# THE DIGEST OR PANDECTS.

## BOOK XLIV.

## TITLE I.

## CONCERNING EXCEPTIONS, PRESCRIPTIONS, AND PRELIMINARY INQUIRIES.

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

He is held to occupy the position of plaintiff who makes use of an exception, for where a defendant has recourse to an exception he becomes a plaintiff.

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

An exception is so called for the reason that it operates as an exclusion, and is ordinarily opposed to proceedings to collect a claim, for the purpose of barring the statement of the same as well as judgment in favor of the party who brings the suit.

(1) Replications are nothing more than exceptions pleaded by the party plaintiff, which are necessary in order to bar exceptions; for a replication is always introduced for the purpose of opposing an exception.

(2) It must be remembered that every exception, or replication, is for the purpose of preventing the opposite party from proceeding further. An exception bars the plaintiff, and a replication bars the defendant.

(3) It is customary for a triplication to be granted against the' replication, and other pleas to follow in order and, after this, the names are multiplied, whether the defendant or the plaintiff interposes an objection.

(4) We usually say that some exceptions are dilatory, and others peremptory; as, for instance, a dilatory exception is one which postpones the action, thus one denying the authority of an agent is a dilatory exception. For he who alleges that anyone has not the power to act as an attorney does not deny that the action should be brought, but maintains that the person who brings it is not qualified to do so.

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

Exceptions are either perpetual and peremptory, or temporary and dilatory. Those are perpetual and peremptory which will always lie, and cannot be avoided; for example, those based on fraud and *res judicata,* and where anything is alleged to have been done against the laws or decrees of the Senate; also such as are applicable in the case of an informal agreement, that is to say, such as provide that the money due shall, under no circumstances, be collected.

Exceptions are temporary and dilatory which cannot be brought at any time, and can be avoided; and of this description is a temporary agreement between the parties under which an action cannot be brought for a specified period, for instance, within five years. Exceptions by which the action of an agent is barred, and which can be avoided, are also dilatory.

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

If the question is asked whether a ward can be barred by an exception on the ground of fraud, where money which was due to him has been paid without the authority of his guardian, and he demands payment a second time, it must be ascertained whether, when he makes the demand, he still has the money, or has purchased something with it.

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

A defendant who alleges that he has already sworn in court that he does not owe the money for which he is sued, can avail himself of all other exceptions in addition to that based on

taking the oath, or of the rest of them without it; for he is permitted to make use of several defences.

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

If a legatee brings an action to recover the property bequeathed, an exception based on the fraud of the testator can be pleaded against him; for, just as an heir who succeeds to the entire estate can be barred by an exception, so a legatee can also be barred as the successor of an individual part of the same.

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

Exceptions to which certain persons are entitled do not pass to others; as, for instance, where a partner, a father, or a patron, can plead an exception to have judgment rendered against him only for the amount which he is able to pay; this privilege is not granted to a surety. Hence the surety of a husband, who was given after the marriage has been dissolved, will have judgment rendered against him for the entire amount of the dowry.

(1) Exceptions which have reference to property can, however, also be pleaded by sureties; for example those based on *res judicata,* fraud, and where an oath has been exacted, if this was done under duress. Therefore, if the principal debtor entered into an agreement concerning the property, his surety will, by all means, be entitled to an exception.

An exception based upon the appearance of a surety, on the ground that the claim will prejudice the right of freedom, can also be employed by him. The same must be said where anyone has become surety for a son under paternal control in violation of the Decree of the Senate, or for a minor of twenty-five years of age, who has been defrauded. If, however, he has been deceived with reference to the property, he will not be entitled to relief before he obtains restitution, and an exception should not be granted the surety.

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

No one is forbidden to avail himself of several exceptions, even though they may be different in their character.

9. *Marcellus, Digest, Book HI.*

An adversary is not considered to admit the claim of the other party, merely because he has recourse to an exception.

10. *Modestinus, Opinions, Book XII.*

Modestinus gave it as his opinion that a judgment obtained by others does not prejudice those who were not parties to the suit; and even if he, against whom judgment was rendered, should become the heir of the person who gained .the case, an exception, based on the fact that, under this judgment, he has failed to effect what he undertook in his own name before he became the heir, cannot be pleaded against him.

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

A man acknowledged as genuine certain notes which were, in fact, forged, and paid them after judgment was rendered against him. I ask, if the truth should subsequently be ascertained, and the notes found to be forged, and the defendant should desire to prove this in accordance with the order of the court, or an interlocutory decree; and, as he had admitted the genuineness of the said notes, whether he could be opposed by an exception, as it is clearly established by the Imperial Constitutions that although a judgment may be obtained by means of forged documents, and they are afterwards ascertained to be false, the fact that the matter has been decided cannot be pleaded in bar. Modestinus answered that, for the reason that payment was made through mistake, or security was furnished in the case of these notes, which were afterwards alleged to be forged, there would be no ground for an exception.

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

Generally speaking, in questions dependent on preliminary decisions, he sustains the part of a plaintiff whose claim is in accordance with what he demands.

13. *Julianus, Digest, Book L.*

If, after judgment has been pronounced in a case involving an entire estate, suit is brought to recover certain specified articles, it is settled that an exception on the ground that the estate will be prejudged cannot be pleaded in bar, for the reason that exceptions of this kind are introduced because they may affect a future decree, if not the one which has already been rendered.

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

A son under paternal control sold a slave forming part of his *peculium,* and a stipulation was made for the price. The slave was returned under a conditional clause of the contract and afterwards died, and the father demanded from the purchaser the money which the son had stipulated should be paid to him. It was decided to be just that an exception *in factum* should be pleaded against him, setting forth that the money had been promised for the slave who had afterwards been returned under a condition of the contract.

15. *Julianus, On Urseius Ferox, Book IV.*

A replication alleging bad faith should not be pleaded against an exception founded upon an oath taken in court, as the Praetor should see that no question is subsequently raised with reference to such an oath.

16. *Africanus, Questions, Book IX.*

You are in possession of the Titian Estate, and you and I have a lawsuit with reference to the ownership of the same. I allege that there is due to this estate a right of way through the Sempronian Estate, which belongs to you. If I bring suit to recover the right of way, it is held that you can avail yourself of an exception on the ground that the action pending for the ownership of the property ought not to be prejudged; that is to say, that I cannot show that I am entitled to the right of way before I have proved that the Titian Estate is mine.

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

If, however, I bring an action to recover the right of way, and afterwards one to recover the Titian Estate, as the objects of the litigation are distinct, and the reasons for restitution different, the exception will cause no injury.

18. *Africanus, Questions, Book IX.*

I bring an action against you for half of a tract of land which you say is yours, and I wish, at the same time, to bring one in partition against you before the same judge. Again, if I allege that a tract of land of which you are in possession is mine, and I wish to recover the crops from you, the question arises whether an exception based on the principle that I ought not to bring a suit, the decision of which will prejudge the case which involves the ownership of all, or a part of the land in question, will operate as a bar, or should be denied.

It is held that, in both instances, the Praetor should intervene, and not permit the plaintiff to institute proceedings of this kind, before the question of the ownership of the land has been determined.

19. *Marcianus, Institutes, Book XIII.*

All exceptions to which the principal debtor is entitled can also be employed by his surety, even against the consent of the former.

20. *Paulus, On the Manner of Drawing up Formulas.*

Exceptions are pleaded either because the party did what he should have done; or because he did what he ought not to have done; or because he did not do what he should have done. An exception on the ground of property sold and delivered, or on that of *res judicata,* is granted for the reason that something has been done which ought to have been done. An exception on the ground of fraud is granted, because something has been done which ought not to have been done. An exception on the ground that praetorian possession of property which has been given has not been permitted, is granted because something was not done which should be done.

21. *Neratius, Parchments, Book IV.*

One action is said to prejudge another, with reference to a larger sum of money, when a question arises in court which is connected either wholly, or in part, with a suit involving a larger amount of property.

22. *Paulus, Various Passages.*

An exception is a proceeding which sometimes relieves the defendant from the risk of having judgment rendered against him, and sometimes diminishes the amount of the judgment.

(1) A replication opposes an exception, and is, as it were, an exception to an exception.

23. *Labeo, Epitomes of Probabilities by Paulus, Book HI.*

Paulus: If anyone places a statue in a city with the intention that it shall belong to the city, and afterwards desires to claim it in court, he can be barred by an exception *in factum.*

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

A son under paternal control can acquire for his father an exception on the ground of an oath having been taken, if he swears in court that his father does not owe anything.

## TITLE II.

## CONCERNING THE EXCEPTION BASED ON RES JUDICATA.

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

As judgments rendered between litigants cannot prejudice others who are not parties to the suit, proceedings can be instituted under a will by which freedom is granted, or a legacy is bequeathed, although the will may have been broken, or may have been declared void, or may have been held not to have been drawn in accordance with the prescribed legal formalities; but, still, if the legatee should lose his case, the testamentary grant of freedom will not be affected.

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

Where an action is brought against the heir of a testator who passed over his son in his will, and the plaintiff is barred by an exception on the ground that the will is in such a condition that possession of the estate can be granted by the Praetor contrary to its provisions, and the emancipated son has neglected to apply for possession of the estate, it is not unjust that he should be enabled again to institute proceedings against the heir. This was stated by Julianus in the Fourth Book of the Digest.

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

Julianus, in the Third Book of the Digest, states that an exception on the ground of *res judicata* can be opposed whenever the same question again arises in court between the same parties. Therefore, if anyone brings an action for the entire estate, after having lost one, brought to recover a portion of the same, or *vice versa,* he will be barred by an exception.

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

An exception on the ground of *res judicata* is tacitly understood to include all those persons who are interested in the case.

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

Proceedings are considered to be instituted with reference to the same question, not only when a plaintiff does not make use of the same action which he brought in the first place, but when he brings another relating to the same matter. For instance, if anyone having brought an action on mandate should, after his adversary promised to appear in court, bring one on the ground of voluntary agency, or one for the recovery of the property, he institutes proceedings relating to the same matter. Hence, it is very properly said that he only does not institute proceedings with reference to the same matter who does not again attempt to accomplish the same result. For when anyone changes the action, he must also change the nature of his claim; as he is always considered to bring suit with reference to the same matter, even if he has recourse to a different kind of action from the one which he employed in the first place.

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

It has very reasonably been held that one action is sufficient for the settlement of a single controversy, and one judgment for the termination of a case; otherwise, litigation would be enormously increased, and would be productive of insurmountable difficulties, especially where conflicting decisions have been rendered. It is therefore very common to introduce an exception on the ground of *res judicata.*

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

If anyone, after having brought an action for all of certain property and lost it, should then bring suit to recover a portion of the same, he will be barred by an exception on the ground of *res judicata;* for a part is included in the whole, and is considered the same thing where a portion of something is claimed and all of it had previously been demanded. Nor does it make any difference whether the claim is made for a certain article, or for a sum of money, or for a right. Hence, if anyone sues to recover a tract of land, and afterwards brings an action for a divided or an undivided portion of the same, it must be said that he will be barred by an exception. Or if you suggest, as an example, that I bring an action for a certain part of a tract of land, the whole of which I have previously sued for, I will be barred by an exception.

The same rule must be adopted where, in the first place, suit is brought for two different articles, and afterwards one is brought for either of them; as the exception will operate as a bar. Likewise, if anyone brings an action to recover a tract of land and, having lost it, he then brings one for the trees which have been cut on said land, or if he, in the first place, brings suit for a house, and subsequently brings one for the ground on which it stands, or the lumber or stone of which it is built, the same rule will apply. This is also the case if I, in the first place, bring suit for a ship, and then bring one to recover the individual parts of which it is composed.

(1) If I bring an action to recover a female slave who is pregnant, and who conceived and brought forth a child after issue was joined in the case, and I then bring an action to recover the child, whether I shall be decided to have asserted the same claim or a different one, is an important point. And, indeed, it may be held that an action is brought for the same thing, wherever what was demanded before the first judge is demanded before a second one. Therefore, in almost all these cases, an exception will operate as a bar.

(2) A difference, however, exists with reference to the stone and timbers of which a house is composed, for where anyone brings a suit for a house, and loses it, and afterwards brings one for the stone or the timbers, or anything else, as his property, he is in such a position that he will be considered to have asserted a different claim, for a house may belong to a person who does not own the stones of which it is constructed. Finally, where materials have been used

for the erection of a house belonging to another, the owner can recover them after they have been separated from the building.

(3) The same question arises with reference to the crops, as where the child of a female slave is involved. For these things are not yet in existence, still they are derived from the property to recover which the action has been brought; and the better opinion is that this exception will not apply to them. It is, however, clear that if either the crops or the offspring of the slave have been included in the restitution of the property, and their value has been appraised, the result will be that an exception can be effectively interposed.

(4) And, generally speaking (as Julianus says), an exception on the ground of *res judicata* will operate as a bar whenever the same question is brought up again in court between the same persons, or in a different kind of a case. Hence, if after having brought suit to recover an estate, and lost it, the plaintiff brings one to recover certain articles forming part of the estate; or if, after having brought an action to recover certain articles belonging to it, and failed, he then brings one to recover the entire estate, he will be barred by an exception.

(5) The same rule should be adopted where anyone, having brought an action to collect a claim from a debtor of an estate and lost it, brings one to recover the entire estate; or, on the other hand, if, in the first place, he brought an action to recover the estate, and afterwards brings one to collect a debt forming a part of the assets of the same, an exception, in this instance, will operate as a bar; for if I bring suit for an estate, all the property and rights of action appertaining to it are considered to be included in the claim.

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

If I bring suit against you for an estate and I am defeated, because you are not in possession of any of it, and I again bring an action to recover it, after you have obtained a portion of the same, can this exception be properly pleaded against me? I think that the exception will not operate as a bar whether it was decided that the estate was mine, or whether my adversary was discharged from liability because he was not in possession of any part of it.

(1) If anyone, having defended his title to a tract of land of which he thought he was in possession, and judgment being rendered for the plaintiff, the defendant afterwards purchases the land, can the plaintiff be compelled to restore it to him? Neratius says that if an exception on the ground of *res judicata* is pleaded against him who brings suit for the land a second time, he can reply that judgment was rendered in his favor.

(2) Julianus says that an exception on the ground of *res judicata* passes from the original party in interest to the purchaser, but does not revert from the purchaser to the original party. Therefore, if you sell property belonging to an estate, and I bring an action to recover said property from the purchaser, and gain the case, I cannot plead the exception against you, if you bring suit against me. But if the judgment was not rendered between the person to whom you sold the property and myself.

10. *Julianus, Digest, Book LI.*

Or if I have lost my case, you will not be entitled to the exception against me.

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

If a mother should, under the Decree of the Senate, bring suit to recover the estate of her minor son who is deceased, for the reason that she thought that, the will of his father having been broken, no pupillary substitution could have been made, and she should be defeated, because the will of the father had not been broken, and, after the will had been opened, where the pupillary substitution should appear, none was found to exist, and she again brings an action for the estate, she will be barred by an exception on the ground of *res judicata;* so Neratius says. I do not doubt that she will be barred by an exception on the ground of *res judicata,* but relief should be granted her, because she only advanced one point in her favor,

namely, that the will of the father had been broken.

(1) Finally, Celsus says that if I bring an action to recover a slave whom I think is my property, because he was delivered to me by someone else, while, in fact, he is mine, because he belongs to an estate which I have inherited, and I bring a second action, after having lost the first, I can be barred by an exception.

(2) If, however, anyone brings suit for land on the ground that Titius had delivered it to him, and, having been defeated, afterwards sues for it on some other ground, he should not be barred by an exception.

(3) Julianus also says, if you and I are heirs of Titius, and you bring an action against Sempronius for part of a tract of land which you allege belongs to the estate, and you are defeated, and I afterwards purchase the same part of the land from Sempronius, I can interpose an exception against you by way of a bar, if you bring suit **in** partition against me, because the matter has been judicially decided between you and my vendor. For if, before I bring suit for the said part of the land, I should bring an action in partition, an exception can be interposed on the ground that the matter between you and myself has been disposed of in court.

(4) Where the origin of two claims is the same, it also makes a second demand the same. But if I bring an action for a tract of land, or a slave, and lose my case, and afterwards I should have a new cause of action from which I derive ownership, I will not be barred by this exception, unless my ownership, having been lost for the time being, is afterwards recovered by a certain species of *postliminium.* But what if the slave whom I claim should be taken by the enemy, and afterwards returns under the right of *postliminium?* In this instance I will be barred by the exception, because the matter is understood to be the same; but if I should have obtained the ownership for some other reason, the exception will not operate as a bar. Therefore, if property is bequeathed to me, under a condition, and while it is pending, having acquired the ownership of it, I bring suit, and I am defeated, and then, the condition having been fulfilled, I again sue to recover the legacy, I think that an exception cannot be pleaded, because I formerly had a different title to ownership than I have at present.

(5) Hence, if ownership is acquired after the first claim has been made, it changes the nature of the case, but the change of the opinion of the plaintiff does not do so; as, for example, if anyone thinks that he has the ownership of property through inheritance, and changes his opinion, and believes that he is entitled to it on account of a donation. This does not give rise to a new claim, for no matter in what way, or where a person may have acquired the ownership of the property, his right to it has finally been disposed of in the first action.

(6) If anyone brings suit for the right to walk through the land of another, and afterwards brings one to drive through the same land, I think that it can be strongly maintained that one thing was asked for in the first place, and another in the second, and therefore that an exception on the ground of *res judicata* cannot be interposed.

(7) It is our practice, where an exception on the ground of *res judicata* is pleaded, to include all the parties who have a right to bring the matter into court with the plaintiff. Among these are the attorney who was directed to bring the action, a guardian, the curator of an insane person or a minor, and the officer who has charge of the business of a city.

On the side of the defendant, whoever undertakes the defence is included because he who institutes proceedings against him brings a suit in court.

(8) Where anyone brings an action against a son under paternal control for the recovery of a slave, and afterwards brings one against the father for the same slave, there will be ground for this exception.

(9) If I bring suit against my neighbor to compel him to take care of his. rain-water, and

afterwards one of us should sell our land, and the purchaser brings the same action, or it is brought against him, this exception will operate as a bar, but only with reference to such work as has been performed after the decision was rendered.

(10) Likewise, if Titius should give to Seius, by way of pledge, property which he attempted to recover from you, and Seius afterwards should bring an action on pledge against you, it must be ascertained when Titius pledged the property. If he did so before bringing suit, the exception will not operate as a bar, because he should have presented the claim, and I retain my right of action on pledge unimpaired.

If, however, he pledged the property after he brought suit, the better opinion is that an exception on the ground of *res judicata* will operate as a bar.

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

When the question is asked whether or not this exception will operate as a bar, it should be ascertained whether the same property is involved;

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

Either the same amount, or the same right which was the subject of the first action.

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

It should also be ascertained if the same cause of action exists, or the persons are of the same rank, and if these things do not coincide, the case is different. Where this exception is pleaded, the same property is understood to be that which was the subject of the first action, even though its quality or quantity may not have been absolutely preserved, and no addition to, or deduction from it has been made, as the term should be accepted in its broadest significance, on account of the welfare of the parties interested.

(1) Where anyone enjoys the usufruct of a portion of the property, and brings suit to recover the entire usufruct, and loses his case, 3nd he then brings an action for the other half of the usufruct, which has subsequently accrued to him, he will not be barred by an exception, for the reason that the usufruct does not accrue to a portion of the estate, but to the person himself

(2) In cases of this kind, personal actions differ from real ones, for where the same property is due to me from the same individual, each cause of action is based on a separate obligation; and a judicial proceeding having reference to one of them is not annulled by a similar demand for another. But when I bring a real action without mentioning on what ground I allege the property to be mine, all titles to it are included in the claim for one portion, because, although the property cannot be mine more than once, it may be due to me several times.

(3) Where anyone institutes proceedings under the interdict to recover possession of property, and afterwards brings a real action, he will not be barred by an exception, because proceedings to obtain possession under an interdict, and a suit to determine the ownership of the property, are different.

15. *Gaius, On the Provincial Edict, Book XXX.*

Where a suit involving an estate is pending between you and myself, and you have in your possession some property belonging to said estate, and I also have some, there is nothing to prevent me from bringing an action against you to recover the estate, and, on the other hand, nothing to prevent you from bringing an action against me for the same purpose. If, however, after the case has been disposed of, you bring such an action against me, it will be necessary to ascertain whether the estate was adjudged to be mine or yours. If it was decided to be mine, the exception on the ground of *res judicata* will operate as a bar against you; because, for the very reason that judgment has been rendered in my favor, and the estate found to belong to me, it has been decided not to be yours. If, however, it has been found not to belong to me, nothing is understood to have been determined with reference to your title to it, because it

may be that the estate does not belong to either of us.

16. *Julianus, Digest, Book LI.*

For it would be extremely unjust that an exception on the ground of *res judicata* should benefit the party against whom the judgment was rendered.

17. *Gaius, On the Provincial Edict, Book XXX.*

If I bring suit against you to recover property which belongs to me, and you are discharged from all liability because you proved that you have ceased to hold possession of said property, without any fraud on your part; and then, after you have obtained possession of said property a second time, I again bring an action against you, an exception on the ground of *res judicata* cannot effectually be interposed against me.

18. *Ulpianus, On the Edict, Book LXXX.*

Where anyone brings suit for the production of property and his adversary is discharged from liability because he was not in possession, and he having afterwards regained possession, the owner brings suit a second time, an exception on the ground of *res judicata* can not properly be pleaded, because the condition of the case is different.

19. *Marcellus, Digest, Book XIX.*

A certain man gave the same property in pledge at two different times, the second creditor brought an action on pledge against the first one, and gained the case, and the first afterwards brought a similar action against the second. The question arose whether an exception on the ground of *res judicata* would operate as a bar. If the second creditor had pleaded the exception before the property had been pledged to him, and he could advance nothing which was new and valid, the exception would undoubtedly be a bar, for it brings up the same point which had already been decided.

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

Where suit was brought under a will against the heir by a person to whom all the family silver had been bequeathed, and who thought that only certain tables had been left him, and brought into court solely the question of appraisement of said tables, and afterwards sued to recover the money which had been left to him, Trebatius says that he will not be barred by an exception, for the reason that he did not bring suit for this in the first place, and did not intend to do so, nor did the judge render any decision with reference to it.

21. *The Same, On Sabinus, Book XXXI.*

If silver plate has been bequeathed to me by will, and I bring an action against the heir to recover it, and it should afterwards be ascertained that the testator had also bequeathed to me his wardrobe by a codicil, the latter legacy will not be affected by the former decision, because neither the parties to the suit, nor the judge, understood that anything was in dispute except the silver plate.

(1) If I bring suit to recover a flock of sheep, and I am defeated, and the flock either increases or diminishes in number, and I again bring an action to recover the same flock, an exception can effectually be interposed against me. If I bring suit for any one of the animals composing the flock, and it is present as part of the same, I think that the exception will still operate as a bar.

(2) If you bring an action against anyone to recover Stichus and Pamphilus, whom you allege are your slaves, and your adversary is discharged from liability, and you again bring suit against him, claiming Stichus as your slave, it is established that you will be barred by an exception.

(3) If I bring an action for a tract of land which I allege to be mine, and afterwards bring one

to recover the usufruct of the same, on the ground that, as the land belongs to me, its usufruct is also mine, I will be barred by an exception, because anyone who owns land cannot bring suit to recover the usufruct of it. If, however, I bring an action to recover the usufruct, as being mine, and afterwards, having obtained the ownership of the land, I again sue for the usufruct, it can be said that the case is different; as, after I obtained the land itself, the usufruct which I formerly enjoyed ceases to be mine as a servitude, and again becomes my property by the right of ownership, and, as it were, by a different title.

(4) If you become surety for my slave, and an action is brought against me on account of his *peculium,* and I gain the case, and afterwards an action is brought against you for the same cause, an exception on the ground of *res judicata* can be effectually pleaded.

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

If an action on deposit is brought against an heir, and lost, the plaintiff can bring one against the other heirs who cannot avail themselves of an exception on the ground of *res judicata.* For although the same question is involved in different actions, still the change of the parties against whom suit is individually brought gives the case a different aspect. If a suit is brought against the heir on account of fraud committed by the deceased, and afterwards one is brought against him for some fraudulent act of his own, an exception on the ground of *res judicata* will not operate as a bar, because a different question is involved.

23. *Ulpianus, Disputations, Book III.*

When an action only for the recovery of interest lost is brought, there need be no apprehension that an exception on the ground of *res judicata* will operate as a bar in a suit for the principal, for, as it is rib advantage, neither, on the other hand, will it be any impediment.

The same rule will apply where, in a *bona fide* contract, the plaintiff wishes only to collect the interest, for the interest still continues to run, because as long as the contract in good faith stands it will. do so.

24. *Julianus, Digest, Book IX.*

Where anyone buys property from a person who is not its owner, and is afterwards discharged from liability when the owner himself brings suit to recover it, and the purchaser then loses possession of the property, and institutes proceedings to recover it from the owner who has obtained possession of the same, the latter can have recourse to an exception on the ground that the property belongs to him, and the other can reply that it has not been decided to be his.

25. *The Same, Digest, Book LI.*

If anyone who is not an heir should bring an action for the estate and, after having become an heir, should again sue for the same estate, he will not be barred by an exception on the ground of *res judicata.*

(1) It is in the power of a purchaser to bring an action to compel the property to be returned within six months, where the condition was that if a slave was worth less than he was sold for, the excess paid should be refunded; for this latter action also includes the clause for the return of the money, when the slave had such a defect that, on account of it, the purchaser would not have bought him if he had been aware of it. Wherefore, it is very properly said that if the purchaser who has made use of either one of these actions should afterwards employ the other, he can be barred by an exception on the ground of *res judicata.*

(2) If you interfere in my business, and bring an action for a tract of land in my name, and I afterwards do not ratify the claim which you have made but direct you to again bring an action to recover the same land, an exception on the ground of *res judicata* will not act as a bar when conditions have changed since the mandate was given.

The same rule will apply where a personal action, and not a real one, is brought.

26. *Africanus, Questions, Book IX.*

I brought an action against you alleging that I had a right to raise my house ten feet higher, and lost it. I now bring one against you alleging that I Have a right to raise my house twenty feet higher. An exception on the ground of *res judicata* can undoubtedly be pleaded. If I again bring suit alleging that I have the right to raise my house still ten feet higher, an exception will operate as a bar; for since I could not raise it to a lower height, I certainly would not be entitled to raise it to a still higher one.

