idea of his existence; as, for instance if anyone should say: "Let my heir give such-and-such land to whoever gives his daughter in marriage to my son". Also where property was left to those, "Who should first be appointed Consuls after the execution of my will", it was also considered as a legacy to an uncertain person, and there are, indeed, many other cases of this kind.

Moreover, it was established that freedom could not be conferred upon an uncertain person, because it had been decided that slaves should be liberated by name. Only a certain person also could be appointed a guardian. Property could be legally bequeathed where the description was certain, that is to say to an uncertain person who belonged to a definite class, as for instance: "Let my heir give such-and-such property to the one of my living relatives

who will marry my daughter". It has been provided by certain Sacred Constitutions that legacies or trusts left to uncertain persons and paid by mistake, cannot be recovered.

(26) A legacy bequeathed to a posthumous child who is a stranger formerly was void. A posthumous child who is a stranger is one who, if born, would not be included among the proper heirs of the testator; and for that reason a grandson the issue of a son who had been emancipated was formerly a posthumous stranger, so far as his grandfather was concerned.

(27) This matter also has not been absolutely passed over without suitable correction, for a Constitution has been inserted into Our Code by means of which We have amended this, not only with reference to estates, but also as it affects legacies and trusts; and this appears perfectly clear from the reading of the Constitution itself. But an uncertain guardian cannot be appointed by Our Constitution, because every man ought to provide with discernment for the guardianship of his posterity.

(28) Still, a posthumous stranger could formerly, and can now, be constituted an heir; unless he is the unborn child of a woman who cannot legally be our wife.

(29) If a testator should make a mistake as to the name, surname, or appellation of the legatee, if certainty exists as to the person the legacy is valid; and the same rule applies with respect to heirs, and justly so, for names were invented for the sake of distinguishing men, and it makes no difference if their identity can be determined in any other way.

(30) The following rule of law resembles this, namely; that a legacy is not rendered void by a false description, for example, if anyone should state in a bequest, "I give and bequeath by born-slave Stichus"; for although he may not have been born in his house but had been purchased, yet if his identity as a slave be established, the legacy is valid; and agreeably to this if the testator described him as follows: "My slave Stichus whom I bought of Seius"; and he was purchased from someone else, the legacy is valid if the identity of the slave is certain.

(31) Still more does a false reason work no injury to a bequest, for example, if anyone should say: "I give and bequeath Stichus to Titius, because while I was absent he transacted my business"; or as follows: "I give and bequeath Stichus to Titius, because through his efforts I was acquitted of a capital crime"; for although Titius may never have attended to the affairs of the testator, or the latter have been acquitted by his agency, the legacy, nevertheless, is valid. But the rule is not the same where the reason was stated conditionally; for instance, in this manner: "I give and bequeath the land to Titius if he attended to my affairs".

(32) The question arises as to whether We can legally make a bequest to the slave of our heir, and it is evident that if it is made purely and simply, it is not valid, and it makes no difference if the slave be liberated from the control of the heir during the lifetime of the testator; for the reason that a legacy which would be void if the testator had died immediately after the will was executed, ought not to be valid solely because he lived a longer time. Such a bequest, however, is valid if made conditionally, so that we must ascertain whether when the right vested the slave was under the control of the heir.

(33) On the other hand, there is no doubt that a legacy can be legally bequeathed without any condition to a master, when his slave is appointed heir; and, again, if the testator should die immediately after executing the will, the right to the legacy is not understood to vest in him who is the heir; since the estate has been separated from the legacy, and another heir can be created through that slave, if he be transferred to the control of the other before he enters upon the estate by the order by his master, or he himself becomes the heir through being manumitted; in which case the legacy is operative; but if he remains in the same condition, and enters upon the estate by order of a legatee, the legacy vanishes.

(34) A legacy formerly was void if bequeathed before the appointment of the heir; evidently because wills derive their force from the appointment of heirs; and on this account the appointment of the heir is considered as it were the head and foundation of the entire will. On

the same principle, a bequest of freedom could not be made before the appointment of the heir. But because We consider it unreasonable to follow the order of the writing; (which the ancients themselves deemed worthy of censure) and pay no attention to the wishes of the testator; We have corrected this defect by one of Our Constitutions; so that it is now permissible for anyone to make a bequest before the appointment of an heir, or between the appointments of heirs, and also to make a grant of freedom which is regarded with much greater force.

(35) In like manner a legacy to be effective after the death of the heir or legatee formerly was void, as if anyone should say: "I give and bequeath when my heir is dead", and also, "The day before my heir or legatee shall die". We have, however, amended this in the same way, by giving equal validity to legacies of this kind as to trusts; so that the rules governing legacies may not in this instance be more severe than those regulating trusts.

(36) To bestow legacies, take them away, or transfer them by way of penalty was also void. A legacy is deemed to be bestowed by way of penalty when it is left to compel the heir to perform, or not to perform some act, for example, when anyone writes as follows: "If my heir should give his daughter in marriage to Titius, (or, on the other hand, if he should not do so) let him pay ten *aurei* to Seius"; or if he should say "If my heir alienates my slave Stichus, (or, on the other hand, if he does not alienate him) let him pay Titius ten *aurei*". And this rule was observed to such an extent that it was set forth in many Imperial Constitutions that not even the Emperor himself could accept anything bequeathed to him by way of penalty.

Nor were legacies of this kind valid under the will of a soldier, although the other intentions of soldiers when they executed their wills were scrupulously observed. It was also established that freedom could not be granted by way of penalty. Sabinus was of the opinion that another heir could not be added by way of penalty, for instance, if anyone should say: "Let Titius be my heir, but if Titius gives my daughter in marriage to Seius, let Seius also be my heir"; for it did not matter, in what way force was brought to bear upon Titius, whether by the gift of a legacy of the addition of a co-heir. But We do not sanction such nicety, and We have decreed generally that whatever property is left, even though it may have been bequeathed, revoked, or transferred to other persons by way of penalty, shall differ in no respect from other legacies which have been given, revoked or transferred; those cases being excepted where the conditions are impossible, forbidden by law, or are otherwise worthy of disapproval; for testamentary dispositions of this description are not permitted by the procedure of Our time.

TITLE XXI.

CONCERNING THE REVOCATION OF LEGACIES.

The revocation of legacies is valid, whether it be made in the will itself or in a codicil, or whether it is made in contrary terms, as, for instance, where anyone has bestowed a legacy by the words: "I give and bequeath"; and it is revoked by saying, "I do not give and bequeath", or by words that are not contrary, that is to say by any words whatsoever.

(1) A legacy may also be transferred from one person to another, for instance, where anyone says: "I give and bequeath to Seius the slave Stichus whom I bequeathed to Titius", whether he do this in the same will or in a codicil; and in this case the legacy is presumed to be at once taken from Titius and bestowed upon Seius.

TITLE XXII.

CONCERNING THE LEX FALCIDIA.

It remains for us to treat of the *Lex Falcidia*, by which restrictions have been recently placed upon legacies; for as formerly, by a law of the Twelve Tables, there was unlimited power of bequeathing property, so that a person could dispose of his entire estate by means of legacies; (since by this law it was provided that, "According as he bequeathed his property so let the

right be"), it afterwards seemed proper to limit this liberty of bequeathing; and this was done for the sake of the testators themselves, for the reason that men frequently died intestate, and those who were appointed heirs declined to enter upon an estate from which little or no profit was to be obtained. And when after this the *Lex Furia* and the *Lex Voconia* were enacted, neither of which seemed to be sufficient for the accomplishment of the purpose, the *Lex Falcidia* was ultimately passed, by which it was provided that no man could bequeath in legacies more than three-fourths of his entire estate, so that if one or more heirs were appointed, the fourth part would remain for him or them.