(1) Likewise, if having brought an action to recover a tract of land, and lost it, the plaintiff brings suit for an island which was formed in a river opposite said land, he will be barred by an exception.

27. *Neratius, Parchments, Book VII.*

When, in a second action, the question arises whether the property is the same as that which was the object of the first one, the following things must be considered: first, the parties interested; second, the property for which suit was brought; and third, the immediate cause of action. For now it is of no consequence whether anyone believes that he has a good cause of action, any more than if, after judgment had been rendered against him, he should find new documents to strengthen his case.

28. *Papinianus, Questions, Book XXVII.*

An exception on the ground of *res judicata* will bar one who succeeds to the ownership of the party who lost the case.

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

An exception on the ground of *res judicata* will not operate as a bar against a co-heir who was not a party to the suit; and a slave, who has not yet been manumitted under the terms of a trust, cannot be. again claimed as a slave, after judgment has been rendered in favor of his freedom; but it is the duty of the Praetor to see that the judgment is complied with in this case, as he cannot decide in favor of the party who was defeated. For if suit to declare a will inofficious has been brought against one of the co-heirs, or two co-heirs have brought actions separately, and one of them gains his case, it has been established that the grants of freedom must take effect; still, it is the duty of the judge to provide for the indemnity of the party who is successful, and who is to manumit the slave.

(1) If a debtor brings suit to determine the ownership of property, which he pledged without notifying the creditor, and judgment is rendered against him, the creditor will not be considered to occupy the place of the defeated party, as the agreement with reference to the pledge preceded the decision.

30. *Paulus, Questions, Book XIV.*

A certain man who could succeed to it as heir at law, having been appointed heir to the sixth part of an estate, contested the legality of the will, and having demanded half of the estate from one of the appointed heirs, lost his case. He is held to have included the sixth part of the estate in his claim, and therefore, if he brought suit for the same share under the same will, an exception on the ground of *res judicata* will operate as a bar against him.

(1) Latinus Largus: A transaction took place with reference to an estate which belonged to Maevius, but whose right to it was disputed by Titius, and a transfer of the property of the estate was made by Titius to Mrevius, as the heir, in which transfer a certain tract of land which, several years before, had been hypothecated to the grandfather of Maevius, and afterwards to another person was delivered, in pursuance of the contract. These matters having been settled, the second creditor of Titius brought suit for his claim, and gained it. After this judgment, Msevius found among the papers of his grandfather the note executed by

Titius, by which it appeared that the land which was included in the said transaction had also been encumbered by the said Titius to his grandfather. Therefore, as it was evident that the land formerly hypothecated to the grandfather of Msevius, the heir, was the same as that on account of which Msevius had a judgment rendered against him in favor of the second creditor, I ask whether the right of his grandfather, of which he was ignorant at the time that the action was brought to recover the land, could not be barred by pleading an exception. I answered that if the ownership of the land was in question, and a decision was rendered in favor of the said creditor, we should hold that an exception on the ground of *res judicata* would operate as a bar against the party who lost the former suit bringing another, because as the plaintiff had been successful, the question appears to be the same one previously involved.

If, however, the person in possession should be discharged from liability, and, having lost possession, should bring suit to recover it from the same party who was not successful in the first place, he will not be barred by an exception, for in the judgment rendered in his favor, nothing was decided with reference to his title. When, however, the action on pledge was brought against the first creditor, no question might happen to be raised as to the title of the party in possession, because in controversies having reference to ownership, what was decided to be mine is at the same time decided not to belong to another; but, in the case of an obligation, the result will be that, where property is encumbered in favor of one person, it does not follow that it is not encumbered to another, if the latter can prove that this is the fact.

It may be said, that it is probable that an exception will not operate as a bar, as there was no doubt as to the right of the possessor, but only as to the encumbrance. In the case stated, however, the point which presents the greatest difficulty to me is whether the right of pledge is extinguished, when the ownership of property is acquired; for the right of pledge cannot continue to exist where the creditor becomes the owner of the property. An action on pledge, however, will lie, because it is true that the property was pledged and the claim was not satisfied. For which reason I do not think that an exception on the ground of *res judicata* will operate as a bar.

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

Paulus held that an exception on the ground of *res judicata* could not be effectually pleaded against anyone who brought a personal action for the recovery of property, who had previously brought an action for the same property and lost it.

## TITLE III.

## CONCERNING DIFFERENT TEMPORARY EXCEPTIONS AND THE UNION OF SEVERAL POSSESSIONS.

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

For the reason that a discussion frequently arises with reference to available days, let us see in what the power to maintain one's rights consists. In the first place, it is requisite for the plaintiff to have power to bring an action, for it is not sufficient for the defendant to be able to himself make a defence, or employ someone who can properly do so for him, but the plaintiff also must not be prevented by any lawful reason from instituting proceedings. Hence, if he is in the hands of the enemy, or absent on business for the State, or is in prison, or if he is detained somewhere by a storm so that he cannot bring the suit, or direct this to be done, he is held not to have the power to do so. It is clear that a person who is prevented by illness, but is able to direct suit to be brought, should be considered as having the power to do so. There is no one who is not aware that he who has not the opportunity of appearing before the Praetor has not the power to bring an action. Hence only those days are available on which the Praetor dispenses justice.

2. *Marcellus, Digest, Book VI.*

The question is asked whether or not the intercalary day should be counted in favor of the party against whom judgment was rendered, in the time prescribed for levying execution on the judgment. Should it also be included in the time fixed by law for the right of action to be extinguished? It should undoubtedly be held that the time is prolonged by the intercalary day; for instance, where a question arises with reference to usucaption which is to be completed within a prescribed period, or to actions which must be brought within a certain time, as is the case with the greater portion of those which have reference to the acts of the Jildiles.

If, however, anyone should sell a tract of land under the condition that, unless the price was paid within thirty days, the sale should be void, will the purchaser be entitled to the benefit of the intercalary day? I hold that he will not.

3. *Modestinus, Differences, Book VI.*

It is clear that prescription based upon long possession applies to land as well as to slaves.

4. *Javolenus, Epistles, Book VII.*

If a slave belonging to an estate, or to anyone who is in the hands of the enemy, should receive security for the payment of a debt, the time prescribed for said security begins to run immediately; for we must ascertain not whether he who placed a lien on the property can bring an action, but whether the person in whose favor it was encumbered has a right to do so against the former. Otherwise, it would be extremely unjust if, on account of the rank of the plaintiffs, the obligations of the defendants should be prolonged, since nothing can be done by them to prevent suit from being brought against them.

5. *Ulpianus, Disputations, Book III.*

Let us see whether any defect in the title of the plaintiff, or of the donor, or the testator who bequeathed me property, will prejudice my rights, if he did not have a good title to its possession in the first place. I think that it will neither be of any disadvantage nor of any benefit to me, for I can acquire by usucaption something which the party from whom I obtain the property cannot acquire in that manner.

(1) The following case has been proposed. A certain woman sold an article after having pledged it, and her heir redeemed it. The question arises whether the heir can make use of an exception on the ground of long possession against the creditor attempting to obtain possession of the pledge. I held that this heir who redeemed the pledge from a third party can avail himself of the exception, because he succeeds to the place of the latter, and not to that of him who pledged the property. The case is the same as if he had redeemed the property and subsequently became the heir.

6. *Africanus, Questions, Book IX.*

If I sell the same property, separately, to two persons, the purchaser to whom it was first delivered will be the only one who will profit by the possession. For if I sell you anything, and afterwards purchase it from you, and then sell it to Titius, he will be entitled to the benefit of both your possession and mine, because you are obliged to give possession to me, and I am obliged to transfer it to him.

(1) I sold you a slave, and it was agreed between us that unless the price was paid by a certain date, the sale should be considered void. As this actually took place, the question arose what opinion should be given with reference to the additional time you held the slave. The answer was, that the same rule should be observed as in the case where the property is returned under a condition; for it is just as if you had sold me the slave a second time, and, when the vendor afterwards obtained possession of him, the time which preceded the sale was added to that during which the slave was held by the party by whom he was returned.

7. *Marcianus, Institutes, Book HI.*

Where anyone has fished for years in a certain place in a public river, he excludes another from enjoying the same right.

8. *Ulpianus, Rules, Book I.*

In computing the addition of the time of possession, it is true that the master is entitled to the benefit of the time during which the slave was in flight.

9. *Marcianus, Rules, Book V.*

It is provided by certain Rescripts of the Divine Antoninus that there is ground for prescription, where long-continued possession of movable property has existed.

10. *Pomponius, Opinions, Book XIII.*

An "informer, having notified the Treasury of certain property which had had no owner within the prescribed four years, desisted, after having given notice. After the four years had elapsed, a second informer having appeared, the first notice will not be available to prevent possession from being barred by lapse of time, unless the collusion of the first informer can be established, and this having been done, the prescription, as well as everything else relating to the affair, will be annulled.

(1) The term of four years which is fixed for notifying the Treasury of the existence of property without ownership is not computed according to mere opinion, but with reference to the character of the unoccupied property. The four years are reckoned from the time when a will is decided to be of no effect; or the possession of an intestate estate has been rejected by all those who had the right to claim it, in the regular order of succession; or where the time prescribed for each of them to do so had expired.

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

Where an heir succeeds to all the rights of the deceased, his ignorance does not affect any defective title of the latter; for example, if the deceased knew that the property belonged to another, he held possession of it by a precarious title. For, although such a title does not bind the heir who was not aware of it, and proceedings under the interdict cannot properly be brought against him, still, he cannot acquire the property by usucaption, as the deceased was unable to do so.

The same rule of law applies where property is claimed on the ground of long-continued possession, for an action cannot legally be defended where, in the beginning, it was not founded on a *bona fide* title.

12. *Paulus, Opinions, Book XVI.*

A creditor, who could have been barred from the possession of his pledge by lapse of time, sold the pledge. I ask whether the possessor could legally avail himself of an exception against the purchaser. Paulus answered that this exception could also be pleaded against the purchaser.

13. *Hermogenianus, Epitomes of Law, Book VI.*

In all matters in which the Treasury is interested, prescription for twenty years is available, except in cases where a shorter time has been expressly provided by the Imperial Constitutions.

(1) Any accounts which have been duly assigned and cancelled cannot be produced against the person responsible for them, after twenty years, or against his heir after ten years have elapsed.

14. *Scxvola, Questions Publicly Discussed, Book II.*

We cannot lay down any rules of general or perpetual application with reference to the union

of one possession to another, for this depends upon equity alone.

(1) It is clear that such a union is granted to those who succeed to us, even by virtue of a contract, or under a will. The addition of the time when the property was possessed by a testator is granted to the heirs, and to those who occupy the place of his successors.

(2) Therefore, if you sell me a slave, I can add the time during which he was in your possession.

(3) If you have given me an article in pledge, and I myself pledge it to someone else, my creditor will be entitled to the addition of the time during which you had possession of it, not only against a third party, but also against you yourself, so long as you did not pay me; for when anyone has the preference over me, as I have over you, there is much more reason to hold that he should be preferred to you. If, however, you should pay me the money, he cannot, under such circumstances, benefit by the time that the property remained in your hands.

(4) Likewise, if, during your absence, someone who is considered to have charge of your business should sell me a slave, and you ratify his act after your return, I can certainly profit by the time during which he was in your possession.

Again, if you give me property in pledge, and it is agreed between us that, if you do not pay the money, I can sell the pledge under the contract, and I do sell it, the purchaser will be entitled to the addition of the time that the property was in your possession, even though the pledge was sold without your permission, for when you made the contract it is held that you consented to the sale, if you should not pay the money.

15. *Venuleius, Interdicts, Book V.*

In the case of usucaption, the rule is observed that if the property is in possession only for a moment during the last day, the usucaption is, nevertheless, completed; for the entire day is not required for the completion of the prescribed time.

(1) The addition of time of possession not only includes that during which the property remained in the hands of the vendor but also the time that the purchaser held it, where the latter also disposed of it. If, however, one of the vendors was not a *bona fide* possessor, the possession of those who preceded him will be of no advantage, because the possession is not continuous, just as the possession of a vendor cannot be added to that of someone who is not in possession.

(2) It must also be added that, if you purchased the property yourself, or ordered someone else to do so, and he also directed it to be sold to a third party, continuity of possession is necessary. If, however, he who is directed to sell the property, should direct another to sell it, Labeo says that the addition of possession of him who gave the second mandate should not be allowed, unless the owner consents for this to be done.

(3) But if I purchase property from a son under paternal control, or from a slave, the addition of the time during which it was in possession of the father, or the master, should be granted me, if the property was sold either with the consent of the father or the master,

or as part of the *peculium* of the slave who was entrusted with its administration.

(4) The time of possession by a ward is also added to that of a person who purchased the property from his guardian. The same rule should be observed in the case of anyone who buys property from the curator of a minor or an insane person. If the sale has been made in behalf of an unborn child, or because possession of the property has been obtained for the purpose of its preservation, or it is diminished on account of a dowry, this addition of the time of possession will also be permitted.

(5) These rules relating to additions of the time of possession are not understood to be as comprehensive as their language indicates; for, even if the property remains in the hands of

the vendor after its sale and delivery, the purchaser will only be entitled to the benefit of the time which preceded the sale, even though the vendor did not have the property in his possession when it was sold.

(6) Where an heir sells to anyone property belonging to the estate, the latter will be entitled to the benefit of the time it remained in the hands of the heir, as well as to that during which it was in the possession of the deceased.

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

Any period of possession to which our own possession can not be added will be of no benefit whatever to us.

## TITLE IV.

## CONCERNING THE EXCEPTION FOUNDED ON FRAUD AND FEAR.

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

In order that this exception may be more clearly understood, let us first consider the reason why it was introduced, and afterwards ascertain how fraud can be committed. By this means we will learn when this exception operates as a bar, and also against what persons it can be employed. Finally, we shall examine within what time it must be pleaded.

(1) The Praetor introduced this exception in order that no one could, by means of the Civil Law, profit by his own fraud against the rules of natural equity.

(2) In order to ascertain whether a fraudulent act has been committed, the facts of the case must be taken into consideration.

(3) Fraud is committed in contracts, in wills, and in the execution, of the laws.

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

It is clear that this exception was formulated *for* the same reason that the action on the ground of bad faith was introduced.

(1) In the next place, let us see in what cases there is ground for this exception, and against whom it may be pleaded. And, indeed,

it must be noted, that he whose fraudulent act is complained of must be expressly mentioned, and that the formula *in rem,* "If any fraudulent act has been committed with reference to the matter," should not be employed, but the following one, namely, "If no fraud has been committed by you as plaintiff." Therefore, the party who pleads the exception must prove that the plaintiff has been guilty of fraud, and it will not be sufficient for him to show that fraud has merely been committed with reference to the case; or, if he alleges it has been committed by certain persons, he must specifically enumerate them; provided they are the parties responsible for the act by which he alleges that he has been injured.

(2) It is evident that the exception is employed in a proceeding *in rem* if we take into account the person who pleads it, for there is no doubt against whom the fraud was committed, but there is one as to whether or not the plaintiff committed it.

(3) The following matters may be discussed with reference to the First Section, where the causes giving rise to the exception are enumerated. If anyone stipulates with another without any consideration, and then institutes proceedings by virtue of this agreement, an exception on the ground of fraud can properly be pleaded against him; for although, at the time that the stipulation was entered into, he may not have been guilty of any fraudulent act, still it must be said that he committed fraud when he joined issue in the case, and persisted in asserting his claim under the said stipulation.

And even if, at the time that the stipulation was made, he had a just cause of action, still it is

held that one did not exist at the time of the joinder of issue. Hence, if anyone about to lend money enters into a stipulation, and the money is not lent, although there was a good consideration for the contract, still, as it was not executed, or was terminated, it must be said that the exception can be properly pleaded.

(4) The question is also asked, if anyone should stipulate absolutely for the payment of a certain sum of money, for the reason that this was the intention of the parties; but, after the stipulation was entered into, it was agreed that the money should not be demanded until a certain time, will an exception on the ground of fraud operate as a bar. And, indeed, there is no doubt whatever that an exception can be pleaded on the ground of an informal contract, as anyone who wishes to make use of this exception can do so; for it cannot be denied that he who makes a demand in violation of a contract which he entered into is guilty of fraud.

(5) Generally speaking, it should be noted that, in all cases where exceptions *in factum* are available, an exception on the ground of fraud can be pleaded in bar, because anyone is guilty of fraud who makes a demand ,which can be successfully opposed by any exception whatever; for if he did not commit fraud in the beginning, still, by making- .the claim now he is acting fraudulently, unless he was so ignorant of the facts as not to be guilty of bad faith.

(6) It has not improperly been asked, if a creditor accepts interest in advance on a loan, and persists in demanding payment of the principal before the time has passed for which he has collected the interest, whether he can be barred by an exception on the ground of fraud. It may be said that he is guilty of fraud, for by accepting the interest he is understood to have deferred collection of the debt until the time had elapsed for which interest was paid, and that he tacitly agreed not to demand payment in the meantime.

(7) The question also arises, if anyone should buy a slave who was to be free on condition of paying ten *aurei,* and the purchaser, being ignorant of this fact, stipulated that, in case of the eviction of the slave, he should be entitled to double his price, and then received the ten *aurei* from the slave, and as the latter had been evicted, and had obtained his freedom, whether the purchaser could bring an action for double the amount by virtue of the stipulation. He would be barred by an exception, unless he deducted the ten *aurei* which he received for the purpose of complying with the condition. This was also stated by Julianus.

If, however, the slave had paid the money out of the property of the purchaser, or out of his *peculium* which belonged to the latter, it may be said that an exception could not properly be pleaded, because he was not guilty of fraud.

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

But if, before the ownership of the slave was transferred to me, he should pay the ten *aurei* to the vendor, and I should bring an action on purchase in order to recover the ten *aurei,* I think that I would be entitled to this action, if I was ready to release him from the stipulation to pay double the amount of the price.

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

The question is asked by Celsus, if the creditors of an estate, with a single exception, should direct Titius to enter upon it, and this one did this for the purpose of deceiving him, but would also have directed him to accept if he had known that Titius would not have consented to do so, and he then brings an action, will he be barred by an exception? Celsus says that he will be barred.

(1) Julianus asks, if a man who is ill promises a hundred *aurei* to his wife's cousin, with the understanding that the money shall come into the hands of his wife, and he afterwards recovers, whether he can plead an exception on the ground of bad faith when suit is brought against him. Julianus says that it was held by Labeo that he could interpose an exception on the ground of fraud.

(2) If we should consent to a compromise, and appoint an arbiter, " and I do not appear at the appointed time, on account of bad health, and the penalty becomes due, can I avail myself of an exception on the ground of bad faith? Pomponius says that I will be entitled to the benefit of such an exception.

(3) It is also asked, what course must be pursued if you com--promise with a debtor who owes you the sum of sixty *aurei,* and through mistake you stipulate for the penalty of a hundred? Labeo holds that it is the duty of the arbiter to order as much to be paid to you as is actually due, and if this is not done, there is no reason why the excess should not be collected. But he also says, that even if the arbiter failed to state the amount which should be collected, and the penalty should be demanded, an exception on the ground of fraud can be pleaded.

(4) If a debtor pays a ward what he owes him, without the authority of his guardian, and the ward becomes enriched to that extent by this payment, it is very properly held that if he attempts to collect the amount a second time, he will be barred by an exception. For if he was pecuniarily benefited by having loaned money, or by having obtained it by means of some other contract, an exception should be granted.

The same rule must be said to apply to all other cases in which payment is illegally made, for if the parties are pecuniarily benefited there will be ground for an exception.

(5) Labeo also says that if anyone should purchase a slave knowing that he had the habit of running away, and stipulated with the vendor that this was not the case, and he afterwards brings an action based on the stipulation, he cannot be barred by an exception, as this was the agreement, although he will not be entitled to an action on purchase. If, however, such an agreement was not made, he will be barred by an exception.

(6) A certain man to whom money was due settled the account with his debtor, and sold his claim to Seius, whom the debtor had directed to purchase it, and the purchaser entered into a stipulation with reference to the transaction, and the creditor then retains the money which he had obtained by a judgment. Can the purchaser bring an action under the stipulation? Ofilius holds that if the vendor of the claim was not ready to pay over the entire amount which he received from the purchaser, an exception on the ground of fraud cannot be properly pleaded against him. I think that the opinion of Ofilius is correct.

(7) Labeo says that where suit has been brought for a slave, and judgment rendered in favor of the plaintiff, and security given by order of court for the slave to be delivered within a certain time, and a penalty has been stipulated for if he should not be delivered, the plaintiff will be barred by an exception if he claims both the slave and the penalty; for to retain possession of the slave and also to exact the penalty would be unjust.

(8) If I give you valuable pearls in pledge, and it is agreed between us that they shall be returned when the debt is paid, and the pearls are lost through your negligence, the question arises whether you can collect the money. An opinion of Nerva and Atilicinus is extant, who hold that I am entitled to an exception, as follows, "If no agreement was made between you and myself that the pearls should be returned to me if the money was paid." The better opinion, however, is that an exception on the ground of fraud can be pleaded in bar.

(9) If a minor should give me a young slave, and afterwards bring an action to recover him, he can be barred by an exception on the ground of fraud, unless he repays the amount furnished for his support, and any other reasonable expenses incurred on account of said slave.

(10) It should, moreover, be noted that if anyone brings suit under a will, against the wishes of the deceased, he can be barred by an exception on the ground of fraud. Hence, an heir can be barred by an exception of this kind, if he acts contrary to the wishes of the deceased.

(11) Where an heir was appointed to the twelfth of an estate, which might be worth two hundred *aurei,* but preferred to receive a legacy instead, which was only worth a hundred, and

did this to avoid being annoyed by the settlement of the estate, and brings an action to recover the legacy, can he be barred by an exception on the ground of fraud? Julianus says that he cannot. But if he received the amount, or what might be considered equivalent to it, from a substituted heir, in order to avoid accepting the estate, and then brings an action to recover the legacy, Julianus says that he is considered to be guilty of fraud, and can be barred by an exception on this ground.

(12) Where I have the usufruct of a tract of land, arid you sell me the land with my consent, the question arises whether I can be opposed by an exception if I bring suit to recover the usufruct? It is our practice that this exception, which is based on bad faith, operates as a bar.

(13) Marcellus says that a replication on the ground of bad faith should not be granted against an exception on the same ground. Labeo concurs in this opinion, for he says that, as both parties are guilty of bad faith, it would be unjust for an advantage to be obtained by the plaintiff and a penalty imposed upon the defendant, for it is far more equitable that the plaintiff should not reap any benefit from a matter in which he has acted deceitfully.

(14) There is no doubt that a replication on the ground of bad faith can be granted against the exception of the Macedonian Decree of the Senate, and it is also provided by the Imperial Constitutions and set forth in the opinions of various authorities that such a replication has the effect of a plea in bar.

(15) Labeo says that, although an action based on a stipulation will lie by virtue of the clause relating to fraud which it contains, still an exception on the ground of fraud may be properly pleaded, if, as he says, anything has been done contrary to the terms of the agreement; for it might be that the plaintiff, before the stipulation was entered into, did not commit any fraudulent act, but did so at the time that he asserted the claim on account of which an exception was necessary.

(16) Neither an exception on the ground of fraud, nor any other which can unfavorably affect the reputation of a patron or a relative in the ascending line, can be pleaded against them. Still an exception *in factum* can be pleaded, for instance, if it is alleged that the money forming the basis of the claim was not paid, an exception on this ground may be interposed. It, however, makes no difference whether a patron is sued on his own contract, or on one made by another, for respect must always be shown to him living or dead. If, however, a patron brings an action against the heir of his freedman, I think that the latter can interpose an exception based on the bad faith of the patron.

The freedman himself, however, can, by no means, plead an exception based on the bad faith of his patron, even if he is sued by the heir of the latter, for it is proper that honor should be shown by a freedman to his patron not only while he is living, but also after his death.

It is clear that a clause relating to fraudulent conduct should not be omitted from the stipulation, because an action on fraud arising from such a clause is not brought, but one is brought by virtue of the stipulation.

(17) We can make use of this exception both on account of the fraudulent conduct of a slave, or of any other person subject to our authority, as well as of those by whose fraudulent acts we acquire anything. So far as the fraudulent conduct of slaves and children is concerned, if any action is brought having reference to their *peculium,* this exception should be pleaded in every instance. If, however, the *peculium* is not involved, an exception on the ground of bad faith should only be interposed with reference to the matter in question, and not where some fraud was committed afterwards; for it would not be just for the fraudulent acts of the slave to injure his master more than where he made use of his services.

(18) The question arose whether an exception on the ground of bad faith can be pleaded in the case of an agent who has only been appointed to bring the suit. I think that it can be properly

maintained that if the said agent was appointed for the purpose of acting in his own behalf (that is to say, if he should commit any fraudulent act before issue was joined), an exception on this ground can be interposed. If, however, he was not acting in his own behalf, an exception can be pleaded only with reference to the fraud committed since proceedings were begun. But when the agent is one to whom the administration of all the business of the principal has been entrusted, Neratius says that an exception can be pleaded on account of any fraudulent act which he may have committed.

(19) I directed Titius to enter into a stipulation for you, Titius afterwards directed Seius to do so, and Seius stipulated for you, and brought suit. Labeo says that you can effectually interpose an exception based on my fraudulent act as well as on that of Seius.

(20) It is also asked, if my debtor should swindle you, and appoint you in his place, and I having made a stipulation with you, bring an action to enforce it, will an exception on the ground of fraud operate as a bar? The better opinion is, that you will not be permitted to plead an exception against me on the ground of the bad faith of my debtor, as I did not swindle you, but you can bring an action on that ground against my debtor.

(21) If, however, a woman should delegate her debtor to her husband, for her dowry, after she had been guilty of fraud, the same rule should be adopted, and the debtor should not be permitted to plead an exception based on the fraudulent conduct of the woman, for fear that she might remain unendowed.

(22) In a case where the heir of a father-in-law is sued to recover a dowry, and pleads an exception based on the fraud of the husband and wife for whose benefit the money is claimed, the question was asked by Julianus whether the exception will operate as a bar, so far as the woman is personally concerned. Julianus says that if the husband sues the heir of his father-in-law for the dowry, and the latter pleads an exception on the ground of fraud committed by the daughter, by whom the money would be obtained, the exception will be effective as a bar; for he holds that the dowry which the husband demands from the heir of the father-in-law is understood to be acquired by the daughter who, by means of it, will obtain her dowry. He does not state whether the heir can also plead an exception based on the fraudulent conduct of the husband. I think, however, that he was also of the opinion that an exception based on the fraud of the husband would operate as a bar, although in this instance, as he says, it could not be held that a dowry was acquired by the daughter.