(1) The question has been raised where two heirs have been appointed, as, for instance Titius and Seius, and the share of Titius was entirely exhausted, or burdened beyond measure by legacies specifically charged upon him, while no legacies whatever were charged upon Seius, or only such as diminished his share one-half; whether Titius should be prevented from reserving anything out of the legacies charged upon him because Seius had the fourth part, or more, of the entire estate; and it was determined that he might hold the fourth part of his own share, for the rule of the *Lex Falcidia* applies to heirs separately.

(2) The value of an estate to which the rule of the *Lex Falcidia* is applicable is computed at the time of death. If, therefore, for example, he who has an estate worth a hundred *aurei* bestows the same amount in legacies, no benefit results to the legatees, if before the estate is entered upon so large an addition is made to it by the acquisitions of slaves, or by the birth of children of female slaves, or by the increase of cattle, that the heir would have the fourth part of the estate left after having paid out a hundred *aurei* in legacies, but it, nevertheless, is requisite that a fourth part should be deducted from the said legacies.

On the other hand, if the testator should bestow seventy-five *aurei* in legacies, and before the estate is entered upon, it should be so diminished by fire, by shipwreck, or by the death of slaves, that more than the value of seventy-five *aurei*, or even less, is left; the legacies shall be due as they stand. Nor is this injurious to the heir, for he has the right not to enter upon the estate; which renders it necessary for the legatees to compromise with him for a certain portion, lest they do not obtain anything by the will being abandoned.

(3) When the value of the estate is estimated under the *Lex Falcidia,* the debts, funeral expenses, and value of manumitted slaves are first deducted, and then a distribution of the balance of the estate is made, so that a fourth part of the same remains for the heirs, and the other three-fourths are divided among the legatees in proportion to the share left to each one of them. Therefore, if we suppose four hundred *aurei* to have been bequeathed, and the value of the estate out of which the legacies are to be paid to be four hundred *aurei*, one-fourth must be taken from each legatee; but if we suppose the legacies to amount to three hundred and fifty an eighth must be taken from them. If the testator bestowed five hundred *aurei* in legacies, in the first place a fifth and afterwards a fourth, must be deducted; for what is over and above the value of the property must first be reserved, and then the amount to which the heir is entitled.

TITLE XXIII.

CONCERNING TRUST ESTATES.

Let Us now pass to trusts, and in the first place We shall treat of trust estates.

(1) It must be borne in mind that, in early times, trusts had no force because no one, if he was unwilling, was compelled to do what he was only requested to perform; for if persons left estates or legacies to those to whom they could not legally do so, they committed them to the good faith of the parties qualified to take under the will; and for this reason they were designated trusts, because they were founded upon no legal obligation but only on the honor of those who were asked to see that they were executed. Subsequently the Divine Augustus time and again, being inclined to favor certain persons, or because the party requested to fulfill

the trust was having been appealed to for the safety of the Emperor, or on account of some well known act of perfidy, ordered the consuls to exert their authority. For the reason that this seemed to be just and popular, it was gradually converted into a regular jurisdiction; and trusts came into such general favor that, a special Prætor, who was called *Fideicommissarius*, ultimately was appointed to interpret the law of trusts.

(2) In the first place then, it should be noted that an heir must be duly appointed by will, to whose good faith shall be committed the delivery of the estate to the other party; otherwise, the will is inoperative because no heir has been properly appointed by it. Therefore, when anyone has written: "Let Lucius Titius be my heir"; he can add, "I ask you, Lucius Titius, that as soon as you can enter upon my estate you will surrender and transfer it to Gaius Seius". Anyone may also ask his heir to surrender a part of the estate; and he is at liberty to leave a trust, either absolutely, or under some condition, or to date from a certain day.

(3) After an estate has been transferred, he who did so still remains the heir, while he who receives it was in former times in some instances considered as an heir, and in others as a legatee.

(4) A Decree of the Senate was enacted in the time of Nero, while Trebellius Maximus and Annæus Seneca were Consuls, by which it was provided that where an estate was transferred on account of a trust, all actions which by the Civil Law would lie for the heir and against him, should be granted for and against him to whom the estate was transferred in compliance with the terms of the trust. After the enactment of this decree, the Prætor began to allow equitable actions both for and against him who had obtained the estate, just as could be done for and against an heir.

(5) But, as regularly appointed heirs when requested in general terms to surrender the entire estate, or nearly all of it, declined to enter upon the same, because little or no profit accrued to them therefrom, and on this account the trust was extinguished; afterwards, in the time of Vespasian Augustus, while Pegasus and Pusio were Consuls, the Senate decreed that he who was requested to transfer an estate should likewise be permitted to retain the fourth part of the same, just as the right to do so in the case of legacies is granted by the *Lex Falcidia*. The same retention was also permitted in the case of separate property which was left in trust. After the Decree of the Senate was enacted, the heir himself sustained the burdens of the estate; while he who received the remainder of it by virtue of the trust occupied the place of a partial legatee, that is to say, of a legatee to whom a portion of the property was bequeathed; which kind of legacy is called a division from the fact that the legatee divided the estate with the heir. For which reason the same stipulations which were usually agreed upon by the heir and the partial legatee, were also agreed upon by the party who obtained the estate under the trust and the heir; that is to say, that the profit and loss arising from the estate should be divided between them in proportion to their respective shares.

(6) Therefore, if the heir should be requested to transfer not more than three-fourths of the estate, then the transfer of the same was made in compliance with the Trebellian Decree, and actions relating to the estate were formerly permitted in proportion to their respective shares; against the heir by the Civil Law, and against the party who received the estate by the Trebellian Decree as if against an heir.

But where he was required to deliver more than three-fourths, or even the entire estate, the case was then governed by the Pegasian Decree, and the heir who at once entered upon the estate — if he acted voluntarily, whether he retained the fourth part of the same or was unwilling to do so — himself sustained all the burdens of the estate; but where the fourth part was retained, stipulations like those designated *partis et pro parte* were formerly entered into, as between a partial legatee and an heir; but if the heir transferred the entire estate, stipulations of an estate which had been bought and sold were formerly entered into.

Where, however, the appointed heir refuses to enter upon the estate because he says that he thinks that it will be detrimental to him, it is provided by the Pegasian Decree that when requested by the party to whom he was directed to transfer it, he shall by order of the Prætor enter upon and transfer the estate; and that actions are also to be granted in favor of and against the beneficiary of the estate, as provided by the Trebellian Decree. Under these circumstances no stipulations are required, for the reason that at the same time security is given to him who has delivered the estate, and actions having reference to it are transferred for and against the party who received the same; both decrees of the Senate being concurrently applicable in this instance.

(7) But since the stipulations derived from the Pegasian Decree were displeasing even to the ancient jurists, and Papinian, that man of eminent genius, declares that in some cases they are captious; and as simplicity rather than complexity in the laws seems to Us to be desirable; therefore, the various points of resemblance and difference in both decrees having been brought to Our notice, We have ordered that the Pegasian Decree, which was the more recent one, shall be repealed, and that general authority shall be granted to the Trebellian Decree; so that estates in trust shall be transferred in compliance with its provisions, whether the heir, by the wish of the testator retains a fourth, or more, or less, or absolutely nothing; so that when nothing or less than a quarter remain to him, he shall be permitted by Our sanction to reserve either the quarter or whatever portion is lacking, or if it has been paid to demand that it be surrendered to him; and that actions shall lie against both the heir and the party taking under the trust, according to their respective shares, as under the Trebellian Decree.

Where, however, the heir voluntarily transfers the entire estate, all actions relating to it will lie for the benefit of the party taking under the trust, as well as against him.

Moreover, with reference to the principal points of the Pegasian Decree, namely, that when the appointed heir declined to enter upon the estate which was given him he might be forced to deliver the whole of it to the beneficiary of the trust if the latter wished this to be done; and that all actions should be transferred to him and against him; this also We have inserted in the Trebellian Decree — so that by the latter alone the necessity is imposed upon the heir if he declines to enter upon the estate, and the beneficiary of the trust wishes that the estate shall be delivered over to himself — in such a way that neither profit nor loss shall affect the heir.