(23) The question whether an exception based on the fraud of a guardian can be effectually pleaded against a ward who brings an action has been discussed by several authorities. I think that even though the interest of wards is favored by such persons, it should still be held that, where anyone fraudulently purchases the property of a ward from his guardian, or makes a fraudulent contract with him concerning the property of his ward, or where the guardian is guilty of any other fraudulent conduct, and the ward is pecuniarily benefited thereby, the latter should be barred by an exception. Nor is it necessary to make any inquiry as to whether security has been given to the ward or not, or whether his guardian is solvent or insolvent, provided he is administering the affairs of the guardianship; for how can he who enters into a contract with a guardian divine these things? If you suggest that someone has entered into collusion with the guardian it is clear that he will be injured by his own act.

(24) If someone who was not the guardian, but acted as such, is guilty of fraud, let us see whether it will injure the ward. I do not think that it will do so, for when, a person who is transacting the business of a guardian sells any property belonging to the ward, and it is obtained by usucaption, the ward will not be prevented from following his own property by an exception, even if he was furnished security, because the administration of his affairs was not granted to this individual. According to this, I think that an exception based on the fraud of the guardian can be pleaded against the ward.

(25), What we have stated with reference to a guardian can also be said to apply to the curator of an insane person, as well as to the case of a spendthrift, and a minor under the age of twenty-five years.

(26) An exception based on fraud committed by a minor of twenty-five years of age can also be pleaded, for sometimes such an exception can undoubtedly be interposed if the minor is of an age when he can legally be guilty of a fraudulent act. Julianus very frequently stated that minors who are near the age of puberty are capable of committing fraud. But what if the debtor of a ward pays a creditor of the latter, to whom he had been delegated? He says that it must be supposed that the ward has arrived at puberty, to avoid the debtor being liable to pay the money twice, under the pretext that the ward does not know what fraud is.

The same rule should be observed in the case of an insane person, if, when he was presumed to be of sound mind, he should order his debtor to pay one of his creditors, or if he should have in his house the money for a debt which he has collected.

(27) An exception based on the fraud of the vendor cannot be pleaded against the purchaser. If, however, the latter should avail himself of the addition of the time that the property was in the possession of the vendor, it seems to be perfectly just that he should be responsible for the fraud of the vendor, as he profits by his possession in this way. And, likewise, it is held that an exception which has reference to the property will bar the purchaser, but one which is based upon an offence committed by the person will not do so.

(28) If the estate of Gaius Seius should come into your hands as the heir at law, and I should be appointed heir, and you fraudulently persuade me not to accept the estate, and I afterwards reject it, and you assign your rights to Sempronius after having been paid by him, and he brings suit against me to recover the estate, an exception on the ground of fraud committed by the person who assigned him his rights cannot be pleaded by me against Sempronius.

(29) If, however, anyone claims an estate by virtue of a legacy, or he to whom property was given by way of donation does so, can an exception on the ground of fraud committed by the party whom he succeeded be pleaded against him? Pomponius thinks that he would be barred by such an exception. I also think that those should be barred who are pecuniarily benefited by obtaining such rights, for it is one thing to purchase them, and another to succeed to them.

(30) Pomponius discusses the same question with reference to anyone who receives property in pledge, where the Servian or Hy-pothecary Action is brought, for he holds that he should be barred because otherwise the property would revert to the person who was guilty of fraud.

(31) The bad faith of the vendor, however, as we have already stated, cannot be pleaded against the purchaser. We observe this rule only with reference to purchasers, and to those who have exchanged property, or received it in payment, as well as to such as occupy the position of purchasers. If, however, a slave has been surrendered by way of reparation for damage, Pomponius thinks that the person who demands the slave, as well as the one who gave him up can have the exception pleaded against him.

Hence, where anyone is pecuniarily benefited by acquiring property in any way whatever, an exception on the ground of fraud committed by the person to whose rights he succeeds can be pleaded against him. For it is sufficient if he who has paid the price, or something instead of it, and is a *bona fide* purchaser, should not suffer through the bad faith of the vendor, provided he himself is not guilty of fraud. If, however, he himself is not free from fraud, he will be liable to the exception on that ground, and must suffer for his own fraudulent act.

(32) If you purchase a tract of land from Titius, which belongs to Sempronius, and it is delivered to you when you pay the price, and Titius afterwards becomes the heir of Sempronius, and sells and delivers the same land to Msevius, Julianus says that the Prsetor must protect you in your rights because if Titius himself should sue you to recover the land,

he will be barred by an exception *in factum,* on the ground of fraud. If Titius himself should be in possession of the land, and you should sue him by the Publician Action, and he should plead an exception against you on the ground that the property is his, you can avail yourself of a replication, as from this it is evident-that he, a second time, sold land which did not belong to him.

(33) Cassius did not introduce an exception on the ground of fear, but was content with that based on fraud, which is one of general application. It, however, seems more proper to establish an exception on the ground of fear as a plea in bar; as this, in some respects, differs from one based on fraud, because the latter includes the person of the party who committed the fraud, for an exception on the ground of fraud is a proceeding *in rem; as,* for instance, "where no act has been committed through fear," so that we do not examine whether the party who brings the action did anything to cause fear, but whether anything was done in the transaction by any person whomsoever, and not merely by the plaintiff, for the purpose of intimidating the defendant. And, although an exception on the ground of the fraud of the vendor cannot be pleaded against the purchaser, still, it is our practice to hold that an exception can be pleaded in bar, where fear has been caused not only by the vendor, but by anyone whomsoever.

(34) It should be noted that this exception on the ground of fear ought not to be pleaded where a son has been intimidated by his father, while under his control. The father, however, is permitted to diminish the amount of the *peculium* of the son, but if the latter should reject the paternal estate, relief should be granted him, as is ordinarily done.

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

You owe me ten *aurei* unconditionally. I bequeath you that sum under a condition. If, in the meantime, my heir should bring an action to collect the amount you owe the estate, he cannot be barred by an exception on the ground of bad faith, as the condition may fail to be fulfilled, therefore he should stipulate for the payment of the legacy. If, however, the heir Joes not give security, he will be barred by an exception on the ground of bad faith; for it is to the interest of the legatee to retain the amount in his hands rather than to be placed in possession of the property of the estate.

(1) If a right of way is bequeathed to anyone, and the Falcidian Law being applicable, he should bring an action to recover the entire right of way, without tendering the appraised value of the fourth part of the same, Marcellus says that he can be barred by an exception on the ground of bad faith, as the heir must provide for his own interest.

(2) Where I gave a tract of land to anyone but did not deliver it, and the person to whom I gave it without delivery of possession should build upon said land with my knowledge, and after he has done so I should obtain possession, and he should bring an action against me for what I have given him; and I should interpose the exception that the donation exceeds the limit prescribed by law, can a replication on the ground of bad faith be pleaded? This can be done, for I acted in bad faith when I permitted him to build, and did not reimburse him for his expenses.

(3) Where a slave has been appointed for the collection of money which is due, any act of bad faith subsequently committed by him will prejudice his master.

(4) If a slave is sold by someone who was permitted by his master to dispose of him, and he is then returned to his master, an exception based on his return can be pleaded against the vendor, if he brings suit to recover the price of the slave, even though he who sold him has paid the purchase money to his master.

He also will be barred by an exception based on the non-delivery of merchandise who has already paid the money to the owner of the same, and therefore, he who sold the merchandise

can bring an action against the owner.

Pedius says that the rule is the same where anyone who transacts our affairs makes a sale.

(5) If I delegate to my creditor someone who intends to donate property to me over and above the amount prescribed by law, he cannot make use of an exception against the creditor, if the latter brings suit, because he only claims what he is entitled to.

The same rule applies to a husband, for he should not be barred by an exception who acts in his own name. Therefore, can it not also be said that an exception on the ground of the fraud of a wife cannot be pleaded against her husband, when he sues for her dowry, .as he would not have married the woman without a dowry, unless a separation had already taken place? Hence the donor, or a woman who has delegated, or released a debtor, is liable to a personal action brought by the latter, either to obtain his release, or, if he has paid what was due, in order that the money may be refunded to him.

(6) The case is not the same where an exception on the ground of fraud is granted, as it is where a right of action is extinguished within a certain time; for the exception is perpetual, as the plaintiff has the power to avail himself of his privilege whenever he desires to do so, but the defendant can only plead the exception after he has been sued.

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

If, through the agency of a creditor, his debtor should happen to lose the money which he was about to pay him, the creditor will be barred by an exception on the ground of fraud.

The same rule will apply when the creditor does not ratify the payment of money by his debtor to his own creditor.

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

Julianus says that if I think that I owe you money, and by your order I promise to pay it to someone to whom you wish to donate it, I can protect myself by an exception on the ground of bad faith; and, in addition to this, I will be entitled to an action against the stipulator to compel him to release me.

(1) Julianus also says that, if you think that a certain person is your creditor, and by your direction I promise to pay him a sum of money which I believe that I owe you, and he brings suit to recover it, he should be barred by an exception on the ground of fraud; and further, if I institute proceedings against the stipulator, I can compel him to release me from the agreement. This opinion of Julianus is equitable, so that I can make use of an exception, as well as bring a personal action against the person to whom I obligated myself.

8. *Paulus, On Plautius, Book VI.*

He is guilty of fraud who demands something which he should return.

(1) If an heir has been charged not to collect anything from a debtor of the estate, the latter can avail himself of an exception on the ground of fraud, and can also bring suit under the terms of the will.

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

If the agent for a defendant suffers judgment to be rendered against him, after the money has been paid, and proceedings to enforce the judgment have been instituted against his principal, the latter can protect himself by pleading an exception on the ground of fraud. Nor can he be compelled to give up what he entrusted to his agent, for it is more just to permit money which has been dishonorably obtained to remain in the hands of the person who was deceived than under the control of him who was responsible for the deceit.

10. *Marcianus, Rules, Book III.*

When either a husband or a wife builds upon land which one of them has given to the other, it is the opinion of several authorities that they can hold the property by means of an exception on the ground of fraud.

11. *Neratius, Parchments, Book IV.*

Where an agent brings an action, an exception based on his bad faith should not be interposed against him, because the suit is that of another, and he is a stranger to it, and the bad faith of one person should not injure another. If he commits a fraudulent act after issue has been joined, it may be doubted whether an exception on this ground can be pleaded; because, by the trial of the case, it becomes that of the agent, and he conducts it, to some extent, in his own name. It has been decided that an exception can be pleaded on account of fraud committed by the agent.

The same rule will apply to the case of a guardian who brings an action in the name of his ward.

(1) In general, however, the following rule should be observed in matters of this kind, that is to say, that fraud should always be punished, even if it will not injure anyone but the person who committed it.

12. *Papinianus, Questions, Book HI.*

Where the justice of the defence affords means for the dismissal of an action, the defendant can be protected by an exception on the ground of fraud.

13. *Paulus, Questions, Book XIV.*

When a will is broken, the rights of children who have been disinherited and who have received nothing from their father's will should be preserved, and an exception on the ground of bad faith cannot be pleaded against them. This not only applies to them personally, but also to their heirs and descendants.

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

Paulus gave it as his opinion that where a man builds a house upon the land of another, he cannot recover the expenses he incurred unless he was in possession, and the owner brings an action against him to recover the land, in which case, he can oppose him by an exception on the ground of fraud.

15. *Scsevola, Opinions, Book V.*

A surety having had judgment rendered against him on account of eviction was ready to return the land from which the purchaser was evicted, and everything else which was included in the contract of sale. If the purchaser pleads the exception based on *res judicata,* I ask whether he can be barred by one on the ground of fraud. The answer was that the exception can be pleaded against him, but that the judge will see that he satisfied the purchaser for all the damage which the latter has sustained.

16. *Hermogenianus, Epitomes of Law, Book VI.*

If a debtor delegated by an insane person whom he supposed to be of sound mind should pay the creditor of the latter, and for this reason suit should be brought against him, he can protect himself by an exception based on fraud, on the ground that the insane person profited by the transaction.

17. *Scsevola, Digest, Book XXVII.*

A father promised a dowry for his daughter, and entered into an agreement that he would support her and all her family. This foolish man made a note payable to his son-in-law in lieu of the interest due on the promise to give a dowry. As he had supported his daughter, and her

husband had been at no expense on this account, the question arose whether an exception on the ground of bad faith could be pleaded in bar against the son-in-law, if he brought suit under the stipulation for the purpose of collecting the note? The answer was, that if her father had supported her, as was stated, and had made the promise by mistake, then an exception on the ground of bad faith could be interposed.

(1) A grandfather bequeathed a-hundred *sesterces* to each one of his grandchildren by his daughter, and added the following words, "I ask you to pardon me, for I could have left you much more if your father Fronto had not treated me badly, for I lent him fifteen *aurei*-which I could not collect, and finally, the enemy deprived me of almost all my property." If the heir of the grandfather should bring an action to collect the fifteen *aurei* from the said grandchildren, who were the heirs of their father, the question arose, would he be considered to have acted against the will of the deceased, and could he be barred by an exception on the ground of fraud? The answer was that the exception would operate as a bar.

(2) An heir who was appointed to the fourth of an estate purchased for a certain sum of money the share of his co-heir who had been appointed heir to three-fourths of it, executed promissory notes for the deferred payments, and bound himself by a stipulation. The vendor of the estate died; Septitius attacked the will as being forged, and having brought suit to recover the estate from the purchaser, obtained an order of court to prevent him from disposing of any part of it. The question arose whether the heirs who brought suit under the stipulation, while a case involving the genuineness of the will was pending, could be barred by an exception on the ground of fraud. The answer was that the heirs of the vendor could be barred by an exception on the ground of fraud if they persisted in demanding payment of the notes before the case relating to the will was decided.

(3) A woman, having appointed her husband and her son heirs to equal portions of her estate, also appointed a daughter whom she had had by a former marriage her heir, as follows: "Let my daughter, Ma?via, be the heir to six-twelfths of my estate, if she accounts to her co-heirs for what I shall owe her at the time of my death, growing out of the accounts of her guardianship, which my father, Titius, her grandfather, administered." As this daughter had been appointed under a condition, if she should reject the estate in order to preserve the right of action on guardianship, the question arose whether she could claim the legacy which had been bequeathed to her by her mother. The answer was that, in accordance with the facts stated, she made the claim in question contrary to the wishes of her mother, and therefore she would be barred by an exception on the ground of bad faith.

## TITLE V.

## UNDER WHAT CIRCUMSTANCES AN ACTION SHALL NOT BE GRANTED.

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

An oath taken in court has the same effect as a judgment, and this is not unreasonable, as where a party tenders an oath to his adversary, he appoints him judge in his own case.

(1) If a ward tenders an oath without the authority of his guardian, we hold that this exception will not operate as a bar, unless it was tendered in court by the authority of the guardian.

(2) If a litigant who claims a tract of land tenders the oath to his adversary, and says that if the person from whom he obtained the land is willing to swear that he delivered it to him, he will abandon the case, an exception will be granted to the party in possession of the land.

(3) If a surety should make oath in court only with reference to himself personally, that is to say, that he is not liable, this will be of no advantage to the principal debtor; and if he should take the oath with reference to the property, an exception will be granted to the principal debtor.

(4) If I manumit a slave who, while in servitude, was accustomed to transact my business, and

I afterwards stipulate with him for the payment of all that he would have been obliged to pay me, if he had been free at the time when he transacted my business, and I bring suit under the stipulation, I will not be barred by an exception, for a freedman cannot complain that he is oppressed, because he was not allowed to profit pecuniarily through the use of the property of his patron.

(5) If I make a stipulation for the purpose of placing restrictions on freedom, I cannot enforce it against my freedman. Restrictions on freedom have very properly been defined to be such as are imposed in such a way that if a freedman should offend his patron, they can be exacted from him, so that he remains continually under the apprehension that they will be required, and, on account of this apprehension, he will submit to anything that his patron demands.

(6) In a word, if some obligation is imposed upon a freedman, to take effect the moment he obtains his liberty, it must be said that there will be ground for an exception. If, however, this is done after an interval, the question admits of doubt, for no one could force him to make such a promise. Still, in this instance, the same conclusion must be arrived at if, after an investigation has been made, it is apparent that the freedman subjected himself to his patron in such a manner as to be rendered liable to a penalty under the stipulation either through fear alone, or on account of excessive respect for him.

(7) If a freedman should form a partnership with his patron in consideration of obtaining his liberty, and his patron should bring an action on partnership against him, will this exception be necessary? I think that the freedman will be released from the exactions of his patron merely by operation of law.

(8) It must be remembered, that an exception allowed because of oppressive conditions imposed on freedom, just like other exceptions, should not be refused a surety, nor anyone who, at the request of a freedman, has rendered himself liable; nor will it be denied to the freedman himself if he should be appointed the attorney of the principal debtor in order to defend his case, or if he should become his heir.

For, as the intention of the Prsetor, in obligations of this kind, is to assist the principal debtor, his design would not be effected unless the freedman should defend the surety, or him who had become liable at the request of the freedman against his patron. For it makes little difference whether the freedman is obliged to pay the patron directly, or to do so through the intervention of the surety, or through someone who has become liable on his account.

(9) Whether the promise has been made for the benefit of the patron himself, or for that of another with the consent of the former, it will be considered to have been made with the design of placing restrictions upon freedom, and therefore there will be ground for this exception.

(10) If, however, a patron should delegate his freedman to his creditor, let us see whether the former can avail himself of this exception against the creditor to whom, having been delegated, he made a promise which had the effect of placing restrictions upon his freedom. Cassius says it was the opinion of Urseius that the creditor could, by no means, be barred by the exception, because he only received what he was entitled to; but that the freedman could recover from his patron what he had paid, if he had not done this for the purpose of settling the controversy which had arisen with reference to his manumission.

(11) Again, if a freedman should delegate his own debtor to his patron, the latter cannot be barred by an exception, but the freedman can recover the amount of the debt from his patron by means of a personal action.

(12) This exception should be granted not only to the freedman himself, but also to his successors; and, on the other hand, it should be noted that the heir of the patron can be barred if he attempts to collect the money.

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

If the oath is tendered to a son under paternal control, and he swears that his father does not owe anything, the exception should be granted to the father.

(1) If, where a game of chance is being conducted, I sell something in order that I may play, and the property having been evicted, suit is brought against me, the purchaser will be barred by an exception.

(2) If a slave promises a sum of money to his master in order that he may be manumitted, and his master would not otherwise have manumitted him, and, having become free, he renews his promise, it is held that his patron will not be barred by an exception if he sues to recover the money, for this sum was not promised for the purpose of placing restrictions upon freedom; otherwise it would be unjust for the master to be deprived of the slave as well as of his price. Therefore, money is promised for the purpose of imposing restrictions upon freedom whenever a master voluntarily manumits his slave, and afterwards wishes him to promise a sum of money, not with the intention of exacting it from him, but in order that his freedmen may fear and obey him.

## TITLE VI.

## CONCERNING PROPERTY IN LITIGATION.

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

When notice is served for the purpose of preventing a sale, this does not render the property in question subject to litigation.

(1) Where the title to property is in controversy between two persons, and I purchase it from a third, whose claim is not liable to dispute, let us see whether there will be ground for an exception. I think that I will be entitled to relief, because he who sold me the property was not engaged in any lawsuit, and it might happen that two others had agreed with one another to dispute the title to the property for the purpose of injuring him, as they could not involve him in litigation. If, however, proceedings have been instituted against the agent, guardian, or curator of anyone, it can be said that they have been instituted against the principal, and therefore that he will be entitled to an exception.

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

If, when a slave purchased property, he knew that it was in litigation, but his master was not aware of this, or *vice versa,* let us see whose knowledge of the fact should be taken into account. The better opinion is that the knowledge of him who purchased the property, and not that of him by whom it was acquired, should be considered. Hence, the penalty attaching to the purchase of the above-mentioned property, which is in litigation, can be collected, provided the slave did not buy it under the direction of his master, for if he did so, even if he knew that the title was in dispute, and his master was ignorant of the fact, the knowledge of the slave will not prejudice him.

This was also stated by Julianus with reference to property in litigation.

3. *Gaius, On the Law of the Twelve Tables, Book VI.*

We forbid property which is in litigation to be dedicated to sacred purposes, otherwise a double penalty will be incurred, and this is not unreasonable, as in this way the condition of an adversary is prevented from becoming more oppressive. It is, however, not 'stated whether the double penalty should be paid to the Treasury, or to the adverse party. Perhaps it should be paid to the latter, in order to console him for being delivered over to a more powerful opponent.

## TITLE VII.

## CONCERNING OBLIGATIONS AND ACTIONS.

1. *Gaius, Golden Matters, Book II.*

Obligations arise whether from contract, from crime, or from various other causes by operation of law.

(1) Obligations arise from contracts either by words or by consent.

(2) In the case of a loan for consumption, the obligation is contracted with reference to the property lent. Such a loan consists of articles which can be weighed, counted, or measured; as, for instance, wine, oil, grain, and money; we also lend things in such a way that their ownership vests in the person who receives them with the expectation that other articles of the same kind and quality will be given us in return.

(3) He to whom we lend anything for use is liable to us on account of the transfer of the property, but he is also obliged to restore the very same thing which he received.

(4) He, however, who has received a loan for consumption, still remains liable if he loses what he receives by any accident whatsoever; but anyone who receives an article for use is released from liability if he loses what he received by an accident which human weakness could not provide against (as, for example, by fire, by the falling of a building, or by shipwreck). He is, nevertheless, held to the strictest diligence in taking care of the article loaned; nor will it be sufficient if he loses what he received by an accident which human weakness to his own property, provided another could have exercised greater vigilance in its preservation.

He is also liable for occurrences which could not be prevented when it was his fault that the property was lost; for instance, if anyone, having invited his friends to supper, should borrow silverware for that purpose and then, having gone on a journey and taken the silverware with him, should lose it, either by shipwreck or by an attack of robbers or enemies.

(5) He, also, with whom we deposit property is liable to us for it, and is obliged to return the same article which he himself received. If, however, he should, through negligence, lose what was entrusted to his care, he will be free from liability, as he did not receive it for his own benefit, but for that of the person from whom he obtained it, and he will only be responsible if any of it was lost through fraud. He, however, will not be liable on the ground of negligence, who entrusted his property to a friend of his, who was careless, for he has only himself to blame. Still, it has been decided that gross negligence is included in the offence of fraud.

(6) A creditor who has received property in pledge is also liable on this ground, and is obliged to return the very same article which he received.

(7) An obligation is verbally contracted by question and answer; as when we stipulate that something shall be paid to or done for us.

(8) Anyone can be bound either in his own name or in that of another. Where a person is bound in the name of another, he is called a surety, and we frequently bind a man in his own name, and receive others from him who are bound by the same obligation, in which way we provide for the better discharge of an obligation which is contracted for our benefit.

(9) If we stipulate for something to be given to us, which is of such a nature that this cannot be done, it is evident that such a stipulation is void by natural law; as, for example, if an agreement is entered into for the delivery of a freeman, or for that of a slave who is dead, or for a house which has been burned, and this is done between parties who did not know that the man in question was not free, or that the slave was dead, or that the house had been destroyed by fire.

The rule is the same if anyone should stipulate for the transfer of a sacred or religious place to himself.

(10) A stipulation is also void if a person contracts for property which belongs to himself, not knowing that this is the case.

(11) It is also established that a stipulation made under an impossible condition is void.

(12) It is clear, by natural law, that the act of an insane person who makes either a stipulation or a promise is of no effect.

(13) He resembles a child who is of such a tender age that he does not yet comprehend what he is doing. The law, however, is more indulgent to him, for anyone who can speak is believed to be capable of making a valid stipulation or promise.

(14) It is perfectly clear that a mute cannot contract a verbal obligation.

(15) The same rule also applies to a person who is deaf, for, if he can speak or promise, he should hear the words of the stipulator; but if he stipulates, he should hear the words of the promisor. Hence it is apparent that we are not speaking of one who hears with difficulty, but of one who does not hear at all.

2. *The Same, Institutes, Book III.*

Obligations are contracted by consent in the case of purchases, sales, hirings, leases, partnerships, and mandates.

(1) We say that obligations are contracted by consent in these ways, because formality of words or writing is not essential; but it is sufficient for those who transact the business to consent.

(2) Hence such obligations may be contracted between parties who are absent, as, for instance, by letter or by messenger.

(3) Moreover, in contracts of this description each of the parties is bound to the others for whatever should be done, consistent with justice and good faith.

3. *Paulus, Institutes, Book II.*

The nature of obligations does not consist in the fact that they render some property or some servitude ours, but that they require us to give something, to do something, or to be responsible for something.

(1) In the case of a loan in order for the obligation to be contracted it is not sufficient for the money merely to be given and received, but it must be given and received with the understanding that this will be the case. Therefore, if anyone gives his money to me as a donation, although it belongs to the donor, and passes into my hands, still I am not liable to him for it, because this was not our intention.

(2) A verbal obligation is also contracted, if this was the intention of the parties; for instance, if I should say to you by way of jest, or for the purpose of explaining what a stipulation is, "Do you promise me So-and-So?" and you answer, "I do promise," an obligation will not arise.

4. *Gaius, Diurnal or Golden Matters, Book HI.* Obligations also arise from criminal acts, for example, from theft, damage, robbery, injuries, all of which offences are of the same kind,

for they are all derived from the matter itself, that is to say from the offence; while, on the other hand, obligations arising from contract are not only derived from the transfer of the property, but also from the words and the consent of the parties.

5. *The Same, Golden Matters, Book III.*

Where anyone who transacts the business of an absent person performs some act by virtue of a mandate, it is evident that, from the contract which is made, actions on mandate will lie between the parties, in which each of them can prove how one should act toward the other in compliance with the rules of good faith. If, however, the agent acts without a mandate, it has been decided that the parties will be mutually liable; and, on this account, proceedings have been introduced which we designate actions based on voluntary agency, by means of which we can compel one another to do whatever justice and good faith demand.

Actions of this kind, however, do not arise either from contracts or from crimes, for he who transacts the business of another during his absence is believed to have made an agreement with him previously ; and it is no breach of the law to undertake to transact the business of another without a mandate. Thus, it can still be said that he whose business has been transacted without his knowledge has either made a contract or committed a criminal offence; but through motives of convenience it has been established that the parties are liable to one another.

This rule has been adopted for the reason that men frequently depart for foreign countries with the intention of speedily returning, and, on this account, do not commit the care of their business to anyone; and afterwards, through the occurrence of unforeseen events, they are necessarily absent for a longer time than they expected to be, and it is unjust that their business should suffer which would, indeed, happen if the person who offered to attend to their affairs should not be entitled to an action to recover any expense which he had properly paid out of his own purse; or if he whose affairs had been transacted should have no right of action against him who took charge of his business without authority.

(1) Those who are liable to an action on guardianship are not, properly speaking, considered to be bound on account of contracts, as no agreement is entered into between guardian and ward. But, for the reason that they cannot be held responsible on account of a criminal offence, they are considered to be liable under a quasi contract. In this case, also, the actions are reciprocal. For not only can the ward bring suit against his guardian, but, on the other hand, the guardian is entitled to an action against his ward, if he has expended anything upon the property of the latter, or becomes responsible for him, or encumbered his own property to one of his creditors.

(2) An heir who owes a legacy is not understood to be liable either on account of a contract or a crime, for a legatee is not understood to have made any contract with the deceased, or with his heir, and it is perfectly clear that no criminal offence has been committed in a case of this kind.

(3) He, also, who, through the mistake of the person who made the payment, received something to which he was not entitled, is bound as in the case of a loan, and is liable to the same action as that to which a debtor is liable to his creditor. It should not, however, be understood that he who is responsible in a case of this kind is bound by a contract; for anyone who pays money by a mistake does so rather with the intention of discharging an obligation than of contracting one.

(4) If a judge should render an improper decision, he is not, strictly speaking, considered to be liable on account of a crime, nor is he bound by virtue of a contract; still, as he has committed a fault, even if this was done through ignorance, he is considered to be liable on account of a quasi offence.

(5) He, also, is considered to be liable on account of a quasi offence, if, from an apartment which belongs to him, or which he has leased, or occupies gratuitously, he throws down, or pours out anything so that it injures a passer-by. Hence, he cannot properly be understood to be liable on account of having committed an offence, because very frequently he is responsible for the carelessness of another, for instance, for that of a slave, or a child. He

resembles one who places or hangs something in a part of the house under which people are accustomed to pass, and which may injure someone, if it should fall. Therefore, if a son under paternal control, who lives separately from his father, should throw down or pour out anything from his apartment, or should place or hang anything above the street which threatens injury to the passers-by, it is the opinion of Julianus that an action should be granted against the son himself, and that neither an action *De peculia* nor a noxal action should be granted against the father.

(6) Likewise, the master of a ship, or the proprietor of a tavern or an inn, is held to be responsible for a quasi criminal offence for any damage or theft which may be committed on board the ship, or in the tavern or inn, provided he does not himself commit the offence, but someone does whom he employs on the ship, or in the tavern or inn; for as this action cannot be brought against him on account of a contract, and as he is, to a certain extent, guilty of neglfgence for making use of the services of bad men, he is considered to be liable on account of the quasi criminal offence.

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

In all temporary actions, my liability is not ended until the last day "has entirely expired.

7. *Pomponius, On Sabinus, Book XV.*

Actions cannot be granted to a son against his father as long as he remains under his control.

8. *The Same, On Sabinus, Book XVI.*

An obligation contracted under the following condition, "If I wish," is void; for when you cannot be compelled to give anything unless you desire to do so, it is just as if nothing had been said. The heir of anyone who makes a promise, and who never expects to perform it, is not liable, because this condition has never been complied with, so far as the promisor himself is concerned.

9. *Paulus, On Sabinus, Book IX.*

A son under paternal control is not entitled to an action in his own name, except for the reparation of injury sustained, and where he has been deprived of property by violence' or clandestinely, or to recover property which he has deposited or lent; which is the opinion of Julianus.

10. *The Same, On Sabinus, Book XLVII.*

Natural obligations should not be considered merely because no action can be brought on account of them, but also for the reason that where money has been paid which was not due it cannot be recovered.

11. *The Same, On Sabinus, Book XII.*

Whatever acts we perform which derive their origin from our contracts are void, unless the beginning of the obligation is ours personally ; and hence we can neither stipulate, purchase, sell, or contract in such a way that another can properly bring an action on this ground in his own name.

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

An heir is liable in full where fraud has been committed by the deceased in contracts of deposit, loan for use, mandate, guardianship, and voluntary agency.

13. *Ulpianus, Disputations, Book I.*

Actions *in factum* can even be brought by a son who is under paternal control.

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

Slaves are responsible for their crimes, and remain so even after their manumission; they are not, however, civilly liable for their contracts, still, they are bound, and they bind others in accordance with natural law. Finally, I shall be released from liability if, after a slave has been manumitted, I pay him a sum of money which he has lent me.

15. *Julianus, Digest, Book IV.*

A certain man who brought an action against an heir was barred by an exception on the ground that the will was about to be set aside for the reason that possession of the estate could be granted to an emancipated son. The said emancipated son having failed to demand possession of the estate, the creditor could very properly ask that his right of action against the appointed heir should be restored to him,, for as long as the possession of the estate could be granted to the son contrary to the provisions of the will, the heir, to a certain extent, was not a debtor.

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

A man borrowed a sum of money from a slave forming part of an estate, and gave him by way of pledge a tract of land or a slave, and having requested that the land or the slave be retained by him under a precarious title, he kept possession of it under such a title. He did this because a slave belonging to an estate acquired property for it by accepting delivery of the same; and by granting property under a precarious title, the result is that it cannot be acquired by usucaption. For if he had lent the property for use, or deposited it, and it had formed part of his *peculium,* he would have the right to bring an action on loan or deposit for the benefit of the estate. This occurs where the contract was made with reference to his *peculium,* for it should be understood that possession of property is acquired under such circumstances.

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

All debtors who owe property for a valid consideration are released where the property comes into the hands of creditors in some other way from which they obtain pecuniary benefit.

18. *The Same, Digest, Book LIV.*

If anyone, who has stipulated to give Stichus, becomes the heir of a person who is entitled to the said Stichus under the terms of a will, and he brings suit under the will to recover Stichus, he does not annul the stipulation. On the other Rand, if he brings an action to recover Stichus under the stipulation, he will still be entitled to one under the will; because in the beginning, these two obligations were contracted in such a way that if one of them was brought into court, the other would, nevertheless, remain unimpaired.

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

A lucrative title is not considered to arise from the promise of a dowry, for the reason that he who claims the dowry is understood to be, to a certain extent, a creditor or a purchaser. However, when a creditor or a purchaser obtains property by some lucrative title, he still retains the right to the action to recover it;, just as, on the other hand, a person who does not obtain the property by a lucrative title is not prevented from bringing an action to recover it on this account.

20. *Alfenus, Digest, Book II.*

A slave should not, under all circumstances, go unpunished, where he has listened to the commands of his master; for instance, when the latter has ordered him to kill someone, or to commit a theft. Wherefore, although a slave may commit piracy by order of his master, he should be prosecuted for doing so after he has obtained his freedom; and any act of violence which he may have committed, which is criminal, will render him liable to punishment.

If, however, a quarrel arose on account of a controversy or a dispute, or force was employed for the purpose of maintaining a right to which his master was entitled, and no crime was

perpetrated, then the Prsetor should not grant an action on this ground against a freedman, who, when a slave, had obeyed the commands of his master.

21. *Julianus, On Minicius, Book V.*

Everyone is considered to have made a contract in the place where he bound himself to pay.

22. *Africanus, Questions, Book III.*

When anyone stipulates for merchandise, and accepts a surety to be furnished on a certain day, the time must be computed from the day when he received the security.

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

A stipulation was entered into with reference to money to be employed in commerce, and as is customary, a penalty was inserted therein for the purpose of indemnifying the person who furnished the money, if it should not be paid by the specified time. The latter demanded the money, and a part of it having been paid, he neglected to demand the remainder then, but, after the lapse of some time, he did demand it. A jurist, having been consulted, gave it as his opinion that the penalty could be collected for the time during which the debtor had not been notified to pay, and that this could even be done if he had not been notified at all; and that the stipulation would become inoperative only where the debtor was responsible for payment not having been made.

Otherwise, it must be said that, if he who had begun to push the claim should cease to do so because he was prevented by illness, the penalty would not attach. Hence, a doubt may arise, if the debtor, having been notified to pay, should himself be in default, whether the penalty would not attach, even though he afterwards tendered the money. This may be said to be more equitable, for if an arbiter appointed to arrange a settlement should order the money to be paid by a certain time, and he whom he ordered to pay it is not in default, it is held that the penalty will not attach; and therefore, Servius very properly held, if the day when the money was to be paid was not included in the decision of the arbiter, a reasonable time should be held to have been granted.

The same rule will apply where anything has been sold under the condition that, unless the price is paid by a certain time, the transaction will be void.

24. *Pomponius, Rules.*

If I" borrow a sum of money from an insane person, believing that he is of sound mind, and I employ that money for my own benefit, the

insane person will be entitled to an action to recover it. For, as rights of action are acquired by us under certain circumstances, when we are not aware of the fact, so, under similar circumstances, actions can be brought in the name of insane persons; for example, if the slave of such a person enters into a stipulation, or property is stolen from him, or he is injured in such a way that suit can be brought under the Aquilian Law; or if he is a creditor and his debtor should convey property to someone with the intention of defrauding him.

The same rule is applicable where a legacy is bequeathed to an insane person, or property is left to him under the terms of a trust.

(1) Likewise, if anyone who has lent money to the slave of another afterwards becomes insane, and the slave employs the borrowed money for his master's benefit, the insane person will be entitled to an action to recover it.

(2) Again, if anyone who has lent money belonging to another should afterwards become insane, and the money be expended, an action to recover it will be acquired by the insane person.

(3) Anyone who transacts the business of an insane person is liable to him in an action on the

ground of voluntary agency.

25. *Ulpianus, Rules, Book V.*

There are two kinds of actions, one a real one, which is styled *vindictio,* and the other a personal one, which is called *condictio.* The real action is that by which we sue for property belonging to us which is in the possession of another, and it is always brought against the party in possession. The personal action is one which we bring against a person who is bound to do something for, or give something to us, and it is always against him that it is brought.

(1) Some actions are based on contract, others on an act, and others still are *in factum.* An action is founded upon a contract whenever one person has entered into an agreement with another for his own advantage; as, for instance, by a purchase, a sale, a hiring, a lease, and other transactions of this kind. An action based on an act is where anyone is liable for some offence which he himself has committed; for instance, a theft or an injury, or for some damage which he has caused. An action *in factum* is, for example, one which is granted to a patron against his freedman, by whom he has been brought into court in violation of the Praetorian Edict.

(2) All actions are said to be either civil or praetorian.

26. *The Same, On Taxes, Book V.*

All penal actions pass to heirs, after judicial proceedings have been instituted.

27. *Papinianus, Questions, Book XXVII.*

Obligations which are not valid themselves cannot be rendered so either by the decision of the judge, the order of the Prsetor, or the power of the law.

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

The claim made against a person is designated an "action;" one made against a thing is called a "petition," the term "pursuit," instituted for the purpose of recovering the property, is employed both against things and persons.

29. *Paulus, Opinions, Book IV.*

*A* certain sum of money was due to Lucius Titius under a judgment. He lent the same debtor another sum of money, and in taking security for its payment, he did not mention that the amount due under the judgment should also be given to him. I ask whether Lucius Titius is entitled to both actions. Paulus answered that there is nothing in the case stated why both rights of action should not remain unimpaired.

30. *Scaevola, Opinions, Book I.*

Where a man has been reduced to slavery, and afterwards obtains his freedom through the indulgence of the Emperor, he cannot, for this reason, be said to assume his obligations to his creditors.

31. *Msecianus, Trusts, Book II.*

Not only stipulations, but also any other contracts which have been made under impossible conditions are considered to be of no force or effect; as, for instance, sales or leases, where they are dependent upon impossible events, are also void; because when an agreement is made between two or more persons the intention of all of them is taken in account, and there is no doubt that they think a contract of this kind cannot be executed, if a condition is imposed which they know to be impossible.

32. *Hermogenianus, Epitomes of Law, Book II.*

When several actions arise from one single crime, as happens when trees are said to be cut

down by stealth, it was established, after many differences of opinion, that proceedings could be instituted against all the parties.

33. *Paulus, Decrees, Book III.*

While it has been set forth in certain Imperial Constitutions that heirs, generally speaking, are not liable to a penalty, it has, nevertheless, been decided that if the deceased had been sued during his lifetime, his heirs will be subject to the penalty, on the principle that issue had been joined with the deceased.

34. *The Same, On Concurrent Actions.*

Anyone who strikes the slave of another in such a way as to injure him becomes liable by his act to a suit under the Aquilian Law, as well as to one for the reparation of damage, for injury is intentionally-committed, and damage is caused by negligence; therefore both actions will lie. There are, however, certain authorities who hold that when one of these actions is chosen, the other is lost; and others are of the opinion that if the action under the Aquilian Law is selected, the one for the reparation of damage will be lost; since it ceases to be proper and equitable for judgment to be rendered against him who has paid the amount of damages appraised.

If, however, the action for reparation of damage has already been brought, the party will still be liable under the Aquilian Law.

This opinion should be restricted by the Praetor, unless suit is brought for the excess that can be obtained under the Aquilian Law. Hence it is more reasonable to admit that the plaintiff can make his choice of the actions, and afterwards employ the other to collect anything more than he can obtain by the first one.

(1) If anyone steals an article which I have lent to him for his own use, he will be liable both to an action on loan, and to a personal action to recover the property, but either one of these proceedings annuls the other, either by operation of law, or by the pleading of an exception; which is the better opinion.

(2) Hence it was held with reference to the tenant who had stolen something belonging to the land, that he was liable both to an action for the recovery of the property, to one for theft, and to one on the lease. The penalty of theft is not merged, but the other two actions are. This is applicable to the proceeding under the Aquilian Law; for if I lend you clothing, and you tear it, both actions will lie to recover the property. After suit under the Aquilian Law has been brought, the right to sue on the loan is extinguished; and after the action on the loan is instituted, there is some doubt as to whether the one under the Aquilian Law cannot be brought within thirty days, for the reason that it is more advantageous.

The better opinion is, that the right to bring it is retained, because it adds to the simple value of the property, and if the simple value has been paid, there will be no ground for bringing it.

35. *The Same, On the Principal Edict, Book I.*

With reference to Praetorian actions, Cassius says that it must be held that such as permit the pursuit of the property may be granted after a year has expired, and the others within the year. Praetorian actions, however, which are not granted after the year has elapsed, are not available against an heir; still, any profit which he has acquired may be exacted from him, just as happens in an action on the ground of fraud, in the interdict *Unde vi,* and in other proceedings of this description. These include the pursuit of the property, by which we endeavor to recover anything which has been taken from our patrimony, and when we proceed against the possessor of the estate of our debtor. The Publician Action, which is granted for the purpose of recovering property, is also the same kind. Where, however, this action is granted on the ground that usucaption has been interrupted, the right is extinguished within a year, because it is granted contrary to the principles of the Civil Law.

(1) An action on a contract made by municipal magistrates is granted against the duumvirs and the municipality after a year has elapsed.

36. *Ulpianus, On the Edict, Book II.*

In personal suits for the recovery of property, a judgment does not always imply disgrace, even though it may be rendered in cases involving infamy.

37. *The Same, On the Edict of the Prsetor, Book IV.*

In the term "action" are included real, personal, direct, equitable, and prejudicial actions, as Pomponius says, and also Praetorian stipulations, because they take the place of actions, as well as proceedings to provide against threatened injury, to insure the payment of legacies, and others of this kind. Interdicts are also embraced in the term "action."

(1) Mixed actions are those in which both parties are plaintiffs; as, for example, such as are instituted for the settlement of boundaries, suits in partition, and for the division of property owned in common, and the interdicts *Uti possidetis* and *Utrubi.*

38. *Paulus, On the Edict, Book III.*

We are not bound by the form of the letters, but by the meaning which they express, as it has been decided that writing shall not have less validity than what is meant by words uttered by the tongue.

39. *Gaius, On the Edict, Book HI.*

A son under paternal control, like the head of a household, is bound by all kinds of titles, and suit can be brought against him on this ground, just as can be done against a person who is independent.

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

Legacies are considered as claims against an estate, although they begin to be payable by the heir.

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

Whenever the law introduces an obligation, unless it is especially provided that we shall only make use of one action, even ancient actions will lie for this purpose.

(1) If two actions for the same cause can be brought, and the plaintiff could have recovered a larger sum by making use of the other, which he did not bring, it will be the duty of the court to render a decision in his favor for that amount; but if he could only have recovered the same sum, or less, the second action will be of no advantage to him.

42. *Ulpianus, On the Edict, Book XXI.*

A person, to whom a legacy was bequeathed under a condition is not a creditor of the estate while the condition is pending, but only after it has been fulfilled; although it is established that anyone who stipulated under a condition remains a creditor while that condition is in abeyance.

(1) We should understand creditors to be those who are entitled to a civil action (provided they cannot be barred by an exception), or a praetorian action, or an action *in factum.*

43. *Paulus, On the Edict, Book LXXII.*

The head of a household that has arrived at the age of puberty, who is his own master, and of sound mind, can obligate himself. A ward cannot become liable under the Civil Law without the authority of his guardian. A slave cannot be bound by a contract.

44. *The Same, On the Edict of the Prsetor, Book LXXIV.*

There are four different kinds of obligations, for they are contracted with reference to a certain time, or under a certain condition, or with reference to a certain measure, or dependent upon certain results.

(1) There are two things to be taken into consideration with reference to time, for the obligation either begins or terminates at a certain date. It begins at a certain date, for instance, as follows, "Do you promise to pay me such-and-such a sum on the *Kalends* of March?" The nature of this obligation is that the amount cannot be collected before the specified time. When it is made within a certain time, for example, as follows, "Do you promise to pay me between now and the *Kalends* of March?" it is established that neither an obligation nor a legacy can be contracted for a time, since when anything begins to be due to another, it ceases to be due under certain circumstances.

It is clear that a stipulator can be barred by an exception on the ground of his agreement, or on account of fraud, after the time has expired. Likewise, if anyone, while delivering a tract of land, should say that he conveys the soil without the building upon it, this will not prevent the building, which by nature is attached to the soil, from passing with it.

(2) A condition is effectual which was inserted in the obligation at the time when it was contracted, and not after it had been perfected; as, for instance, "Do you promise to pay me a hundred *aurei* if a ship does not arrive from Asia?" In this case, however, if the condition should be fulfilled, there would be ground for an exception based on an informal agreement, or on fraud.

(3) The measure of an obligation becomes apparent when we stipulate for ten *aurei* or a slave, as the delivery of either one of these disposes of the entire contract, and one of them cannot be demanded as long as both are in existence.

(4) The result of an obligation has reference to either a person or a thing; to a person where I stipulate that payment shall be made . either to me or to Titius; to a thing where I stipulate than ten *aurei* shall be paid to me, or a slave shall be delivered to Titius; and, in this instance, the question arises whether, when the slave is delivered to Titius, he becomes free by operation of law.

(5) When I stipulate as follows, "If you do not give me such-and-such a tract of land, do you promise to pay me a hundred *aurei ?"* only the sum of a hundred *aurei* is the object of the stipulation, but the transfer of the land is one way of discharging the obligation.

(6) If I stipulate for the building of a ship, and if you do not build it that you should pay me a hundred *aurei,* let us see whether or not there are two stipulations, one absolute, and the other conditional; and if the condition of the second one is fulfilled, whether it will not annul the first; or whether it will not incorporate it into itself, and become, as it were, a renewal of the first. The last is the better opinion.

45. *The Same, On Plautius, Book HI.*

When a man, who owes Stichus under a stipulation, manumits him before being in default, and the slave dies before the promisor is sued for not delivering him, the latter will not be liable. For he is not considered to be to blame because he did not deliver the slave.

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

An insane person and a ward are liable without the authority of their curator or guardian, where the obligation arises from the property itself; as, for instance, if I hold a tract of land in common with one of them, and have incurred some expense with reference to it, or the ward has damaged it in some way, he will be liable to an action in partition.

47. *The Same, On Plautius, Book XIV.*

Arianus says that there is a great deal of difference between the question whether anyone is

liable or has been released. When inquiry is made with reference to the existence of liability, we should be more inclined to deny that this is the case, if we have any occasion to do so. When, on the other hand, the question is with reference to being released, the tendency should be in favor of it.

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

In any transactions in which speech is not necessary, consent will be sufficient; and in matters of this kind a deaf person can take part, for the reason that he can understand and give his consent, as in hiring, leases, purchases, and other similar contracts.

49. *The Same, On Plautius, Book XVIII.*

Actions arising from contracts are granted against heirs, even where some crime is involved; as, for example, where a guardian has been guilty of bad faith in administering his trust, or where someone with whom property was deposited has committed fraud. In this, instance, even if a son under paternal control or a slave has committed a fraudulent act of this kind, an action *De peculio,* and not a noxal action, will be granted.

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

When anyone promises to pay a sum of money within a year, or has judgment rendered against him requiring him to do so, he can pay it on any day during the year.

51. *Celsus, Digest, Book III.*

An action is nothing else but the right to recover what we are entitled to by means of a judicial proceeding.

52. *Modestinus, Rules, Book II.*

We contract an obligation either with reference to the property itself, or by words, or by both of these at the same time, or by consent, or by the Common Law, or by praetorian law, or by necessity, or by a criminal offence.

(1) We contract an obligation on account of the property, when it is delivered to us.

(2) We contract one by words, where a question is asked, and a proper answer is given.

(3) We contract an obligation on account of the property and by words, where the property is delivered, and answers to questions are given at the same time.

(4) When we consent to anything, we are necessarily liable on account of our voluntary acquiescence.

(5) We contract an obligation by the Common Law, when we obey the laws in accordance with what they prescribe, or we violate them.

(6) We contract an obligation by praetorian law when something is ordered to be done or prohibited by the Perpetual Edict, or by the magistrate.

(7) Those contract an obligation by necessity who cannot do anything else than what they are directed to do. This happens in the case of a necessary heir,

(8) We contract an obligation on account of a criminal offence, where the principal part of the inquiry has reference to the illegal act committed.

(9) Even simple consent will be sufficient to establish an obligation, although it may be expressed by words.

(10) Many obligations are contracted merely by signs of assent.

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

Several offences committed with reference to one and the same thing give rise to different

actions; but it is established that all of them cannot be employed, and if several causes of action arise from one obligation, one alone, and not all, should be made use of.

(1) When we make the general statement in an obligation, "Or for the benefit of him to whom the property shall belong," we include not only persons who have been arrogated, but also others who may succeed to us by any other right.

54. *The Same, Rules, Book V.*

Fictitious contracts are not legally binding, even in the case of sales, for the reason that they are only simulated, and are not based on truth.

55. *Javolenus, Epistles, Book XII.*

In all matters having reference to the transfer of ownership, the concurrence and the intention of both contracting parties must exist; for in sales, donations, leases, or any other kind of contracts, unless both parties agree, anything which has been begun will have no effect.

56. *Pomponius, On Quintus Mucius, Book XX.*

Any actions to which I may be entitled through the agency of my slave, whether they are derived from the Law of the Twelve Tables, or from the Aquilian Law, or can be brought on account of injury or theft committed, will continue to exist, even if the slave should afterwards be either manumitted or alienated, or should die.

A personal action for the recovery of property which has been stolen by the said slave will also lie, unless I, having obtained possession of him, should either alienate or manumit him.

57. *The Same, On Quintus Mucius, Book XXXVI.*

In all agreements which have been made, whether they were entered into in good faith or not, if any mistake has arisen through a misunderstanding of the parties, that is, if he who purchased or leased the property differed in opinion from him with whom he made the contract, the transaction will be void.

The same rule should be adopted in the formation of a partnership, so that if the partners think differently, one holding one opinion and the other another, the partnership will not be valid, as it depends upon the consent of the parties.

58. *Callistratus, The Minority Edict, Book I.*

It must be remembered that where issue has been joined in a case, it passes against the heir and other persons of this kind.

59. *Licinius Rufinus, Rules, Book Vill.*

A ward, through borrowing money, does not render himself liable by natural law.

60. *Ulpianus, On the Edict, Book XVII.*

Where penal actions relating to the same sum of money are concurrent, one of them never annuls the other.

61. *Scsevola, Digest, Book XXVIII.*

The agent of Seius sent a note to a goldsmith, at the bottom of which were the following words: "I, Lucius Kalendius, have approved what was written above, and a balance of so much is due from us to So-and-So." I ask whether this would bind Gaius Seius? The answer was that if Seius was not otherwise bound, he would not be liable for what was stated in this document.

(1) Seia, desiring to pay a salary to Lucius Titius, sent him the following letter: "To Lucius Titius, Greeting. If you are of the same mind, and entertain the affection for me which you have always done, sell your property and come to me as soon as you receive this letter. I will

pay you ten *aurei* every year, as long as I live, for I know how much you love me." If Lucius Titius should sell his property and go to her, I ask whether the annual salary mentioned in the letter could be collected by him. The answer was, that an investigation must be made with reference to the rank of the persons, and their motives, in order to determine whether an action should be granted.

# THE DIGEST OR PANDECTS.

## SEVENTH PART.

## BOOK XLV.

## TITLE I.

## CONCERNING VERBAL OBLIGATIONS.

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

A stipulation cannot be made except by the words of the two contracting parties, and hence neither anyone who is dumb or deaf, nor a child, can enter into a stipulation; nor can an absent person do so, because the parties must understand one another reciprocally. Therefore, if any one of these persons wishes to make a stipulation, let him do so by means of a slave who is present at the time, and the latter will acquire for him the action based on the stipulation. Likewise, if anyone desires to bind himself, let him order that this shall be done, and he will be bound by his order.

(1) Where one of the parties present asks a question, and departs before an answer is given him, he renders the stipulation void. If, however, he asks the question while present, and departs, and on his return is answered, he will bind himself, for the intermediate time did not vitiate the obligation.

(2) If anyone should ask a question as follows: "Will you pay?" and the other answers "Why not?" the latter binds himself. This will not be the case if he assents without speaking, for he who assents in this manner is bound not only civilly but naturally; and therefore it is very properly said that even his surety does not become liable for him.

(3) If anyone, having been simply interrogated, should answer, "If such-and-such a thing is done, I will pay," it is certain that he will not be bound. And if he should be asked, "Will you pay before the fifth *kalendsT'* and he answers, "I will pay on the *ides,"* he will -also not be bound, for he did not answer with reference to what he was asked; and *vice versa,* if he should be asked under a condition and should answer absolutely, it must be said that he will not be liable. If anything is added or taken from the obligation, it must always be held that it was vitiated, unless the stipulator should immediately accept the difference in the answer; for then a new stipulation will be considered to have been made.