(8) Moreover, it does not matter whether anyone appointed an heir to the entire estate be asked to transfer it all or only a portion of the same, or whether an heir appointed to a part is asked to transfer all that part or only a portion of it; for, under these circumstances, We direct the same rule to be observed which We have prescribed with reference to the transfer of the entire estate.

(9) Where anyone is asked to transfer an estate where some single thing is deducted or reserved which includes the fourth part, as, for instance, a tract of land, or anything else; the transfer shall be made, in like manner, in conformity with the Trebellian Decree; just as would have been the case if the party had been requested to retain a fourth part and surrender the balance of the estate. There is this distinction, however, that in the one instance, that is to say when the estate is delivered after a certain part of it has been deducted or reserved, the actions are entirely transferred under the Decree of the Senate, and the property which remains in possession of the heir will be exempt from any burden derived from the estate, just as if it had been acquired by a legacy; but in the other instance, that is when the heir is requested to retain a fourth part and deliver the remainder of the estate, and does this, the actions are divided, and are transferred in the proportion of three-quarters to the beneficiary of the trust, and one-quarter of the same to the heir.

Even if the heir is asked to surrender the estate after having deducted or reserved some specified property in which the greater part of the estate is included, the actions are equally transferred as a whole, and he to whom the estate is to be transferred should decide whether or

not it is to his advantage for this to be done. The same rules certainly are applicable when an heir is requested to transfer the estate and two or more articles have been deducted or reserved; and the same principle applies where an heir is requested to deliver the estate after having deducted or reserved a certain sum of money which amounts to the fourth or even to a greater portion of the same.

What We have stated concerning a person appointed heir to the entire estate We also render applicable to him who has been appointed heir to only a part of it.

(10) Moreover, anyone who is about to die intestate may request him to whom he knows his property will belong either by the Civil or the Prætorian Law, to deliver to some person his entire estate or a part of it, or any designated article, as, for instance, a tract of land, a slave, or a sum of money; while, on the other hand, legacies are only valid when bequeathed by will.

(11) He can likewise ask him to whom anything is delivered to give it in his turn, either wholly or in part, to another, or even to give him some other property.

(12) And because the original trusts were dependent upon the good faith of heirs, and thence derived both their name and nature, and because the Divine Augustus rendered them obligatory by law; We, Ourselves, have recently attempted to surpass the Emperor, and have promulgated a Constitution arising from a matter suggested by that eminent man Tribonian, the Quæstor of Our Sacred Palace; by which We have established that if a testator has confided in the good faith of his heir to transfer his estate or the special object of a trust, and the fact cannot be proved either by a written instrument or by five witnesses, (which is recognized as a legal number where trusts are concerned) but a smaller number than five, or absolutely no witness was present; then whether it was the father of the heir, or anyone else whosoever, who confided in the good faith of the heir and desired that something be delivered by him, and the heir, influenced by perfidy, refused to discharge his trust by denying that the incident occurred as stated; if the beneficiary of the trust calls upon him to make oath, he himself having first sworn that he was not acting wrongfully; the heir is required either to swear that he heard nothing of this kind said by the testator, or if he refuses to do so, he must be forced to discharge the trust, whether it relates to the entire estate or merely to a portion of the same; so that the last wishes of the testator, dependent upon the good faith of the heir, may not be rendered nugatory.

We have decreed that the same rule shall be observed where any property left in like manner imposes an obligation upon a legatee or the beneficiary of a trust. If the party to whom the property said to be subject to an obligation has been left, acknowledges that this is the case, but has recourse to the subtlety of the law, he shall, in every instance, be forced to make payment.

TITLE XXIV.

CONCERNING PARTICULAR THINGS LEFT IN TRUST.