(4) If when I stipulate for ten *aurei,* and you answer twenty, it is certain that an obligation is only contracted for ten. On the other hand, if I ask for twenty, and you answer ten, the obligation will only be contracted for ten; for although the amounts must agree, still it is perfectly clear that twenty and ten are involved.

(5) If I stipulate for Pamphilus, and you promise both Pamphilus and Stichus, I think that the addition of Stichus should be considered superfluous. For when there are as many stipulations as objects, there are, as it were, two stipulations, one of which is useful and the other useless, and the useful one is not vitiated by that which is of no value.

(6) It makes no difference if the answer is given in a different language. Hence, if anyone interrogates in Latin and he is answered in Greek, the obligation is contracted, provided the reply is suitable. The same rule governs in an opposite case. But is there any doubt whether we shall apply this only to Greek, or also to other tongues; for example, to Punic, Assyrian, or any other language? Sabinus has written upon this point, but the truth is, that any kind of speech can give rise to an obligation, if, however, each of the parties understands the language of the other either himself, or through a faithful interpreter.

2. *Paulus, On Sabinus, Book XII.*

Some stipulations relate to giving, and others have reference to acts to be performed.

(1) Of all these examples, some admit of partial payment, as, for instance, where we stipulate to pay ten *aurei.* Others do not admit of this, and in their nature are not susceptible of division; for instance, when we stipulate for a right of way, a right of passage, or a right to drive. Some, by their nature, are susceptible of division, but, unless the entire thing is given, the stipulation is not carried out; for example, when I stipulate in general terms for a slave, a dish, or any kind of a vase. For if one part of Stichus is furnished, there is, as yet, no discharge of any part of the stipulation, and it may be immediately demanded, or remain in suspense until another slave is furnished. The stipulation of furnishing either Stichus or Pamphilus is of the same kind.

(2) Therefore, in stipulations of this description, heirs cannot be released by merely giving a part, so long as all of them do not give, the same thing; for the condition of the obligation is not changed by the person of the heirs. Therefore, if what is promised is not susceptible of division, as, for example, a right of way, each of the heirs of the promisor will be liable for all of it. But in the case where one of the heirs has paid in full, he has recourse against his co-heir by an action in partition. Hence it happens, as Pomponius says, that each of the heirs of a person who has stipulated for a right of way, or a right of passage, is entitled to an action for the whole.

Some authorities, however, think that in this case the stipulation is extinguished, because a servitude cannot be acquired by each of them separately, but the difficulty of delivery does not render the agreement void.

(3) If, however, having stipulated for a slave, I bring an action against one of the heirs of the promisor, only the share of the others due under the obligation remains to be paid. • This is also the case when a release is granted to one of the heirs.

(4) The same rule which we have mentioned, as affecting the heirs, is applicable to the promisor himself and his sureties.

(5) Again, if the stipulation has reference to an act to be performed, for instance, if I stipulate that nothing shall be done either by yourself or by your heir to prevent me from passing or driving, and one of several heirs prevents me, his co"-heir will also be liable; but they can recover what they have given him by an action in partition. Julianus and Pomponius also adopt this opinion.

(6) On the other hand, if the stipulator should die after having provided that he and his heir should enjoy a right of way, and one of his heirs should be prevented from doing so, we say that it makes a difference whether the stipulation is entirely violated, or this is done only with reference to the share of him whose right was interfered with. For if a penalty is added to the stipulation, it will be incurred in full; but those • who have not been prevented will be barred by an exception on the ground of fraud. If, however, no penalty has been imposed, then the stipulation will only be violated so far as the share of him who was prevented is concerned.

3. *Ulpianus, On Sabinus, Book XLIX.*

The same rule applies to the stipulation, "Do you promise that myself and my heir can have so-and-so?"

(1) The reason for this difference is, that when one of the heirs is hindered, the co-heir, who has no interest in the matter, cannot bring suit under the stipulation, unless a penalty has been imposed which causes the stipulation to be violated by all; because, in this instance, we do not inquire who is interested. But when one of the heirs, interferes, all of them are liable, for it is to the interest of him who is prevented not to be hindered by anyone.

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

We say the same thing, if I have stipulated that no fraud should be committed by you, or by your heir; and either the promisor or stipulator should die, leaving several heirs.

(1) Cato says, in the Fifteenth Book, that where the penalty of a certain sum of money is promised, if something else should be done, and the promisor is dead, and one of several heirs should commit the act which is provided against, the penalty will be incurred by all the heirs, each in proportion to his share of the estate, or it will only be incurred by one according to the amount of his share.

If the act provided against was committed by all the heirs, and the object of the stipulation was indivisible, as, for example, where a right of way is granted for the reason that it cannot be divided, the act is considered, to a certain extent, to have been done by all.

But where provision is made for something which is susceptible of division, for instance, that legal proceedings cannot any longer be prosecuted, then the heir who violated the stipulation will alone incur the penalty in proportion to his share. The reason for this difference is because, in the first instance, all the heirs are considered to have committed the act, since the agreement that you shall do nothing by which I may be prevented from passing or driving cannot be violated except in its entirety.

But let us see if what appears in the following stipulation is not the same thing, but rather something that resembles it, namely: "Do you promise that Titius and his heir will ratify this?" For in this stipulation he alone will be liable who does not ratify the act, and can alone bring an action for what was demanded.

This opinion was also held by Marcellus, although the master himself cannot make a partial ratification.

(2) If he who stipulated for double the amount should die, leaving several heirs, each one of them can bring an action in proportion to his share of the estate, on account of the eviction of what he is entitled to.

The same rule will also apply to a stipulation relating to an usufruct, for the prevention of threatened injury, and notice to discontinue a new work. After notice to discontinue a new work, partial restitution to its former condition cannot be made.

This rule has been adopted by stipulators on account of its convenience. Partial restitution cannot be made by a promisor,, nor can a partial defence be instituted by him.

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

Some stipulations are judicial, some are praetorian, some conventional, and others common, that is to say, both praetorian and judicial. Judicial stipulations are such as are prescribed officially by the court, as, for instance, the provision of security against fraud.

Praetorian stipulations are such as are prescribed officially by the Praetor, for example, those against threatened injury. Praetorian stipulations must be understood to also include those having reference to the duties of the Mile, for these also proceed from the authority of jurisdiction.

Conventional stipulations arise from the agreement of the parties, and I am tempted to say there are as many kinds of them as there are of objects to be contracted for, since they are employed in the same verbal obligations, and depend upon the nature of the business to be transacted.

Stipulations are common, for instance, where it is agreed that the property of a ward shall be rendered secure; for the Praetor orders a bond to be given to protect the property of the ward, and sometimes the judge does this, if it cannot otherwise be accomplished. In like manner, the stipulation for double the amount proceeds either from the judge or from the Edict of the diles.

(1) A stipulation is a certain form of words by which the party who is questioned answers that he will give or do whatever is the subject of the interrogation.

(2) The agreement to satisfy is a stipulation which binds the promisor that sureties shall be furnished by him, that is to say, per-sons who will promise the same thing.

(3) The agreement to satisfy is a term which is used in the same way as to secure. For where anyone is content with what is furnished him, this is called satisfaction; and, in like manner, where sureties are furnished who bind themselves verbally and he to whom they are offered is content with them, this is designated giving sufficient security.

(4) If you promise a certain sum of money as principal, and also a penalty if it is not paid, and one of your heirs pays a portion of the principal, he will, nevertheless, be liable to the penalty until what is due from his co-heir has been paid.

The same rule applies to a penalty in the case of a reference to arbitration, where one of the parties complies with the decision of the judge, and the other does not. The heir should be reimbursed by his co-heir, for in stipulations of this kind, no other decision can be made without injuring the stipulator.

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

When anyone has been forbidden to manage his own property, he is benefited by a stipulation, but he cannot deliver anything, or bind himself by making a promise. Hence a surety cannot intervene in his behalf, any more than in that of an insane person.

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

Where an impossible condition has been prescribed, and it has reference to the performance of some act, it is an impediment to the stipulation. The case is otherwise, however, if a condition like the following one, namely, "If he does not ascend to heaven," is inserted into the stipulation; for it is available and effectual, and applies to money which has been loaned.

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

In the following stipulation, "If you do not deliver Stichus on the *kalends,* do you promise to pay ten *aurei"!"* the slave having died, the question arises whether the action can be brought immediately before the *kalends?* Sabinus and Proculus hold that the plaintiff must wait until the day, which is the better opinion, for every obligation has reference to a condition and an appointed time, and although the condition seems to have been fulfilled, still the time for performance has not yet arrived.

But with reference to one who promises as follows, "If you do not touch the sky with your finger before the *kalends,"* we can proceed immediately. This opinion was also adopted by Marcellus.

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

If Titius and Seius stipulate separately, as follows, "If you do not convey such-and-such a tract of land to So-and-So, do you promise to pay me?" the time for paying one of them will not terminate until judgment is rendered, and therefore the right of action will belong to him who manifests the greatest diligence.

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

In a stipulation such as the following, "If Lucius Titius does not come into Italy before the *Kalends* of May, do you promise to pay ten *aurei!"* it is our practice that suit cannot be brought before it is ascertained that Titius cannot come into Italy before that date, and that he has not come, either living or dead.

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

If a son, while at home, enters into a stipulation, he is considered to have acquired for the benefit of his father on the return of the latter from the hands of the enemy.

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

If I stipulate as follows, "Do you promise to pay ten, or five *aurei?"* five will be due. And also, "Do you promise to pay on the *Kalends* of January, or February?" this is the same as if I had stipulated for payment on the *Kalends* of February.

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

He who enters into a stipulation for payment before the next *kalends* is in the same position as one who stipulates for payment on the *kalends.*

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

If I stipulate with you that a house shall be built, or if I have charged my heir to build a house, it is 'held by Celsus that an action cannot be brought in this case until the time has expired in which the house could have been built, nor will the sureties be liable before that time.

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

Hence doubt arises, if a portion of the house having been built it should afterwards be destroyed by fire, whether the entire time for rebuilding it should be computed, or whether only the remaining time should be taken into consideration. The better opinion is that the entire time for rebuilding it should be granted.

16. *The Same, On Sabinus, Book VI.*

If you owe me Stichus or Pamphilus, and one of them should become my property in some way, you will owe me the other.

(1) A stipulation of this kind, "For each year," is both uncertain and perpetual, and does not resemble a legacy, which is extinguished by the death of the legatee.

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

A stipulation is not valid when the condition imposed depends upon the will of the person who makes the promise.

18. *Pomponius, On Sabinus, Book X.*

Anyone who promises the same thing twice is not legally liable for it more than once.

19. *The Same, On Sabinus, Book XV.*

Where a stipulation is made as follows, "If a divorce takes place through your fault, do you promise to pay?" the stipulation is void, because we should be content with the penalties imposed by the laws, unless the stipulation imposes the same penalty as that prescribed by law.

20. *Ulpianus, On Sabinus, Book XXXIV.*

Stipulations like the following are not void, namely, "Do you promise to pay what Titius owes you when he ceases to be your debtor?" for this stipulation is just as valid as if it had been made under any other condition.

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

If, after a divorce has taken place, the woman who owes nothing as dowry stipulates that she should be paid a hundred *aurei* as her dowry, or one who is entitled to only a hundred *aurei* stipulates that two hundred shall be given her by way of dowry, Proculus says that if she who is entitled to a hundred stipulates for two hundred, there is no doubt that the stipulation will call for a hundred; and that the other hundred can be collected by an action on dowry. Therefore, it must be said that if there is nothing due as dowry, a hundred *aurei* can be collected under the stipulation; just as when a legacy is bequeathed by way of dowry to a daughter, a mother, a sister, or anyone else whomsoever, it will be valid.

22. *Paulus, On Sabinus, Book IX.*

If I stipulated with you for what I believed to be gold, when, in fact, it was brass, you will be liable to me for the brass, as we agreed upon the object; but I can bring an action against you on the ground of fraud, if you knowingly deceived me.

23. *Pomponius, On Sabinus, Book IX.*

If you owe me a certain slave on account of a legacy, or a stipulation, you will not be liable to me after his death; unless you were to blame for not delivering him to me while he was living. This would be the case, if, after having been notified to deliver him, you did not do so, or you killed him.

24. *Paulus, On Sabinus, Book IX.*

If a minor owes Stichus under a stipulation, he is not considered to be in default, and be liable, if Stichus should die, unless a demand was made upon him with the consent of his guardian, or it was made upon his guardian alone.

25. *Pomponius, On Sabinus, Book XX.*

If I stipulate for what is already due to me under a stipulation, and the promisor can protect himself against this stipulation by pleading an exception, he will be bound by the subsequent agreement, because the first one is rendered of no effect by pleading the exception.

26. *Ulpianus, On Sabinus, Book XLII.*

We know that, generally speaking, dishonorable stipulations are of no force or effect.

27. *Pomponius, On Sabinus, Book XXII.*

For instance, if anyone promises to commit homicide, or sacrilege. It is, however, the duty of the Prsetor to refuse an action in all obligations of this kind.

(1) If I should stipulate as follows, "Do you promise to pay if you do not ascend to the Capitol within two years?" I cannot lawfully bring an action against you until the term of two years has expired.

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

If we stipulate for property to be delivered, we do not understand that its ownership shall be transferred to the stipulator, but merely that the article itself shall be delivered.

29. *Ulpianus, On Sabinus, Book XLVI.*

We must remember that, in stipulations, there are as many agreements as. there are sums of money, and as many stipulations as there are articles involved. The result of this is that where a sum of money or an article which was not included in the preceding stipulation is mixed with another, a renewal does not take place, but two stipulations are made. And although it has been decided that there are as many stipulations as there are sums of money, and as many stipulations as there are articles; still, if anyone stipulates for a certain sum or a pile of money which is in sight, there are not as many stipulations as there are separate pieces of money, but only a single stipulation; as it is absurd that there should be a separate stipulation for every coin.

It is also certain that there is only one stipulation for a legacy, although several objects may be included in one legacy, or there may be several legacies. Moreover, there is but one stipulation, where it refers to the entire body of slaves, or all the slaves in a household. In like manner, a stipulation which has reference to a team of four horses, or to a number of litter-b'earers, is but one. If, however, anyone stipulates for "this article and that," there are as many stipulations as there are objects.

(1) If I stipulate with a thief for a slave, the question arises whether the stipulation will be valid. What causes the difficulty is, that having stipulated for a slave, I am generally held to have contracted for my own property, and a stipulation of this kind is not valid when anyone makes an agreement with reference to what is bis own. If I should stipulate as follows, "Do you promise to give what must be given under a personal action for recovery?" there is no doubt that the stipulation will be valid. If, however, I should merely stipulate for "a slave," the stipulation will be of no force or effect. If the slave should afterwards die, without the thief being in default, Marcellus says that the latter will not be liable to a personal action, for as long as the slave lived he could have been recovered by such a proceeding. But if we suppose that he died, he is placed in such a position that the right to bring a personal action for his recovery based on the stipulation will be extinguished.

30. *The Same, On Sabinus, Book XLVII.*

It must generally be understood that, if anyone should state in writing that he has become a surety, all legal formalities are considered to have been complied with.

31. *Pomponius, On Sabinus, Book XXIV.*

If I stipulate for my own property under a condition, the stipulation will be valid if the property should not belong to me at the time when the condition is fulfilled.

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

If we are mistaken in the name of the slave whom we stipulate shall be delivered to us, it has been decided that the stipulation will be valid so long as no mistake was made with reference to its object.

33. *Pomponius, On Sabinus, Book XXV.*

If Stichus is promised to be delivered on a certain day, and dies before that day arrives, the promisor will not be liable.

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

It makes a great deal of difference whether I stipulate for property which I cannot make use of in commerce, or whether someone promises it to me. If I stipulate for something which I have not the right to dispose of in commerce, it is settled that the stipulation is void. If anyone promises me something which he cannot dispose of commercially, he injures himself, and not me.

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

If I stipulate for an act to be performed which Nature does not permit to take place, the obligation does not become operative, any more than when I stipulate that something shall be given which is not possible, unless it is the fault of someone that this cannot be done.

(1) Again, an obligation does not arise, if the object of the stipulation is something which is forbidden by law, where the cause of the prohibition is perpetual; for instance, if anyone should stipulate to marry his own sister. And even if the cause should not be perpetual, as happens in the case of an adopted sister, the same rule applies, because an offense is immediately committed against good morals.

(2) If in hiring, leasing, sales, and purchases, the other party does not answer the interrogatory, but, nevertheless, consents to what has been answered, the agreement will be valid; for contracts of this kind are not confirmed by words as much as by consent.

36. *Ulpianus, On Sabinus, Book XLVIII.*

If anyone having agreed to bind himself in one way is fraudulently bound in another, he will be liable under the strict construction of the law; but he can have recourse to an exception on

the ground of fraud, because anyone who has been rendered liable by fraud is entitled to an exception.

The same rule applies if no fraud has been committed by the stipulator, even if the thing itself is fraudulent, for anyone who brings an action under such a stipulation commits fraud by doing so.

37. *Paulus, On Sabinus, Book XII.*

If I stipulate for a certain sum of money, for instance, what is in a chest, and it is lost without the fault of the promisor, nothing will be due to us.

38. *Ulpianus, On Sabinus, Book XLIX.*

The following stipulation, "Do you promise that I can have such-and-such a thing?" contains the provision that I shall be permitted to have it, and that nothing shall be done by anybody to prevent us from having it. The effect of this is that the other contracting party is considered to agree that you shall be permitted by all persons in the future to have what you have been promised. Therefore he appears to have guaranteed the acts of others. No one, however, will be liable if he promises that others will do something, and this is our practice. But he binds himself not to do anything to prevent the other party from having the property, and he also binds himself that neither his heir, nor any of his other successors, will do anything to prevent the stipulator from having what he promised him.

(1) If, however, he promises that no interference will take place through the agency of anyone except his heir, it must be said that his promise of the act of another is void.

(2) If he should desire to guarantee the act of another, he can promise a penalty, or the value of the property. But to what extent will he be considered to guarantee possession of the property? This has reference to cases where no one raises a controversy, that is to say, neither the promisor himself, nor his heirs, nor their successors.

(3) If anyone should raise a question, not with regard to the ownership of the property, but merely to its possession, or to the usufruct or the use of the same, or to any right attaching to what has been sold, it is clear that the stipulation becomes operative, for he has not the unrestricted right to anything where what he has is diminished in any way.

(4) The question arose whether the promise to hold property only applies to what belongs to the person himself, or whether it also applies to property belonging to others. The better opinion is that a promise of this kind can be made with reference to the property of others, if it afterwards should come into the hands of the promisor. Hence, if it still continues to belong to someone else, it must be said that the stipulation does not become operative, unless a penalty was added, although nothing may have been done by the person himself or his successor.

(5) Just as he who makes the promise and his successors are liable, so, also, the stipulation becomes operative for the benefit of the stipulator himself and his successor, if he should not be allowed to have the property. If, however, another is not allowed to have it, it is certain that the stipulation does not become operative; and it makes no difference whether I stipulate "that he shall be permitted to have it," or "that I shall be permitted to have it."

(6) Those who are under the control of others can stipulate with the latter that they shall be permitted to hold the property, for the same reason that they can stipulate for other things for their benefit. If, however, a slave should stipulate that he himself shall be entitled to have the property, the question arises whether he must be considered to have entered into a legal stipulation? Julianus, in the Fifty-second Book of the Digest, says if a slave stipulates that he shall be permitted to have certain property, or promises that nothing will be done by him to prevent the stipulator from having it, the stipulation does not become operative, although he can be deprived of the property, and he himself can take it away; for in a stipulation of this kind not a fact, but a right, is involved. Therefore, if he stipulates that nothing shall be done

by the promisor to prevent him from making use of a right of way, Julianus says that not the right of stipulation, but a fact, is involved. It seems to me, however, that although the stipulation that he should be permitted to have the property includes the statement of a right, still, in the case of a slave and a son under paternal control, it should be understood to apply to the retention, and not to the deprivation of possession, and the stipulation will be valid.

(7) This stipulation also, "Do you promise that I shall have possession?" is valid. Let us see whether a slave can properly make use of such a stipulation for his personal advantage. But although a slave cannot hold possession under the Civil Law, still this has reference to natural possession, and therefore there can be no doubt that the slave has made a valid stipulation.

(8) It is definitely settled that if a .slave has stipulated that he shall be permitted to hold property, the stipulation is valid. For although slaves cannot hold possession civilly, still there is no doubt that they can hold it.

(9) The term "to have" is susceptible of two different meanings, for we say that a person who is the owner of property has it, and that he who is not the owner holds it. Finally, we are accustomed to say that we "have" property which has been deposited with us.

(10) If anyone should stipulate that he shall be permitted to enjoy anything, this agreement does not affect the heir.

(11) And if he did not add "For himself," I do not believe that this stipulation for the usufruct will pass to the heir. This is our practice.

(12) If anyone stipulates that he and his heir shall be permitted to enjoy some right, let us see whether the heir can bring an action under the stipulation. I think that he can do so, although usufructs are different; for if the stipulation was with reference to a right of way to be enjoyed by himself and his heir, we should adopt the same opinion.

(13) If anyone desires to provide against the fraud of a promisor and his heir, it will be sufficient for him to stipulate that there is no fraud, and that there will not be any. If, however, he desires to provide against the fraud of everyone else, it will be necessary for him to add: "If any fraud exists in this transaction, or should arise hereafter, do you promise to pay a sum equal to the value of the property?"

(14) Anyone can add to his own person that of his heir.

(15) The person of an adoptive father can also be added.

(16) A distinction exists between a day which is uncertain and one that is certain; and therefore it is evident that anything which is promised at a certain time may be paid immediately, for all the intermediate time is left to the promisor for payment. And where anyone promises that, "If anything should be done, or when anything shall be done," and he does not make payment when the thing is done, he will not be considered to have complied with his promise.

(17) No one can stipulate for another except a slave for his master, and a son for his father, as obligations of this description have been contrived in order that everyone may acquire for himself anything in which he may be interested, but I have no interest in what is given to another. It is clear that if I wish to do this, a penalty should be included in the stipulation, in order that, if what has been agreed upon should not be done, the stipulation will become operative, even in favor of a person who has no interest in the transaction. For when anyone stipulates for a penalty, his interest is not taken into account, but only the quantity and difference of the stipulation, whatever that may be.

(18) When the intention of a stipulation is examined, the language should be interpreted against the stipulator.

(19) When anyone says, "Ten to me and ten to Titius," he is understood to mean the same ten,

and not two tens.

(20) If I stipulate for another, when I am interested in doing so, let us see whether the stipulation becomes operative. Marcellus says that, in a case of this kind, the stipulation is valid. Where anyone undertakes the administration of the guardianship of a ward, and gives it up to his fellow-guardian, stipulating that the property of the ward shall be secured, Marcellus says, that the stipulation can be maintained to be valid, for it is to the interest of the stipulator that what he agreed to shall be done, as he would be liable to the ward if this were not the case.

(21) If anyone promises to build or lease a house, and then stipulates with another that a house shall be built for the stipulator; or if anyone promises that Ma3vius will convey a tract of land to Titius, and if he does not do so, that he will pay a penalty; or if he stipulates with Msevius to transfer a tract of land to Titius, just as if anyone should lease something to be done which he himself had undertaken ; it is certain that he will be entitled to an equitable action based on the lease.

(22) Hence, if anyone should stipulate when it is to his interest that something should be given, he is in such a position that the stipulation will be valid.

(23) Therefore, where I stipulate that something shall be given to my agent, and, likewise, if I stipulate that it shall be given to my creditors, the stipulation will be valid, because it is to my interest that no penalty should attach, nor any land be sold which has been hypothecated.

(24) If anyone stipulates as follows, "Do you promise to produce him in court?" there is no reason why this obligation should not be valid.

(25) We can stipulate for the building of a sacred or religious edifice, otherwise we cannot bring an action under a lease.

39. *Paulus, On Sabinus, Book XII.*

A master, by stipulating for his slave, acquires for himself, as a fath'er also does, if he stipulates for his son; so far as this is permitted by the laws.

40. *Pomponius, On Sabinus, Book XXVII.*

If my son stipulates for my slave, the acquisition is obtained for my benefit.

41. *Ulpianus, On Sabinus, Book L.*

It is clear that no doubt can arise where anyone stipulates for payment on the *Kalends* of January, and adds on "the first" or "the next." And, also, if he mentions the second or the third, or any other, he also fixes the date beyond dispute. If, however, he does not mention what January, he introduces a question of fact as to his intention; that is to say, what was agreed upon between the parties; for we examine what was the intention, and decide accordingly. Where the intention is not evident, we must adopt the opinion of Sabinus, and hold that the first *Kalends* of January were meant. But if anyone makes a stipulation on the very day of the *kalends,* what rule shall we follow? I think that the intention should be considered to refer to the following *kalends.*

(1) Whenever the day is not stated in an obligation, the money is considered to be due at once; unless a place is mentioned which requires a certain time to arrive there. Where, however, a day is fixed, the effect is that the money will not immediately be due, from which it is clear that the mention of the time is in favor of the promisor, and not of the stipulator.

(2) This rule also applies to the *ides,* and the *nones,* and, generally speaking, to all dates.

42. *Pomponius, On Sabinus, Book XXVII.*

Where anyone stipulates for payment this year, or this month, he cannot properly bring suit

until all of the year, or all of the month, has expired.

43. *Ulpianus, On Sabinus, Book L.*

If anyone should stipulate that restitution shall be made to him, for instance, by the arbitration of Lucius Titius, and then the stipulator himself should cause Titius to delay in rendering his award, the promisor will not be liable for being in default. But what if he who is to decide the matter should cause delay? It will be better to hold that the case should not be withdrawn from the jurisdiction of him to whose arbitration it was submitted.

44. *Paulus, On Sabinus, Book XII.*

And, therefore, if nothing is decided, the stipulation will be void, so that if a penalty has been added it can not be enforced.

45. *Ulpianus, On Sabinus, Book XL.*

Whatever one person stipulates in favor of another who has control over him will be considered as if the latter himself had made the stipulation.

(1) Just as anyone can stipulate for something "when he dies," so, also, those who are subject to the authority of others can stipulate in such.a'way that what they provide will take effect at the time of their death.

(2) Where anyone stipulates as follows, "Do you promise to pay my daughter after my death?" or, "Do you promise to pay me after my daughter's death?" the stipulation will be valid; but, in the first case, the daughter will be entitled to an equitable action, although she may not be her father's heir.

(3) We can stipulate not only, "When you die," but also, "If you die," for as there is no difference between "When you come," or, "If you come," likewise there is no difference between, "If you die," and "When you die."

(4) A son is understood to stipulate for payment to his father, even if he does not say so.

46. *Paulus, On Sabinus, Book XII.*

We can legally stipulate for payment on the hundredth *kalends,* because the obligation is present, and payment is postponed until the prescribed time arrives.

(1) Anything which consists of an act cannot be deferred until the death of the person, as for instance, "Do you promise to come to Alexandria when you die?"

(2) If I should stipulate as follows, "When you please," some authorities say that the stipulation is void; others hold that it is void if you should die before you make up your mind; which is true.

(3) This stipulation, however, "If you are willing to pay," is held to be invalid.

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

Anyone who stipulates as follows, "Do you promise to pay what you ought to pay on these *kalendsl"* is understood to be stipulated not for to-day, but for the time agreed upon, that is to say, for the *kalends.*

## PART II.

## CONCERNING VERBAL OBLIGATIONS.

48. *Ulpianus, On Sabinus, Book XXVI.*

If I stipulate for the payment of ten *aurei* on demand, the stipulation contains a notice for the payment of the amount more quickly, and, as it were, without delay, rather than conditionally; and therefore, even if I should die before making the demand, the condition will not be

considered to have failed.

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

When a son under paternal control promises to deliver Stichus, and it was his fault that he was not delivered, and Stichus should die, an action *De peculia* will be granted against the father for the amount for which the son was liable under the obligation. If, however, the father was in default, the son will not be liable, but a praetorian action should be granted against the father.

All these things are said to be applicable to a surety.

(1) If I stipulate that nothing shall be done by you to prevent me from enjoying a right of way, and I accept a surety from you, and it should be the fault of the surety that I do not enjoy the servitude, neither party will be liable; but if the promisor is to blame, both of them will be.

(2) In the following stipulation, "It shall be done neither by you nor by your heir," the act is considered to have been performed by the heir, even though he may have been absent, and ignorant of the fact, and hence did not do what was required by the terms of the stipulation. A minor, however, is not considered to be responsible for a stipulation of this kind, even if he is the heir.

(3) If the promisor of a slave is required to deliver him before the time agreed upon, and the slave should die, he will not be held responsible.

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

In the following stipulation the words, "Nothing will be done by you," do not mean that you will not do anything to prevent some act from being performed, but that you will use your utmost efforts to accomplish it.

(1) Again, in a stipulation having reference to the purchase of an estate, and which is in the following terms, "All the money which comes into your hands; or which you have prevented from coming into your hands; or which you may, in the future, prevent from doing so," there is no doubt that he who has prevented anything from coming into his hands will be liable.

51. *The Same, On the Edict, Book LI.*

*A* man who has promised a slave belonging to another will not be liable to an action under the stipulation, if the slave obtains his freedom; for it is sufficient for him not to be guilty of fraud or negligence.

52. *The Same, Disputations, Book VII.*

In conventional stipulations the contracting parties prescribe the form of the agreement; but praetorian stipulations are governed by the intention of the Praetor who introduced them. Finally, it is not permitted to change anything in praetorian stipulations, or to add to, or take anything from them.

(1) If anyone promises to deliver a vacant possession, this stipulation, does not include a bare fact, but also has reference to the condition of the property.

53. *Julianus, Digest, Book LXII.*

It is very convenient to draw up stipulations in such a way that they shall contain everything which can be expressly included in them, and so that also the clause having reference to fraud will apply to matters which cannot be recalled at the time, as well as to uncertain future events.

54. *The Same, Digest, Book XXII.*

In stipulations, species and genera are differently distributed. When we stipulate for species, it

is necessary for the stipulation to be so divided between owners and their heirs that a part of each article will be due to each one. Whenever we stipulate for genera, the division is made between them by number. For instance, if anyone who stipulates for Stichus and Pamphilus leaves two heirs entitled to equal portions of his estate, it is necessary for half of both Stichus and Pamphilus to be due to each of them. If the same person has stipulated for two slaves, one slave will be due to each of his heirs.

(1) A stipulation for services resembles those in which genera are included, and therefore a stipulation of this description is made, not with reference to the parts of the services, but to the number of those entitled to them. If a slave held in common stipulates for one kind of service, it is necessary for each of his owners to demand a part of the service in proportion to his interest in the said slave. The discharge of an obligation of this kind is very easy, if the freedman prefers to offer the appraised value of his services, or his patrons consent that his labor shall be performed for their joint benefit.

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

When anyone stipulates that payment should be made to himself for Titius, payment can be properly made to Titius, but not to his heirs.

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

Where anyone makes a stipulation as follows, "Do you promise to pay ten *aurei* to Titius and myself?" it is probable that he stipulated for only ten *aurei* to be paid to Titius and himself together; just as where anyone makes a bequest to Titius and Sempronius, he is only understood to have left ten *aurei* to them conjointly.

(1) "Do you promise that you and Titius, your heir, will pay ten *aurei!"* It was superfluous to include Titius, for, if he is the sole heir, he will be liable in full; and if he is the heir to only a part of the estate, he will be liable to the same extent as the remaining co-heirs; and although it seems to have been agreed that suit could be brought only against Titius, and not against his co-heirs, still, this informal agreement which has been entered into will be of no benefit to his co-heirs.

(2) Anyone who stipulates for payment to himself or to his son clearly includes his son in the stipulation, in order that he may legally be paid. Nor does it make any difference whether he stipulates for himself and a stranger, or for himself and his son. Therefore payment can properly be made to the son, either while he is under the control of his father, or after his emancipation; nor does it matter that a party who stipulates for payment to be made to his son acquires for himself, because the stipulator, when including himself, causes it to be understood that his son is joined with him, not for the purpose of acquiring an obligation, but to render payment more easy.

(3) Where anyone has stipulated that payment shall be made to his son alone, who is under his control, it cannot legally be made to the latter; because his son is mentioned in the contract rather on account of the obligation than for the purpose of payment.

(4) Where a person stipulates as follows, "Do you promise to pay ten *aurei* as long as I live?" he can legally demand the ten *aurei* immediately, but his heir can be barred by an exception on the ground of an informal agreement; for it is clear that the stipulator did this to prevent his heir from making the claim; just as he who stipulates that money shall be paid to him "up to the time of the *kalends,"* can, in fact, bring suit for it after the *kalends* have arrived, but he will be barred by an exception based on the contract. For the heir, also, of one to whom a servitude attaching to a tract of land has been granted for his lifetime, will be entitled to the right of way, but he can be barred by an exception based on the informal agreement.

(5) He who stipulates as follows, "Do you promise to pay before the next *kalends?"* does not differ from one who stipulates for payment on the *kalends.*

(6) A person who has the ownership of property without the usufruct can legally stipulate for the usufruct to be transferred to him; for he inserts in the obligation something which he has not at the time, but which he can have subsequently.

(7) If I stipulate with you for the Sempronian Estate, and afterwards I stipulate with another for the same estate, without its usufruct, the first stipulation will not be renewed because you will not be released by transferring to me the land without its usufruct; but I can still properly bring suit against you to recover the usufruct of the said land. What then should be done? When you transfer the land to me, he also with whom I stipulated for the land without the usufruct will be released from liability.

(8) If Seius promises me, under a condition, the same slave for whom I have absolutely stipulated with Titius, and while the condition is pending, and after Titius is in default, the slave should die, I can immediately bring an action against Titius, and the condition having been fulfilled, Seius will not be liable.

If, however, I should give Titius a release, Seius will be bound, if the condition should be complied with. There is, therefore, this difference, namely, after the slave dies, the property for which Seius was liable ceases to be in existence, but the release having been given, the slave whom Seius promised still remains.

57. *The Same, Digest, Book LIII.*

Where anyone promises to pay ten *aurei* if Titius should become Consul, even though the promisor should die while the condition is pending, he will leave his heir liable.

58. *The Same, Digest, Book LIV.*

He who stipulates for the usufruct of land, and afterwards for the land itself, resembles one who stipulates for a part, of the land and afterwards for the whole of it, because the land is not understood to be conveyed if the usufruct is reserved. And, on the other hand, where anyone stipulates for the land, and afterwards for the usufruct, he resembles one who stipulates for all of it, and afterwards for a part. When a person stipulates for a right of way to drive, and afterwards for a footpath, the subsequent stipulation is void, just as where the stipulation of anyone for ten *aurei,* and afterwards for five, is void. Likewise, if anyone stipulates for the crops, and afterwards for the use of the land, the stipulation is void; unless, in all these cases, he expressly states that he does this with the intention of making a new stipulation, for then the first obligation having been extinguished, a right of action will arise from the second, and the right of passage, and the use of the land, as well as the five *aurei,* can be exacted.

59. *The Same, Digest, Book LXXXVIII.*

Whenever anyone stipulates for oil to be delivered on a certain day, or under some condition, its value should be estimated on the day when the obligation becomes due, for then it can be demanded; otherwise, an advantage will be taken of the promisor.

60. *Ulpianus, On the Edict, Book XX.*

The same rule will apply if anyone stipulates for the delivery of a certain weight of oil at Capua, for an estimate should be made at the time when it can be claimed, which is as soon as a person can arrive at the place designated.

61. *Julianus, On Urseius Per ox, Book II.*

A stipulation formulated as follows, "Do you promise to pay me such-and-such a sum of money, if you do not appoint me your heir?" is void, as this stipulation is contrary to good morals.

62. *The Same, On Minicius, Book II.*

If a slave, after having been forbidden by his master, stipulates for the payment of money by

another, he will still render the promisor liable to his master.

63. *Africanus, Questions, Book VI.*

Where anyone stipulates as follows, "If a ship should come from Asia, or Titius should be made Consul," no matter which condition is first fulfilled, the stipulation will become operative, but this will not be done a second time. For when one of two distinct conditions fails, the one which is fulfilled will necessarily render the stipulation operative.

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

The following stipulation was entered into: "If Titius should be made Consul, do you promise to pay ten *sesterces* annually, from to-day?" The condition was fulfilled after three years; may it not reasonably be doubted whether proceedings could be instituted to compel payment for this time? The answer was that the stipulation was valid, and that payment should be understood to be due even for those years which had elapsed before the condition was fulfilled, as the meaning was, that if Titius should be made Consul, ten *sesterces* must be paid every year, and that even the time which had passed ought to be included.

65. *Florentinus, Institutes, Book Vill.*

Anything which you may add that is foreign to the stipulation and which has no reference to the present contract will be considered as superfluous, but will not vitiate the obligation; for instance, if you say, "I sing of arms and the man, I promise," the stipulation will be valid.

(1) When, however, any change is made in the designation of the property, or of the person concerned in the transaction, it is held that this will present no obstacle. For if he stipulates for *denarii,* you will be bound, if you promise *aurei* to the same amount. And where a slave stipulates for Lucius, his master, and you promise to pay Titius, who is the same person, you will be liable.

66. *Paulus, On the Lex AZlia Sentia, Book III.*

If a minor of twenty years of age stipulates with his debtor for the manumission of a slave, the execution of the stipulation should not be granted. If, however, the minor is twenty-five years of age, the manumission will not be prevented, because the law mentions a minor of that age.

67. *Ulpianus, On the Edict, Book II.*

The following stipulation, "Do you promise to guarantee the payment of ten thousand *sesterces!"* is valid.

(1) A person who stipulates that someone shall see that he is paid ten *aurei* cannot bring suit to recover that sum, as the promisor may be released by giving a solvent surety, as Labeo says, and Celsus also states in the Sixth Book of the Digest.

68. *Paulus, On the Edict, Book II.*

When I stipulate for a penalty if you do not lend me a sum of money, it is certain _ that the stipulation is valid. If, however, I should stipulate as follows, "Do you promise to lend me a certain sum of money?" the stipulation is vague, because what is to my interest is included therein,

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

Where a man who is dead cannot be produced in court, the penalty for something which is impossible is not incurred; just as where someone, having stipulated to deliver Stichus, who is dead, provides for a penalty if he should not be delivered.

70. *The Same, On the Edict, Book XI.*

A woman who gave a dowry to my compatriot, Glabrio-Isidor, made him promise this dowry

to a child if she should die during marriage, which she did. It was decided that an action under the stipulation would not lie, as a person unable to speak could not stipulate.

71. *The Same, On the Edict, Book XIII.*

Whenever we stipulate for a penalty in order that some act may be performed, we express ourselves properly as follows, "If it is not done in this way." If, however, the penalty is for some act not to be performed, we should express it as follows, "If anything contrary to this is done."

72. *The Same, On the Edict, Book XX.*

.Stipulations are not divided when they relate to things which are not susceptible of division; as, for example, rights of way of every description, the privilege of conducting water, and other servitudes. I think that the same rule will apply when anyone stipulates for the performance of some act, for instance, the delivery of land, the excavation of a ditch, the building of a house; or for certain services, or for anything else of this kind, as their division annuls the stipulation. Celsus, however, in the Thirty-Eighth Book of the Digest, says that it was the opinion of Tubero that where we stipulate for something to be done, and it is not done, a sum of money should be paid, and that even in this kind of a transaction the stipulation is divided; in accordance with which, Celsus says that it may be held that an action should be granted, dependent upon the circumstances of the case.

(1) When anyone stipulates as follows, "If the work is not completed before the *Kalends* of next March, do you promise to pay a sum of money equal to the value of the work?" the promise will not date from the day when the work was begun, but after the *Kalends* of March, because the person who makes the promise cannot be sued before the *Kalends* of March.

(2) It is clear that if anyone has stipulated to prop up a house, it will not be necessary to wait until the house falls down before bringing suit; nor, where a house is to be built, to wait until the time has passed in which it could be built; but as soon as the promisor is in default in building the house, then suit can be brought, as the time fixed for the performance of the obligation has elapsed.

73. *Paulus, On the Edict, Book XXIV.*

Sometimes the performance of an absolute stipulation is delayed by the nature of the thing itself; for instance, where someone has stipulated with reference to an unborn child, or future crops, or a house which is to be constructed, for then the right of action arises whenever delivery can be made, according to the nature of the property. Again, if anyone stipulates for payment to be made at Carthage, while he is at Rome, the time is tacitly understood to be included which will be necessary to consume in order to go to Carthage. In like manner, if anyone stipulates with a freedman for his services, their time will not expire before they have been defined and not performed.

(1) When a slave belonging to an estate makes a stipulation it will have no force or effect, unless the estate has been entered upon, just as if it was made under a condition.

The same rule applies to a slave who is in the hands of the enemy.

(2) The promisor of Stichus, by tendering him after being in default, purges himself of the default. For it is certain that an exception on the ground of fraud will bar anyone who refuses to receive money tendered him.

74. *Gaius, On the Provincial Edict, Book Vill.*

Some stipulations are certain, and others are uncertain.

(1) A stipulation is certain when, by its mere mention, its nature and its amount are predisclosed, as for instance, ten *aurei,* the Tusculan Estate, the slave Stichus, a hundred

measures of the best African wheat, a hundred jars of the best Campanian wine.

75. *Ulpianus, On the Edict, Book XXII.*

When, however, it is not apparent what the thing stipulated for is, and its nature or amount is undetermined, it must be said that the stipulation is uncertain.

(1) Therefore, when anyone stipulates for a tract of land without any specific designation, or for a slave in general terms, without mentioning his name, or for wine or wheat without stating its kind, he has included something uncertain in the obligation.

(2) This is so far true that if anyone stipulates as follows: "Do you promise to give me a hundred measures of good African wheat, and a hundred jars of good Companian wine?" he will be considered to have stipulated for articles which are uncertain, because something better than something good can be found, on which account the appellation "good" does not specify any certain article, as anything which is better than good is also itself good. But when anyone stipulates for "the best," he is understood to stipulate for an article whose excellence occupies the first rank, the result of which is that this designation refers to something which is certain.

(3) If anyone stipulates for the usufruct of a certain tract of land, he is understood to have inserted something vague into his obligation. This is the present practice.

(4) Where a person stipulates that any child which shall be born to the female slave, Arethusa, or any crops grown upon the Tusculan Estate shall be given to him, it is doubtful whether he shall be considered to have stipulated for some object which is-certain. It is, however, from the nature of the case, perfectly clear that this stipulation is for an uncertain object.

(5) But where anyone stipulates for the wine, the oil, or the wheat which is in a certain warehouse, he is understood to stipulate for something which is certain.

(6) When, however, someone stipulates with Titius as follows: "Do you promise to pay me what Seius owes me?" and also he who stipulates as follows, "Do you promise to pay me what you owe me, under your will?" he inserts something which is uncertain into his obligation, even if Seius owes a certain sum, or a certain sum is due him under the will, although these instances can hardly be distinguished from those which we have mentioned with reference to the wine, oil, or wheat stored in the warehouse.

On the other hand, the sureties are considered to have promised something certain, provided he for whom they bound themselves owes something that is certain; although they may also be asked, "Do you consider yourselves liable for this?"

(7) Any person who stipulates for something to be done, or not to be done, is considered to stipulate for what is uncertain: for something to be done, as, for instance, "the excavation of a ditch, the construction of a house, the delivery of free possession;" for something not to be done, for example, "that nothing shall be done by you to prevent me from walking and driving over your land, or that you will take no steps to prevent me from having the slave Eros."

(8) Where anyone stipulates for one thing or the other, for instance, for ten *aurei* or the slave Stichus, it is not unreasonable to ask whether he has included something which was certain or uncertain in his obligation. For these objects are specifically designated, and uncertainty only exists as to which of them should be delivered. Still he who has reserved the choice for himself, by adding the following words, "Whichever I may wish," may be considered to have stipulated for something which is certain, as he can maintain that he has the right to give only the slave, or the ten *aurei.* He, however, who does not reserve the choice for himself, stipulates for something which is uncertain.

(9) He who stipulates for the principal and any interest whatever is considered to have stipulated for something which is both certain and uncertain; and there are as many

stipulations as there are things.

(10) The following stipulation, "Do you promise to transfer the Tusculan Estate?" shows that the object is certain, and contains the provision that the entire ownership of the property shall be conveyed to the stipulator in some way or other.

76. *Paulus, On the Edict, Book XVIII.*

When I stipulate for one thing or the other, whichever I may select, the choice is a personal one and therefore a selection of this kind attaches to a slave or a son under paternal control. If, however, the stipulator should die before making his choice, the obligation will pass-to the heirs.

(1) When we stipulate that you shall either give or do something, that which is owing at the present time is only included in the stipulation, and not what may be due hereafter, for instance, on judgments. Therefore, the words, "What you must pay," "either now, or within a certain time" are inserted into the stipulation. This is done because a person who stipulates for you to pay something has reference to money which is already due. If, however, he wishes to designate the entire indebtedness, he says, "What you must pay either now or within a certain time."

77. *The Same, On the Edict, Book LVIII.*

Where money is promised upon a certain day, under a penalty, and the promisor dies before the day arrives, the penalty will be incurred, even though the estate may not have been accepted.

78. *The Same, On the Edict, Book LXII.*

If a son under paternal control, having stipulated under a condition, should be emancipated, and afterwards the condition should be fulfilled, his father will be entitled to the action; because, in stipulations, the time when we make the contract is considered.

(1) When we stipulate for a tract of land, the crops which are in existence at the time of the stipulation are not included.

79. *Ulpianus, On the Edict, Book LXX.*

If security is furnished to the agent of a person who was present, there is no doubt that an action on the stipulation will lie in favor of the principal.

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

Whenever the language of a stipulation is ambiguous, it is most convenient to adopt the meaning which is favorable to the preservation of the property in question.

81. *The Same, On the Edict, Book LXXVII.*

Whenever anyone promises to produce another in court, and does not provide a penalty (for instance, if he promises to produce his slave, or a freeman), the question arises whether the stipulation becomes operative. Celsus says, that even when it was not stated in the stipulation that a penalty should be paid, if the person was not produced, it is understood that he who makes the promise will be liable for the interest of his adversary in having him produced. What Celsus says is true, for he who promises to produce another in court promises that he will take measures to do so.

(1) If an agent promises to produce anyone without a penalty, it can be maintained that he made the agreement, not for his own benefit, but for that of the person whom he represents; and it can be assured with still more reason that the stipulation of the agent includes the value of the property involved.

82. *The Same, On the Edict, Book LXXVIII.*

No one can make a valid stipulation for his own property, but he can make one for its price. I can legally stipulate that my own property shall be restored to me.

(1) If the slave to be produced should die after the promisor is in default, the latter will still be liable, just as if the slave were living. He is considered to be in default who prefers to go into court rather than to make restitution.

83. *Paulus, On the Edict, Book LXXI1.*

The contract is made between the stipulator and the promisor, and therefore where one of them promises for another that he will either pay something, or perform some act, he will not be liable, for each one must promise for himself. And he who asserts that there is no fraud connected with the transaction, and that there will be none, does not simply make a disavowal, but promises that he will see that no fraud is committed. The same rule applies to the following stipulations, namely, "that the party interested will be permitted to have the property," and that "Nothing will be done either by you or your heir to prevent this from taking place."

(1) If, when stipulating for Stichus, I have another slave in my mind, and you have still another, the transaction will be void. This was also the opinion of Aristo with reference to judgments. The better opinion, however, is that he shall be considered to be demanded whom the purchaser had in his mind; for while the validity of the stipulation depends upon the consent of both parties, a judgment is rendered against one of them without his consent, and therefore the plaintiff should rather be believed; otherwise the defendant will always deny that he consented.

(2) If, when I stipulate for either Stichus or Pamphilus, you promise to give me one of them, it is decided that you will not be liable, and that no answer was given to the interrogatory.

(3) The case of sums of money is different, as, for instance, "Do you promise to pay ten, or twenty *aurei?"* For, in this instance, although you promise ten, the answer was properly given, because a person is considered to have promised the smaller of two sums of money.

(4) Again, if I stipulate for several things, for example, for Stichus and Pamphilus, although you may have promised one of them, you will be liable, for you are considered to have answered in one of these two stipulations.

(5) I cannot legally stipulate for anything which is sacred or religious, or which has been perpetually destined for the use of the public, as a market or a temple, or a man who is free; although what is sacred may become profane, and anything which has been destined for public service may revert to private uses, and a man who is free may become a slave. For when anyone promises that he will give something which is profane, or Stichus, he will be released from liability if the property becomes sacred, or Stichus obtains his freedom, without any act of his. Nor will these things again become the subject of the obligation, if by some law, the property should again become profane, and Stichus, from being free, should again be reduced to servitude; as what is the consideration of both the release and the obligation can neither be delivered nor not be delivered. For if the owner of a ship, who has promised it, takes it apart and rebuilds it with the same materials, the obligation is renewed, because it is the same ship. Hence Pedius states that it can be said that if I stipulate for a hundred jars of wine, from a certain estate, I should wait until it is made, and if it was made and was then consumed without the fault of the promisor, I should again wait until more has been made, and can be delivered; and during these changes, the stipulation will either remain in abeyance or will become operative.

These cases, however, are dissimilar, for when a freeman is promised, it is not necessary to wait until tHe time of his servitude, as a stipulation of this kind with reference to a freeman should not be approved ; for example, "Do you promise to deliver So-and-So, when he

becomes a slave?" and also, "Do you promise to transfer that ground when, from being sacred and religious, it becomes profane?" because such a stipulation does not include the obligation of the present time, and only such things as by their nature are possible can be introduced into an obligation. We are considered to stipulate not for a species but for a genus of wine; and, in this instance, the time is tacitly included.

A freeman belongs to a certain species, and it is not in accordance with either civil or natural law to expect an accident or adverse fortune to happen to a man who is free, for we very properly transact our affairs with reference to such property as can immediately be subjected to our use and ownership.

If a ship is taken apart with the intention of using its planks for some other purpose, although the owner may change his mind, it must be said that the original vessel has been destroyed, and that this is a different one. If, however, all of the planks have been removed for the purpose of repairing the ship, the original vessel is not considered to have been destroyed, and when the materials are put together again, it again becomes the same; just as where beams are taken from a house with the intention of being replaced, they continue to belong to the house. If, however, the house is taken down to the level of the ground, even though the same materials are replaced, it will be a different building.

This discussion has reference to praetorian stipulations by which provision is made for the restoration of property, and the question arises whether it is the same property.

(6) If I have stipulated for something under a lucrative title, and I obtain it by such a title, the stipulation is extinguished. Where I become the heir, the stipulation is extinguished by the ownership. If, however, I being the heir, the deceased charged me with a legacy of the property, an action can be brought under the stipulation.

The same rule applies if the legacy was bequeathed conditionally, because if the debtor himself should bequeath the property under a condition, he will not be released. If, however, the condition should not be complied with, and the property should remain in the possession of the heir, there would be no further ground for the claim.

(7) If I stipulate for Stichus, who is dead, even though this is the case, and a personal action for his recovery can be brought, just as can be done from a thief, Sabinus says that I have made a valid stipulation. But where a stipulation is made under other circumstances, it will be void; for even though the slave may be due, the promisor is released from liability by his death. He would therefore hold the same opinion if I should stipulate for the dead slave, when the debtor was in default.

(8) Where anyone promises to produce a female slave, who is pregnant, in a certain place, although he may produce her without her child, he is understood to produce her in the same condition.

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

If I stipulate for the construction of a house, and the time in which you could build it should elapse, so long as I do not bring the case into court, it is established that you will be released if you build the house. If, however, I have already brought suit, it will be of no advantage to you if you build it.

85. *The Same, On the Edict, Book LXXV.*

In the discharge of an obligation, it must be remembered that there are four things to be considered: for sometimes we can recover something from each individual heir; and sometimes it is necessary to bring suit for the whole property, which cannot be divided; and again, an action can be brought for a part of the property, while the debt cannot be paid unless in its entirety; and there are instances where an action must be brought for all the property although the claim may admit of a division of payment.

(1) The first case has reference to the promisor of a certain sum of money, for both the demand and the payment depend upon the hereditary shares of the estate.

(2) The second case applies to some work which the testator ordered to be done. All the heirs are liable conjointly, because the effect of the work cannot be divided into separate parts.

(3) If I should stipulate that nothing shall be done either by you or your heir to prevent me from using a right of way, and that, if you should do so, you shall pay a specified sum of money, and one of several heirs of the promisor prevents me from using the right of way, the opinion of the best authorities is that all the heirs will be bound by the act of one of them, because, although I am prevented by one alone, I am still not partially prevented, but the others can be indemnified by an action in partition.