Anyone can also leave particular things in trust, as, for instance, a tract of land, a slave, a garment, vessels of silver, or money; and he can request either the heir himself, or a legatee to deliver it to a third person, although he cannot charge a legatee with the payment of a legacy.

(1) A testator, moreover, can leave not only his own property in trust but also that of his heir or legatee, as well as that of a beneficiary under the trust, or of anyone else whomsoever. Therefore, not only can the legatee or the beneficiary under the trust be asked to deliver to another party whatever has been left him; but this can likewise be done with reference to other property, whether it belongs to him or to some one else; and this must only be observed in order that no one may be asked to deliver to another person more than he himself has received under the will, for a request for more than this is void. Also, when the property of another is left in trust, he who has been asked to deliver it must either purchase the article itself and deliver it, or pay what it is worth.

(2) Freedom can also be granted a slave by way of trust, so that either an heir, a legatee, or a beneficiary of the trust may be requested to manumit him, and it is immaterial whether the testator makes a request with respect to his own slave, or concerning one that belongs to the heir himself, or to a legatee, or even to a stranger; and therefore a slave belonging to a stranger must be purchased and manumitted. If his owner is unwilling to sell him — it being presumed that he has received nothing by the will of the party who leaves the slave his freedom — the fiduciary grant of freedom is not immediately extinguished, but merely deferred; because, in the course of time, freedom may be bestowed upon him whenever an opportunity occurs to purchase the slave.

Where he is manumitted by reason of a trust, he does not become the freedman of the testator even though he may be his slave, but he becomes the freedman of the party who manumitted him; while he who was directly ordered to be liberated by the will, becomes the freedman of the testator himself, and is designated "*orcinus*". No one, however, can obtain his freedom directly by will, excepting one who has been a slave of the testator at both times, that is when he made his will, and when he died; and freedom is considered as directly bestowed when a testator does not request that the slave be manumitted by some other person, but expresses his desire that he shall obtain his freedom by means of his own will.

(3) The following are the words generally used in instituting trusts: "I request, I ask, I wish, I direct, I confide in your good faith"; and these terms are as obligatory when used separately, as they are when all are employed together.

TITLE XXV.

CONCERNING CODICILS.

It *is* well established that the law of codicils did not exist before the time of Augustus, but that Lucius Lentulus, through whose agency trusts also originated, introduced the use of codicils. For, while he was dying in Africa, he left a codicil confirmed by his will by which he requested Augustus to do something by way of a trust; and when the Divine Augustus fulfilled his request, others subsequently, following his example, executed trusts; and the daughter of Lentulus paid legacies which legally she did not owe. Then Augustus is said to have assembled learned jurists, among whom was Trebatius, whose opinion at that time was of the greatest value, and to have asked whether this could be permitted, and whether the use of codicils was not contrary to the rules of law; and Trebatius persuaded Augustus by stating that this was most useful and necessary for citizens, on account of the many and long journeys that took place among the ancients, so that where a man could not make a will, he could still be able to make a codicil.

After this time, when Labeo also had made a codicil, there was no doubt in the mind of anyone that codicils could be accepted in perfect compliance with the law.

(1) Not only can anyone make a codicil after he has made a will, but also any person dying intestate can create a trust by means of a codicil. But Papinian says that when a codicil has been made before a will has been executed, it has no force, unless it is afterwards confirmed by an express statement; still the Divine Emperors Severus and Antoninus declared in a Rescript that the execution of a trust could be demanded by virtue of a codicil which preceded a will, if it were established that the party who afterwards made the will had not revoked the wish which he had expressed in the codicil.

(2) An estate, however, can neither be given nor taken away by means of a codicil, for if it could, the effect of wills and codicils would be confused; and, for this reason, no disinheritance can be inserted in a codicil. An estate cannot be given or taken away by a codicil except directly; for it can be legally left as a trust by means of one. A condition cannot be imposed upon an appointed heir, nor can a substitution be made directly by a codicil.

(3) Anyone can make several codicils, and they require no particular mode of execution.