(4) The claim can be demanded in part, where all must be paid, as, for instance, where I stipulate for a slave who is not specifically designated, for the claim is divided, but it cannot be discharged except in full; otherwise this might be effected by the transfer of parts of different slaves, which the deceased could not have done, to prevent me from obtaining what I stipulated for.

The same rule will apply, if anyone should promise ten thousand *sesterces* or a slave.

(5) An action can be brought for the entire amount, and payment of a part will bring about a release, when we institute proceedings on account of eviction; for the heirs of the vendor should all be notified together, and all of them must defend the case, and if one of them does not do so, all will be liable, but each one will only be required to pay in proportion to his share of the estate.

(6) Likewise, if a stipulation was made as follows, "If the Titian Estate is not transferred, do you promise to pay a hundred *aurei?"* the penalty of a hundred *aurei* will not be incurred, unless the entire estate is transferred, and it is of no advantage to convey the remaining shares of the land, if one of the parties refuses to convey his share; just as the payment of a part of a debt to a creditor is not sufficient to release the property pledged.

(7) If anyone, who will become liable under a certain condition, prevents the condition from being fulfilled, he will, nevertheless, be liable.

86. *Ulpianus, On the Edict, Book LXXIX.*

When it is said that there are as many stipulations as there are things, this only applies where the things are mentioned in the stipulation, but if they are not enumerated, there is but one stipulation.

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

No one can legally stipulate for something which is his, in the event that it will belong to him.

88. *The Same, On Plautius, Book VI.*

The default of the principal debtor also injures the surety, but if the surety should offer a slave, and the principal debtor is in default, and the slave should die, relief must be granted the surety. If, however, the surety should kill the slave, the principal debtor will be released, but an action based on the stipulation can be brought against the surety.

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

If I rent land to a tenant for five years, and, after three years have elapsed I stipulate as follows, "Do you promise all that you are obliged to pay, or do?" nothing more is embraced in this stipulation than what should be done at that time; for in making a stipulation nothing is included but what is already due. If, however, it should be added, "What you will be obliged to pay, or do," the obligation will have reference to the future.

90. *Pomponius, On Plautius, Book III.*

When we stipulate that if the principal is not paid, a penalty shall be due every month, instead of the legal interest, even though a judgment may -be obtained for the principal, the penalty will still continue to increase, because it is certain that the principal has not been paid.

91. *Paulus, On Plautius, Book XVII.*

If I stipulate for a slave, and he should die without anyone being in default, even if the promisor should kill him, legal proceedings may be instituted. Where, however, the promisor neglects him when he is ill, will he be liable? When we consider whether this is the case, where an action is brought to recover a slave, and he has been neglected by the person who has possession of him, the latter will be liable on the ground of negligence; just as where anyone who has promised to deliver the slave to whom the stipulation has reference is presumed to be negligent in doing something, and not for refraining from doing something.

The latter opinion should be approved, because he who promises to pay is responsible for payment, and not for the performance of some specific act.

(1) If, however, the property is in existence, but cannot be delivered, as, for instance, a tract of land which has become religious, or sacred, or a slave who has been manumitted, or even captured by the enemy, negligence is determined as follows: if the property belonged to the promisor at the time of the stipulation, or became his afterwards, and any of the occurrences above mentioned took place, he will still be liable. The same thing will occur if this happened through the agency of another, after the slave had been alienated by the promisor. Where, however, the slave belonged to someone else, and something of this kind occurred through the agency of another, the promisor will not be liable, because he did nothing, unless something of this kind took place after he delayed making payment. Julianus accepts this distinction.

Again, if a slave who belonged to the promisor was taken from him for the reason that he was to be free under a certain condition, he should be considered to be in the same position as if he had promised the slave of another, because the slave ceased to belong to him without any act on his part.

(2) The question is asked if, not being aware that he owed the slave, he should kill him, will he be liable? Julianus thinks that this is the case where one, not knowing that he was charged by a codicil to deliver a slave, manumits him.

(3) In the next place, let us consider the rule established by the ancients, that is to say, whenever the debtor is guilty of negligence, the obligation will continue to exist. How should this be understood? And, indeed, if the promisor acts in such a manner as to render himself unable to pay, the constitution becomes easy of comprehension. Where, however, he is only in default, a doubt may arise whether, if he should not afterwards delay, the former default will be disposed of. Celsus says, that he who is in default in delivering Stichus, whom he promised, can clear himself of the default by subsequently tendering the slave; for this is a question having reference to what is proper and equitable, and, in a case of this kind, pernicious errors are frequently, committed in relying too much on the authority of the science of the law. This opinion is probably correct, and is adopted by Julianus.

For when the question of damages arises, and the case of both parties is the same, why should not the position of him who holds the property be preferable to that of him who attempts to obtain it?

(4) Now let us see to what persons this constitution applies. There are two things to take into account: first, we must inquire what persons are responsible for the continuance of the obligation; and second, for whom they cause it to be continued. The principal debtor certainly perpetuates the obligation, but is there any doubt that the other debtors also perpetuate it? It is the opinion of Pomponius that they do, for why should a surety extinguish his obligation by

his own act? This opinion is correct, therefore the obligation is perpetuated both in their persons and in those of their successors, as well as in those of their accessories, that is to say, their sureties; for the reason that they have given their promise with reference to it under all circumstances.

(5) Let us see whether a son under paternal control, who made a promise by the order of his father, can prolong the obligation of the latter by killing the slave. Pomponius thinks that he can do so, because we understand the person who gives the order to be an accessory.

(6) The effect of this regulation is, that the slave can still be claimed, but it is held that a release may be granted, or a surety be accepted on account of the obligation. There is some doubt as to whether this obligation can be renewed, for the reason that we cannot stipulate for a slave who is not in existence, or for money which is not due. I think that a renewal can be made if it is agreed upon between the parties; which is also the opinion of Julianus.

92. *The Same, On Plautius, Book XVIII.*

If I stipulate as follows, "Do you promise that nothing will be done by you to prevent me, or my heir, from removing my vintage?" the action will also be granted to my heir.

93. *The Same, On Vitellius, Book III.*

If I stipulate as follows: "Do you promise that you will do nothing to prevent me from taking one of the slaves which you have?" I will be entitled to the choice.

94. *Marcellus, Digest, Book III.*

*A* man stipulated for wheat to be delivered to him. This is a question of fact, and not of law. Therefore, if he had a certain kind of wheat in his mind, that is to say, wheat of a certain quality, or of a certain quantity, this is considered to have been stated. Otherwise, if he intended to designate the kind of wheat and the amount, and did not do so, he is considered not to have stipulated for anything-, and hence the other party is not bound to deliver a single measure of wheat.

95. *The Same, Digest, Book V.*

Where anyone stipulates for the construction of a house, he only acquires the obligation when it is evident in what place he desired the house to be built, and if he is interested in having it built there.

96. *The Same, Digest, Book XII.*

Where anyone owes me a slave under the terms of a stipulation and he surprises him in the act of committing a crime, and kills him with impunity, a praetorian action cannot be brought against him.

97. *Celsus, Digest, Book XXVI.*

If I stipulate as follows, "Will you appear in court? And if you do not do so, will you deliver a centaur?" the stipulation will be the same as if I had merely promised to appear in court.

(1) I can legally stipulate with you as follows: "Do you promise that you will pay in the name of Titius?" For this is not similar to the stipulation that "Titius will give something," but under it I can bring an action, if I have any interest; and therefore if Titius is solvent, I can recover nothing under this stipulation, for what interest have I in inducing you to do something, while if you do not do it, I shall be equally sure of my money?

(2) "Do you promise to pay me ten *aurei,* if I marry you?" I think that, in this case, after proper cause has been shown, the action can be refused; still, there is not infrequently ground for a stipulation of this kind.

The same rule applies where a husband stipulates with his wife in this way, when there is no

reference to a dowry.

98. *Marcellus, Digest, Book XX.*

I think that property which belongs to me can be stipulated for under a condition, as I can stipulate for a right of way to a tract of land, although the land may not belong to me at the time. If, however, this should not be the case, and I stipulate for land belonging to another, under a condition, and the land afterwards becomes mine by a lucrative title, the stipulation is immediately annulled. If the owner of the land stipulates for a right of way under a condition, the stipulation will be annulled as soon as the land is alienated; and this is certainly the case in the opinion of those authorities who hold that obligations which have been legally contracted are extinguished, when the conditions under which they exist become such that they could not have been established under them.

.(1) The question arises when suit can be brought under the following stipulation: "Do you promise to prop up such-and-such a house?" It is not necessary to wait until the house falls down, for it is to the interest of the stipulator that it should be propped up, rather than that it should not be; still proceedings cannot properly be instituted, if sufficient time has not elapsed for the person to prop' it up who intends to do so.

99. *Celsus, Digest, Book XXXVIII.*

Whatever is required to render an obligation binding is understood to have been omitted, if it is not plainly expressed in words; and we almost always interpret it in favor of the promisor, because the stipulator was free to give a broader meaning to the terms; but, on the other hand, the promisor should not be heard if it is to his interest that the agreement should be considered to have reference to certain vessels, or to certain slaves.

(1) If I stipulate as follows, "Do you promise to pay if you do not ascend to the Capitol within two years?" I cannot legally bring suit before the expiration of the two years; for although these words are ambiguous, still they are understood to have this meaning, "If it is absolutely true that you did not ascend to the Capitol."

100. *Modestinus, Rules, Book Vill.*

A condition which has reference to the past, as well as to the present time, either annuls the obligation immediately, or does not, under any circumstances, defer its performance.

101. *The Same, On Prescriptions, Book IV.*

Persons who have arrived at the age of puberty can bind themselves under a stipulation without their curators.

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

Vendors furnished security against eviction to a purchaser to the extent of his interest, and they also specially promised that they would be responsible for all expenses which might be incurred by the purchaser, who was the stipulator, if the matter should come into court. After the death of the purchaser, one of the vendors brought suit, alleging that the price was due to him; and the heirs of the purchaser, who proved that the price had been paid, demanded, under the terms of the stipulation, that they should be reimbursed for the expenses incurred in defending the case. Modestinus gave it as his opinion that if the vendors promised to pay the expenses incurred in an action brought to determine the ownership of the property, such expenses could, by no means, be collected under the stipulation where one of the vendors sued to recover the price which had already been paid.

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

*A* freeman cannot be the object of a stipulation, for demand cannot be made for his delivery, nor can his appraised value be paid, any more than if a person should stipulate for a dead

slave, or for land in the hands of the enemy.

104. *Javolenus, On Cassius, Book XL*

Where a slave has agreed to pay a sum of money for his freedom, and has given a surety for that purpose, even though he may be manumitted by another person, the surety will, nevertheless, legally be bound, for the reason that the inquiry was not made to ascertain by whom he was manumitted, but merely to learn whether he has been manumitted.

105. *The Same, Epistles, Book II.*

I stipulated that either Damas or Eros should be given to me. When you gave me Damas, I was in default in receiving him. Damas is dead. Do you think that I am entitled to an action under the stipulation? The answer was, that according to the opinion of Mas-surius Sabinus, I think that you cannot bring suit under the stipulation; for he very properly held that if the debtor was not in default in paying what he owed, he would immediately be released from liability.

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

When anyone stipulates for one of several tracts of land, which bear the same name, and the said tract has no specified designation, he stipulates for something which is uncertain; that is to say, he stipulates for the tract of land which the promisor may choose to give him. The will of the promisor, however, is in abeyance, .until what has been promised is delivered.

107. *The Same, Epistles, Book Vill.*

I ask whether you think the following stipulation is dishonorable, or not. A natural father appointed, as his heir, his son, whom Titius had adopted under the condition that he should be released from paternal control. His adoptive father refused to emancipate him, unless he was willing to stipulate for the payment of a sum of money by a third party in consideration of his manumission. After his emanici-pation, the son entered upon the estate, and then the father, under the terms of the stipulation above mentioned, demanded the money. The answer was, I do not think that the ground of this stipulation is dishonorable, as otherwise he would not have emancipated his son. Nor can the terms of the stipulation be considered unjust, if the adoptive father desired to obtain some advantage, on account of which his son would have more esteem for him after his emancipation.

108. *The Same, Epistles, Book X.*

I stipulated with Titius as follows, "If some woman marries me, do you promise to give me ten *aurei* by way of dowry?" The question arose whether such a stipulation was valid. The answer was that if the dowry was promised to me, stipulating as follows: "Do you promise to pay me ten *aurei* by way of dowry, no matter what woman I marry?" there is no reason why the money should not be due, if the condition was complied with. For when a condition dependent upon the act of some person who is uncertain can create an obligation, as, for instance, "Do you promise to pay ten *aurei* if anyone ascends to the Capitol?" or, "If anyone demands ten *aurei* of me, do you promise to pay as many?" there is no reason why the same answer should not be given as in the case where a dowry was promised.

(1) No promise is valid which depends upon the will of the person who makes it.

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

If I stipulate as follows, "Will you pay me ten, or fifteen *aurei?"* ten will be due. Again if I stipulate as follows, "Will you pay after one, or two years?" the money will be due after two years; because in stipulations, the smallest amount of money, and the longest period of time are considered to be inserted in the obligation.

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

If I stipulate for ten *aurei* for myself and Titius, when I am not under his control, ten *aurei* will not be due to me, but only five, as the other half will be deducted; for when I have improperly stipulated for the benefit of a stranger my share will not be increased to that extent.

(1) If I stipulate with you as follows, "Do you promise to give me any women's clothing which belongs to you ?" the intention of the stipulator rather than that of the promisor should be taken into account, and attention should be paid to whatever was in existence, and not to what the promisor had in his mind at the time. Therefore, if the promisor was accustomed to wear a woman's garment, it will still be due.

111. *The Same, On Quintus Mucius, Book V.*

If I stipulate that you shall do nothing to prevent me from making use of a certain house, and you do not prevent me, but prevent my wife from doing so; or, on the other hand, if my wife should make the stipulation, and you should prevent me from making use of the house, does the stipulation become operative? These words should be understood in their broadest signification; for even if I stipulate that you shall do nothing to prevent me from making use of any kind of a right of way, and you do not prevent me from doing so, but interfere with another who enters in my name, it must be held that the stipulation becomes operative.

112. *The Same, On Quintus Mucius, Book XV.*

If anyone stipulates for "Stichus or Pamphilus, whichever one he pleases," he can demand either one that he selects, and he alone will be included in the obligation. If, however, it is asked whether he can change his mind, and demand the other, the terms of the stipulation must be examined in order to ascertain whether its terms are expressed as follows: "The one whom I would have chosen," or "The one whom I may choose." If the first of these was employed, the stipulator cannot change his mind after he has once made his selection ; but if the words admit of discussion, and are, "The one whom I may choose," he is at liberty to change his mind until he has made his final decision.

(1) If anyone stipulates as follows, "Will you give me security for a hundred *aurei?"* and he gives a surety for this amount; Proculus

says that the interest of the stipulator is always considered in the agreement for security, as sometimes this extends to the entire principal, as, for instance, where the promisor is not solvent, and sometimes to less, where the debtor is only partly solvent; and again it amounts to nothing, if the debtor is so wealthy that we have no interest in requiring security from him; but in estimating the solvency of the persons, their integrity, rather than the value of their property, should be taken into consideration.

113. *Proculus, Epistles, Book II.*

When I stipulate for myself as follows: "Proculus, if the work is not completed, as I desire it to be, before the *Kalends* of June, do you promise to pay such-and-such a sum by way of penalty?" and I extend the time; do you think that it may be said that the work has not been done, as I wished it to be, before the *Kalends* of June, when I, myself, voluntarily gave more time for its completion?

Proculus replied that it is not without reason that a distinction should be made whether the promisor was in default in not finishing ' the work before the *Kalends* of June, as was agreed upon in the stipulation; or, whether, as the work could not be completed before that date, the stipulator extended the time to the *Kalends* of August. For if the stipulator extended the time when the work could not be completed before the *Kalends* of June, I think that the penalty would attach; for it makes no difference if some time had passed before the *Kalends* of June, during which the stipulator did not desire that the work should be finished before that date; that is to say, that he did not expect something to be done which could not be done.

Or, if this opinion is incorrect, even if the stipulator should die before the *Kalends* of June, the penalty will not be incurred; as being dead, he could not signify his wishes, and some time would remain after his death for the completion of the work. And I am almost inclined to believe that the penalty would be incurred, even if enough time to complete the work was not left before the *Kalends* of June.

(1) When anyone sells something, and promises to furnish sureties to the purchaser, and guarantees the property sold to be free from encumbrance, and the purchaser desires the property to be free from all liens, and he who promised that it should be under the stipulation is in default; I ask, what is the law? Proculus answered that the vendor will be responsible to the extent of the plaintiff's interest, in accordance with the amount of damages assessed in court.

114. *Ulpianus, On Sabinus, Book XVII.*

If I stipulate for the transfer of a specified tract of land, upon a certain day, and the promisor is responsible for it not having been transferred on that day, I can recover damages to the amount of my interest in not having the delay take place.

115. *Papinianus, Questions, Book II.*

I stipulated as follows: "Do you promise to appear in a certain place, and if you do not do so, to pay fifty *aurei?"* If, through mistake, the time was omitted in the stipulation, when it was agreed that you should appear on a certain day, the stipulation will be imperfect. It is just the same as if something which could be weighed, counted, or measured had been stipulated for by me, without adding the weight, amount, or measure; or where a house was to be built, and the place was not mentioned; or a tract of land was conveyed, without giving its description.

If, however, it was understood from the beginning that you might appear on any day whatsoever, and, if you did not do so, that you should pay a specified sum of money, this stipulation would be valid, just as any other made under a condition, and it would not become operative before it was established that the person who made the promise could not appear.

(1) If, however, I should stipulate as follows, "Do you promise to pay a hundred *aurei,* if you do not ascend to the Capitol, or go to Alexandria?" the stipulation does not immediately become operative, even though you may be able to ascend to the Capitol, or to go to Alexandria; but only when it becomes certain that you can neither ascend to the Capitol, or go to Alexandria.

(2) Again, if anyone stipulates as follows, "Do you promise to pay a hundred *aurei* if you do not deliver Pamphilus?" Pegasus says that the stipulation does not take effect before it becomes impossible for Pamphilus to be delivered. Sabinus, however, thinks that, according to the intention of the contracting parties, an action can be brought after the slave could have been delivered; but that proceedings cannot be begun under the stipulation, as long as it was not the fault of the promisor that he was not delivered. He sustains this opinion by giving the example of a legacy left for maintenance. For Mucius stated that if an heir was able to furnish maintenance, and did not do so, he would immediately become liable for the money bequeathed. This rule was adopted because of its utility, as well as on account of the wishes of the deceased, and the nature of the thing itself.

Hence the opinion of Sabinus may be adopted, if the stipulation does not begin with a condition, for instance, "Do you promise to pay such-and-such a sum, if you do not deliver Pamphilus?" But what if the stipulation was expressed as follows, "Do you promise to deliver Pamphilus, and if you do not do so, do you promise to pay such-and-such a sum?" This undoubtedly would be true, if it was proved to be the intention that if the slave was not delivered, both the slave and the money would be due. If, however, it was promised that the money alone would be due if the slave was not delivered, the same opinion could be

maintained; since it was established that the intention of the parties was that the slave should be delivered, or the money paid.

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

If, after having stipulated for ten *aurei* from Titius, you stipulate with Msevius for all that you cannot obtain from Titius, there is no doubt that Msevius can be compelled to assume responsibility for the payment of the entire amount. If, however, you bring an action against Titius for the ten *aurei,* Msevius will not be released from liability until Titius has paid the judgment.

Paulus says that Maevius and Titius are not liable under the same obligation, but that Msevius is liable on condition that you cannot collect the amount from Titius. Therefore, after Titius has been sued, Msevius will not be discharged from liability, because it is uncertain whether he will owe the money or not; and if Titius should pay, Msevius will not be released, as he was not liable; for the condition upon which the stipulation was dependent has failed; and Msevius cannot properly be sued, while the condition of the stipulation is still pending, for nothing legally can be demanded of him until Titius has been exhausted.

117. *The Same, Questions, Book XII.*

If, after having stipulated for a hundred slaves to be chosen by myself and my heir, I leave two heirs before I make my choice, the stipulation will be divided by the number. It will, however, be different if the heir should succeed after the slaves have been chosen.

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

A man who is free and who is serving me in good faith as a slave makes a promise to me as stipulator; and this stipulation is almost entirely valid in every respect, even though he may promise me something which is my own property. For what else can be said to show that a freeman is not liable? And still, if I promise the same person as a stipulator, under similar circumstances, I will be liable. For how will he be entitled to an action against me which he would have acquired for my benefit, if he had stipulated with a third party? Therefore, in this respect, he should be compared to a slave in whom someone enjoys the usufruct, or to the slave of another who is serving in good faith. But when a slave promises the usufructuary, or the slave of another who is serving a *bona fide* purchaser in good faith, with reference to property which belongs to either of them, an action *De peculia* will not be granted against the master; because, in cases of this kind, such persons are considered as masters.

(1) "Do you promise to pay ten *aurei* to-day?" I said that the money could be demanded on this very day, and that the claimant could not be held to have proceeded too soon, even if the day of the stipulation had not ended, which would be the law under other circumstances. For what ought not to be demanded within a certain time cannot be paid within that time; and in the case stated the day is considered to be inserted, not for the purpose of deferring the action, but in order to show that it can be begun at once.

(2) "Do you promise to pay ten *aurei* to me, or to Titius, whichever one I may choose?" So far as payment to me is concerned, the. stipulation is certain, but with reference to payment to him it is uncertain. For suppose that it is to my interest that payment should be made to Titius, rather than to myself, as I promised a penalty if payment is not made to Titius?

119. *The Same, Questions, Book XXXVI.*

The clause for the prevention of fraud which is placed at the end of a stipulation does not relate to those parts of the agreement concerning which provision is expressly made.

120. *The Same, Questions, Book XXXVII.*

If I stipulate as follows, "Do you promise to pay this sum of a hundred *aurei?"* although the clause, "Provided there are a hundred *aurei,"* is understood, this addition does not establish a

condition, for if there are not a hundred *aurei,* the stipulation is void; and it has been decided that a clause which does not refer to the future, but to the present time, is not conditional, even though the contracting parties may be ignorant of the truth of the matter.

121. *The Same, Opinions, Book XL*

Where both parties to the stipulation agree to the provision that no fraud has been, or shall be committed in the transaction, suit for an uncertain amount can be brought, in order that the stipulation may be expressed in a more proper manner.

(1) A woman who was living in the same house with a man with the intention of marrying him stipulated with him for the payment of two hundred *aurei,* if, during the time of the marriage, he resumed his custom of keeping a concubine. I gave it as my opinion that there was no reason why the woman could not recover the money under the stipulation, if the condition was fulfilled, as the agreement was in accordance with good morals.

(2) A man, having been banished to an island, made a promise, the stipulation being expressed as follows, "Do you promise to pay when you die?" the stipulation will not become operative unless the promisor should die.

(3) A stipulation with reference to fraud will bind the heir of him who makes the promise by the mere act of the latter; just as is the case in other contracts, for instance, those of mandate and deposit.

122. *Scstvola, Digest, Book XXVIII.*

A man who borrowed money at Rome which was to be paid within three months in a distant province promised the stipulator to pay it there; and, a few days afterwards, told his creditor in the presence of witnesses that he was ready to pay the money at Rome, if the amount which he had paid to him as interest was deducted. The question arose if, after having tendered the entire amount to which he was liable under the stipulation, it could be demanded of him, when it became due, in the place in which he promised to pay it. The answer was that the stipulator could demand it on the day when it became due, and at the place where he agreed it should be paid.

(1) Callimachus borrowed money from Stichus, the slave of Seius, in the province of Syria, for the purpose of being used in maritime trade from the city of Berytus to Brindisi. The loan was for the two hundred days required for the voyage, was secured by the pledge and hypothecation of merchandise purchased at Berytus, to be taken to Brindisi, and also included that which was to be purchased at Brindisi, and conveyed to Berytus; and it was agreed between the parties that when Callimachus arrived at Brindisi, he should depart from there by sea, before the next *Ides* of September, with the other merchandise which he had purchased and placed on board the ship; or if, before the time above mentioned, he did not purchase the merchandise or leave the said city, that he would immediately repay the entire amount, just as if the voyage had been completed; and that he would pay to those demanding the money all the expenses incurred in taking it to Rome; and Callimachus promised Stichus, the slave of Lucius Titius, as stipulator, to pay and perform all this faithfully. And when, in accordance with the •agreement, before the above-mentioned *ides,* the merchandise had been placed on board the ship, Callimachus embarked with Eros, the fellow-slave of Stichus, with the intention of returning to the province of Syria; and the ship having been lost, and Callimachus, as had been agreed, having placed the merchandise on the ship leaving Berytus at the time when he ought to have repaid the money to be taken to Rome, the question arose whether he could profit by the consent of Eros, who had been with him, and to whom his master had neither permitted, nor ordered anything more to be done with reference to the money, after the day which was agreed upon for its payment, than to take it to Rome as soon as he had received it; and whether Callimachus would still be liable in an action on the stipulation for the delivery of the money to the master of Stichus. The answer was that,

according to the facts stated, he would be liable.

I also ask, as Callimachus had sailed after the day above mentioned, with the consent of Eros, the said slave, whether the latter could deprive his master of the right of action after it once had been acquired by him. The answer was that he could not do so, but that there would be ground for an exception, if it had been left to the judgment of the slave whether the money should be paid at any time, and at any place that he might select.

(2) Flavius Hermes donated the slave Stichus, in order that he might be manumitted, and made the following stipulation with reference to him: "If the said slave, Stichus, whom I have this day delivered to you as a donation for the purpose of his manumission, should not be manumitted, and set free in proper form by you and your heir (provided this is not prevented by some fraud on my part), Flavius Hermes has stipulated for fifty *aurei* to be paid by way of penalty, and Claudius has promised to pay this sum." I asked whether Flavius Hermes can bring an action against Claudius for the freedom of Stichus. The answer was that there is nothing in the facts stated to prevent him from doing so.

I also ask, if the heir of Flavius Hermes wished to collect the penalty from the heir of Claudius, whether the latter could give Stichus his freedom, in order to be released from the penalty. The answer was that he could. I also ask, if the heir of Flavius Hermes did not wish to bring suit against the heir of Claudius for the reason above stated, whether the freedom to which Stichus was entitled in accordance with the agreement entered into by Hermes and Claudius, as evidenced by the above-mentioned stipulation, should still be granted by the heir of Claudius. The answer was that it ought to be done.

(3) Certain co-heirs, having divided the lands of an estate, left one tract to be held in common, under the condition that if anyone wished to alienate his share of the same he should sell it either to his co-heirs or the successor of the latter, for the sum of a hundred and twenty-five *aurei.* The parties mutually stipulated for the payment of a hundred *aurei* by way of penalty, if any of them should violate this contract. A woman who was one of the co-heirs, having frequently notified the guardians of the children of her co-heir, in the presence of witnesses, and requested them to either purchase or sell the said tract of land, in accordance with the agreement, and the guardians having done nothing, I ask whether, if the woman should sell the land to a stranger, the penalty of a hundred *aurei* could be collected from her. The answer was that, in accordance with the facts stated, she could, under such circumstances, interpose an exception on the ground of bad faith.

(4) Agerius, a son under paternal control, promised the slave of Publius Msevius, as the stipulator, that he would pay him whatever it might be decided that his father owed Publius Msevius. The question arose how much he would owe, his father having died before the amount was ascertained; and, if suit was brought against his heir, or some other successor, and a decision rendered with respect to the indebtedness, whether Agerius would be liable. The answer was, that if the condition was not fulfilled, the stipulation would not become operative.

(5) Seia, the heir of a single guardian, having made an agreement based on a settlement with the heir of a female ward, paid the greater part of the debt, and gave security for the remainder; the said heir, however, immediately refused to abide by the agreement, brought an action on guardianship, and, having lost his case, appealed to a competent judge, and afterwards from him to the Emperor; and this appeal was decided to have been taken on insufficient grounds. As the heir of the ward was in default in receiving the money mentioned in the stipulation from the heir of the guardian, having never even demanded it, the question arose whether interest would now be due from the heir of the guardian. The answer was, that if Seia had not been in default in tendering the money provided for by the stipulation, interest would not legally be due.

(6) Two brothers divided an estate between them, and mutually obligated-themselves to do nothing against the division, and if either of them violated the agreement, that he would pay a penalty to the

other. After the death of one of them, the survivor brought an action for the estate against his heirs, alleging that it was due to him under the terms of a trust bequeathed by his father; and judgment was rendered against him on the ground that he had made a compromise with reference to the matter. The question arose whether the penalty was incurred. The answer was that, in accordance with the facts stated, the penalty would be due.

## PART III.

## CONCERNING VERBAL OBLIGATIONS.

123. *Papinianus, Definitions, Book I.*

A stipulation entered into concerning a crime which has been Or is to be committed, is void from the beginning.

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

"Do you promise to build a house in such-and-such a place within two years?" The stipulation will not become operative before the end of two years, even though the person making the promise should not build it, and sufficient time does not remain in which it can be completed; for the provisions of the stipulation, the time of which was fixed in the beginning, cannot be changed by something which may afterwards occur, and this was inserted in the agreement for the purpose of compelling someone to appear in court; that is to say, the stipulation will not become operative before the prescribed date, even if it is certain that there is not sufficient time remaining to comply with the contract.

125. *Paulus, Questions, Book II.*

When we stipulate as follows, "Whatever you must give, or pay, or do," nothing more is included in such a stipulation than what is due at the present time, for it does not provide for anything else.

126. *The Same, Questions, Book HI.*

Where I stipulate as follows, "If Titius should become Consul, do you then promise from that day to pay ten *aurei* every year?" If the condition is fulfilled after three years, thirty *aurei* can be demanded.

(1) Titius stipulated with Msevius for a tract of land, with the reservation of its usufruct, and also for the usufruct of the same land. There are two stipulations, and there is less in the usufruct which anyone promises by itself than there is in that which accompanies the ownership. Finally, if the promisor should give the usufruct, and the stipulator should lose it by non-user, and afterwards convey the land with the reservation of the usufruct, he will be released from liability.

The same thing, however, does not happen in the case of one who promises the land without any reservation, and conveys the usufruct, and afterwards, having lost the usufruct, conveys the ownership of the land without it; for, in the first instance, he will be released by the transfer of the usufruct, but, in the second, he will be discharged from no part of the obligation, unless he conveys the land, with all the rights attaching thereto, to the stipulator.

(2) "I, Chrysogonus, the slave of Flavius Candidus, and his agent, have stated in writing, in the presence of my master, who has also subscribed and sealed this instrument, that, having received a thousand *denarii* as a loan from Julius Zosa, the agent of Julius Quin-tillianus, who is absent, the said Zosa, freedman and agent of the said Quintillianus has stipulated that the said money shall be paid to Quintillianus, or his heir, entitled to the same, upon the next

*Kalends* of November; and my master, Candidus, has promised, and Julius Zosa has stipulated, that if the money is not paid on the day aforesaid, interest shall be due at the rate of eight *denarii* for the time during which the sum remains unpaid. Flavius Candidus, my master, has given this promise, and has signed this instrument."

I gave it as my opinion that we cannot acquire any obligation by means of any free person who is not subject to our authority, or does not serve us in good faith as a slave. It is clear that if a freeman pays a sum of money in our name, which either belongs to him, or to us, in order that it may be paid to us, he acquires for us the obligation of a loan; but what a freedman stipulates to be paid to his patron is void, so that he does not benefit a person who is absent and is intended to be made the principal creditor, even to the extent of receiving payment.

It remains to be ascertained whether, after the money has been counted, the contracting party can collect the sum which was lent; for whenever we loan money, and stipulate for the same money, two obligations are not created, but only a single verbal one. It is clear that if the coins were counted first, and the stipulation followed, it cannot be said that the natural obligation was departed from. .Where the stipulation follows, and interest is agreed upon without mentioning the name of the person entitled to it, this has not the same defect; but it must not be considered to the detriment of the patron to hold that the freedman has stipulated for interest for the benefit of him who is entitled to the principal; and hence the stipulation for interest will profit the freedman, but he will be compelled to surrender it to his patron; for, as a rule, in stipulations the words from which the obligation arises should be considered. Rarely does the intention appear to include a time or condition, and it never includes a person, unless this is expressly stated.

(3) If I stipulate for you to appear in court, and, if you do not do so, that you shall give something which is impossible for the promisor-to furnish; the second stipulation is omitted, and the first one remains valid, and it will be just the same as if I had merely stipulated for you to appear in court.

127. *Scsevola, Questions, Book V.*

If a ward, without the authority of his guardian, promises Stichus to give a surety, and the slave dies after the ward has been in default, the surety will not be liable on this account; for no default can be understood to take place where no right to make a demand exists. The surety, however, will be liable to the extent that he can be sued during the lifetime of the slave, or afterwards, if he himself should be in default.

128. *Paulus, Questions, Book X.*

When there are two contracting parties, and one of them stipulates for something that is valid, and the other for something that is void, payment cannot properly be made to him to whom the promisor is not liable; because payment is not made to him in the name of another, but on account of an obligation of his own which is of no force or effect. For the same reason, where anyone stipulates for Stichus or Pamphilus, and the obligation is only valid with reference to one of them, because the other belongs to the stipulator, and even if he should cease to belong to him, delivery cannot legally be made, because both the objects of the stipulation have reference to the obligation and not to payment.

129. *Scsevola, Questions, Book XII.*

Where anyone stipulates as follows, "Will you pay ten *aurei* if a ship arrives, and Titius becomes Consul?" the money will not be due unless both of these events take place. The same rule applies to the opposite case, "Do you promise if a ship does not arrive, and Titius does not become Consul," for it is essential that neither of these things should occur. The following written agreement resembles this, namely, "If a vessel does not arrive, and Titius is not made Consul." When, however, the stipulation is in the following terms, "Will you pay if a ship

arrives, or Titius becomes Consul?" it is sufficient for one of these events to take place. On the other hand, if it is expressed as follows, "Will you pay if a ship does not arrive, or Titius does not become Consul?" it will be sufficient if only one of these things does not occur.

130. *Paulus, Questions, Book XV.*

When it is said that a father legally stipulates for his son just as he stipulates for himself, this is true so far as matters which can be acquired by the father under his right of paternal authority are concerned. Otherwise, the stipulation will be yoid if the act has reference to the son personally; as, for instance, if it provided that he should be permitted to hold property, or to enjoy a right of way. On the other hand, the son, by stipulating for his father to enjoy a right of way, acquires it for him; nay more, he acquires for his father what he himself cannot individually obtain.

131. *Scsevola, Questions, Book XIII.*

Julianus says, "If I stipulate that nothing shall be done either by you or by Titius, your heir, to prevent me from using the right of way," not only Titius will be liable, if he does anything to prevent this, but his co-heirs as well.

(1) A person who stipulates that a tract of land shall be conveyed to him, or Titius, even though the land may be conveyed to Titius, can still claim it, in order that he may be guaranteed against eviction; for he is interested, as he can recover the land from Titius in an action on mandate. If, however, he merely interposed Titius for the purpose of making a donation, it can be said that the principal debtor is at once released by its delivery.

132. *Paulus, Questions, Book XV.*

Where anyone undertakes the care of the son of another, and promises the person who places him in his charge that he will pay a certain sum of money if he should treat him otherwise than as a son, and, after he had driven him from the house, or, at the time of his death, left him nothing by his will, I ask if the stipulation will become operative, and whether it makes any difference if the youth referred to is the son, the foster-child, or a relative of the stipulator. I ask, besides, if anyone should legally give his son in adoption, and the stipulation should have been made as above mentioned, and his adoptive father should disinherit or emancipate him, whether the stipulation will become operative? I answered that the stipulation is valid in both instances. Therefore, if anything is done in violation of the agreement, the stipulation will take effect.

But in the case in which there was a lawful adoption, let us first consider whether suit can be brought if the individual disinherited or emancipated is an adopted son, for a father is accustomed to do these things with reference to his son, and hence he did not treat him otherwise than he might have done his own son. Therefore, he who was disinherited can bring an action on the ground of inofficiousness. But what shall we say if he deserved to be disinherited? It is clear that an emancipated son is not entitled to this remedy, hence the adoptive father should agree to pay a specified sum if he emancipated, or disinherited him. Still, in this case, if the stipulation became operative, it might be asked whether the disinherited son should be permitted to allege that the act was inofficious; especially if he was the natural heir of his father, and if he should lose his case, whether an action under the stipulation could be refused him. If, however, it should not be refused the stipulator, and the son should lose his case, he ought not to be denied the right to collect the money which was due.

With reference to one who did not adopt him, I do not see how the following clause, "If he should treat him otherwise than as a son," must be understood. Shall we, in this instance, require disinheritance or emancipation, acts which cannot be performed by a stranger? If he who adopted the son in accordance with law does nothing contrary to the terms of the

stipulation, when he makes use of his right as a father, he speaks to no purpose when he refers to one who does not do this. Still, it may be said that the stipulation becomes operative.

(1) Where a son under paternal control stipulates as follows, "Will you be responsible for all the money which I shall lend to Titius?" and, after having been emancipated, he lends him money, his surety will owe nothing to the father, because the principal debtor is not liable to him.

133. *Scaevola, Questions, Book XIII.*

If I stipulate as follows, "Do you promise that force will not be employed by you, or by your heir?" and I bring suit against you because you used violence against me, any act of this kind committed by the heir will still properly remain subject to the terms of the stipulation; for it can take effect, even if force is subsequently employed by the heir, as reference is not merely made to a single act of violence. For, just as the person of the heir is included, so also are any act or acts of violence committed by him, in order that judgment may be rendered against him to the amount of the other party's interest. Or, if we wish the stipulation to be as follows, "Do you promise that nothing shall be done by you or by your heir?" so that it may relate to only the first act of violence committed, and if this occurs, the stipulation will not take effect a second time, on account of any act of the heir. Therefore, if an action based on this act of violence is brought, nothing further can be done under the stipulation. This is not true.

134. *Paulus, Opinions, Book XV.*

Titia, who had a son by a former husband, married Gaius Seius, who had a daughter; and, at the time of the marriage, they made an agreement that the daughter of Gaius Seius should be betrothed to the son of Titia, and an instrument was drawn up to this effect with a penalty added, if either of the parties placed any impediment in the way of the marriage. Gaius Seius afterwards died during his marriage, and his daughter refused to marry her betrothed. I ask whether the heirs of Gaius Seius are liable under the stipulation. The answer was that, in accordance with the facts stated, as in accordance with good morals, proceedings could not be instituted under the stipulation, an exception on the ground of bad faith might be pleaded against the party bringing the suit, because it is considered dishonorable for marriages which are to take place in the future, or where they already have been contracted, to be hampered by the imposition of penalties.

(1) The same authority gave it as his opinion that, in general, matters which are inserted in the preliminaries are also understood to have been repeated in the stipulation, so that the agreement does not become void on account of a repetition of this kind.

(2) The same authority held that Septicius, having provided for the payment of money by instruments in writing as well as for interest at six per cent, which was deposited with Sempronius, and this transaction having taken place between persons who were present, it should be understood that, even so far as Lucius Titius was concerned, the provisions of the stipulation had already been accepted.

(3) The same authority was of the opinion that, where several different contracts had been entered into, and a single stipulation was subsequently made with reference to all of them, even though there was but one interrogatory, and one answer, still it was the same as if each agreement constituted a separate stipulation.

135. *Scaevola, Opinions, Book V.*

If anyone should make the following promise, "I will pay you ten *aurei* upon the day that you demand them, and interest on the same every thirty days," I ask if the interest will be due from the date of the stipulation, or from the time when the principal was demanded. The answer was that, according to the facts stated, the interest will be due from the day of the stipulation, unless it is clearly proved that the intention was otherwise.

(1) The question was also asked if I should pay the money as soon as it was demanded. The answer was that, according to the facts stated, it began to be due from the day on which the stipulation was made.

(2) Seia entered into a contract with Lucius Titius that, as he had directed her to buy a garden for him, when she had received the entire price of the same with interest, she would transfer the ownership of the garden to him. It was agreed between them immediately afterwards that he should pay her the entire amount before the first *Kalends* of April, and receive the garden. As all the purchase-money with interest was not paid by Lucius Titius to Seia before the *Kalends* of April, but he was ready to pay the balance, together with the interest, within a reasonable time, and if Seia refused to accept it, it was not his fault that the balance was not paid, the question arises, if Lucius Titius is still ready to pay the entire amount to Seia, whether he can bring suit under the stipulation. The answer was that he could, if he tendered the money not long afterwards, and if the woman did not suffer any damage on account of the delay; all of which should be referred to the decision of the court.

(3) Titius stated in an instrument in writing that a slave had been given and delivered to him by Seia, under the condition that he should not come into the hands of his brother, his son, his wife, or his brother-in-law. Seia having stipulated for this, Titius agreed to it, and after the lapse of two years died, leaving two heirs, Seia and his brother, to whom it had expressly been provided that the slave should not belong. The question arose whether Seia could bring suit under the stipulation against this brother, who was her co-heir. The answer was that she could do so, to the extent of her interest.

(4) A daughter, who instituted proceedings against a will as being inofficious, and afterwards compromised with the heirs by means of a stipulation, in which was inserted the clause relating to fraud, brought an action before the Prefect attacking the will as forged, but was unable to prove this. I ask whether she could be sued under the clause providing against fraud. I answered that whatever was done afterwards had nothing to do with the stipulation.

136. *Paulus, Opinions, Book V.*

Where the property with reference to which the stipulation is made has different names of the same meaning, the validity of the obligation is not affected, if one party uses one name and the other another.

(1) If anyone should stipulate for a right of way to enable him to reach his land, and he afterwards, before the servitude is established, alienates the land or a part of the same, the stipulation will be annulled.

137. *Venuleius, Stipulations, Book I.*

The act of the stipulator and the promisor should be continuous, in such a way, however, that any short interval may be permitted to intervene, and the stipulator may be answered with very little delay. If, however, after the interrogatory has been put, something else should be done, the stipulation will be void; even though the promisor answered upon the same day.

(1) If I stipulate for a slave, and I have one slave in my mind, and you have another, the transaction will be void; for a stipulation is perfected by the consent of both parties.

(2) When I stipulate as follows, "Do you promise to pay at Ephesus?" a certain time is implied. The question arises, what time should be understood? The better opinion is to refer the entire matter to a court, that is to say to an arbiter, who will estimate how much time the diligent head of a household would require to be able to accomplish what he had promised to do; so that where anyone agreed to pay at Ephesus, he would not be compelled to travel at great speed day and night, and continue his journey regardless of every kind of weather; nor should he travel so leisurely as to appear worthy of blame; but the season, as well as the age, sex, and condition of health of the promisor, should be taken into account, in order that he

may act so as to arrive promptly, that is to say, within the time that most men of his rank would ordinarily consume in making the journey. This having elapsed, even if he remained at Rome, he would not be able to pay the money at Ephesus; still he could properly be sued, either because it was his own fault that he did not make payment at Ephesus, or for the reason that he could pay it there by another, or indeed could pay it anywhere. For anything which is due at a certain time can be paid before that time, although it cannot be demanded. If, however, having used the post, or having had an unusually favorable sea-voyage, he should arrive at Ephesus sooner than anyone else ordinarily could have done, he will immediately become liable, because when anything is determined by time, or by the performance of an act, there is no longer ground for conjecture.

(3) Again, where anyone promises to build a house, there is no need of searching for workmen everywhere, and hastening to procure the largest number possible; nor, on the other hand, should the promisor be satisfied with only one or two, but a moderate number should be obtained in accordance with the conduct of a diligent builder, the time and place also being taken into consideration.

Likewise, if the work is not begun, that only will be estimated which could have been completed during the interval, and if, after the time has passed which would have been required to finish the house, it is afterwards constructed, the contractor will be released from liability, just as a person will be released who promises to give himself up, if he does so at any time afterwards.

(4) It should be considered whether someone who has promised to pay a hundred *aurei* becomes liable immediately, or whether the obligation remains in abeyance until he can collect the money. But what if he has no money at home, and cannot find his creditor ? These matters, however, differ from natural obstacles, and involve the ability to pay. This ability, however, is represented by the ease or difficulty of the person, and does not refer to what is promised; otherwise, if anyone should agree to deliver Stichus, we ascertain where Stichus is; or if it makes much difference when delivery is to be made at Ephesus, or where the person, being at Rome, promises to deliver something which is at Ephesus; for this also has reference to the ability to give, because there is something in common in the payment of the money, and the delivery of the slave, and that is, that the promisor cannot immediately do either. And, generally speaking, the cause of the difficulty has reference to the inconvenience of the promisor, and not to interference by the stipulator; lest it might be alleged that he who has promised to give a slave belonging to another cannot do so because his master is unwilling to sell him.

(5) If I stipulate with someone who cannot do what is possible for another to accomplish, Sabinus says that the obligation is legally incurred.

(6) When anyone stipulates under the following condition: "If Titius should sell a sacred or religious place, or a market, or a temple," or anything of this kind, which has been perpetually set apart for the use of the public, and the condition cannot, under any circumstances, legally be complied with, or if the promisor cannot do what is agreed upon, the stipulation will be of no force or effect, just as if a condition which was impossible by nature had been inserted into it.

Nor does it make any difference if the law can be changed, and what is now impossible may become possible hereafter, for the stipulation should be interpreted, not according to the law of the future, but according to that of the present time.

(7) When we stipulate for something to be done, Labeo says that it is customary, and more advisable, for a penal clause to be added, as follows: "If this is not done in this way." But when we stipulate against something being done, we provide as follows, "If anything contrary to this should be done." And when we stipulate conjointly, that some things shall be done, and

others shall not, the following provision should be inserted, namely, "If you do not do this, or if you do anything contrary to this."

(8) Moreover, it should be remembered that what we stipulate shall be given cannot be acquired by only one of our heirs, but must be acquired by all of them. But when we stipulate that something shall be done, only one of them can legally be included.

138. *The Same, Stipulations, Book IV.*

When anyone stipulates for something to be given to him on certain market-days, Sabinus says that he can demand it after the first day. Proculus, however, and other authorities of the rival school, think that it can be demanded as long as the smallest part of the market day specified remains. I agree with Proculus.

(1) When I stipulate absolutely, as follows, "Do you promise to give this, or that?" you can change your mind with reference to what you have to give, as often as you please; because there is a difference between an intention which is expressed, and one which is implied.

139. *The Same, Stipulations, Book VI.*

When we attempt to obtain anything by virtue of a double stipulation, the heirs of the vendor should all be sued for the entire amount, and all of them should defend the case; and if one of them fails to do so, it will be of no advantage to the others to make a defence, because the sale must be defended in its entirety, as its nature is indivisible. Where, however, one of them is in default, all are considered to be so; and therefore all of them will be liable, and each one will be required to pay in proportion to his share of the estate.

140. *Paulus, On Neratius, Book III.*

After several things were proposed, the following stipulation was agreed to, "Do you promise that everything above mentioned shall be given?" The better opinion is that there are as many stipulations as there are things.

(1) With reference to the following stipulation, "Do you promise to pay this money on the day appointed in one, two, and three years?" a diversity of opinion existed among the ancients.

Paulus: I hold that, in this instance, there are three stipulations for three different sums of money.

(2) Although it is established that an obligation is extinguished if the conditions are such that it cannot begin, this is not true in all cases. For instance, a partner cannot stipulate for a right of way of any kind for the benefit of land owned in common; and still, if he who stipulated should leave two heirs, the stipulation will not be extinguished. Again, a servitude cannot be acquired by a few of the proprietors, but what is acquired can be preserved for the benefit of the -joint ownership. This occurs where a part of the servient estate, or of that to which the servitude is due, becomes the property of another owner.

141. *Gaius, On Oral Obligations.*

If a slave, or a son under paternal control, stipulates as follows, "Do you promise to give this article or that, whichever I may wish?" neither the father nor the master, but only the son or the slave, can decide as to the selection of one of the articles.

(1) If a stranger personally is included in the stipulation, for instance, as follows, "Whichever one Titius may choose," the stipulator has no right to demand either of the articles, unless Titius has selected it.

(2) Although a ward can legally stipulate from the moment when he can speak for himself, still, if he is under the control of his father, he will not be liable, unless with his authority; but a child who has arrived at puberty, and is under paternal control, is usually liable just as if he were the head of a household. What we have remarked with reference to a minor can also be

said to apply to a son under paternal control who has not yet reached the age of puberty.

(3) If I stipulate as follows, "Do you promise to pay me or Titius?" and you answer that you will pay me; it is the opinion of all the authorities that you have properly replied to the interrogatory, for the reason that it is established that the right of obligation has been acquired by me alone, but only Titius should be paid.

(4) If the following stipulation should be made between persons who are at Rome, namely, "Do you promise to pay to-day at Carthage?" some authorities hold that such a stipulation does not always include what is impossible; because it may happen that both the stipulator and the promisor may have, some time previously, notified their agent that a stipulation would be made upon a certain day, and the promisor may have directed his steward to make payment, and the stipulator his to receive it; because, if entered into in this way, the stipulation would be valid.

(5) When I stipulate for myself or for Titius, it is said that I cannot stipulate for one thing for myself and another for him, as, for instance, ten *aurei* for myself, or a slave for Titius.

If, however, what was specifically designated for Titius is given to him, although the promisor will not be released by operation of law, he still can plead an exception by way of defence.

(6) Different dates, however, may be fixed, for example, "Do you promise to pay me on the *Kalends* of January, or Titius on the *Kalends* of February?" and, again, a nearer date can be agreed upon with reference to Titius, as follows, "Do you stipulate to pay me on the *Kalends* of February, and Titius on the *Kalends of* January?" In this case we understand the stipulation to mean, "If you do not pay Titius on the *Kalends* of January, do you promise to pay me on the *Kalends* of February?"

(7) Moreover, I can stipulate for myself absolutely, or for Titius under a condition. On the other hand, if I stipulate for myself under a condition, and for Titius absolutely, the entire stipulation will be void, unless the condition relating to me personally should not be fulfilled: that is to say, the additional obligation will not be valid unless the one which has reference only to me individually takes effect. This, however, can only be determined in this way, if it becomes evident that Titius was added unconditionally; otherwise, if I should stipulate as follows, "If a ship arrives from Africa, do you promise to pay me, or Titius?" Titius is considered to have been added under the same condition.

(8) From this it appears that if one condition is imposed with reference to me, and another with reference to Titius, and that which has reference to me should[1] not be fulfilled, the entire stipulation will be of no force or effect; but if my condition as well as that of Titius is complied with, payment can be made to Titius, still, if the condition should fail with reference to him, it will be considered as not having been added.

(9) From all these things it is evident that although another person cannot properly be added, the stipulation is none the less valid, so far as we are concerned.

## TITLE II.

## CONCERNING THE LIABILITY OF TWO OR MORE PROMISORS.

1. *Modestinus, Rules, Book II.*

The person who stipulates is called the contractor of the stipulation; he who promises is considered the contractor of the promise.

2. *Javolenus, On Plautius, Book III.*

When two persons have promised or stipulated for the same sum of money, each of them binds and is bound for the full amount by operation of law. Therefore, having made the

demand, the entire obligation is discharged by the release of one of them.

3. *Ulpianus, On Sabinus, Book XLVII.*

Novation does not take effect where there are two promisors. For although one may answer first, and the other bind himself after an interval, the result will be that we must hold that the first obligation continues to exist, and that the second is accessory. It makes little difference whether the parties answered together, or separately, when it is their intention that there shall be two joint-debtors, and that a novation shall not take place.

(1) Where there are two joint-promisors, the entire amount can be demanded of one of them. For it is the nature of the obligation contracted by two joint-promisors that each one of them shall be bound for the entire amount, and that it can be demanded from either; and there is no doubt that half can be demanded from each one, just as can be done from the principal debtor and the surety. For, 'as there is but one obligation, only one sum of money is due, and if one of them pays it, both will be discharged from liability; or if it is paid by the other, discharge from liability will also result.

4. *Pomponius, On Sabinus, Book XXIV.*

Two joint-promisors are legally liable whether they are asked, "Do you both promise?" and they answer "I do" or "We do," or if they are asked, "Do you promise as individuals?" and they answer, "We promise."

5. *Julianus, Digest, Book XXII.*

There is no one who is not aware that the services of others can be promised, and.that a surety can be furnished in an obligation of this kind, and therefore that nothing prevents the contract of two stipulators or two promisors from being entered into under such circumstances; as, for instance, where two joint-stipulators make an agreement for the same work to be performed by the same artisan; and, on the other hand, where two artisans, skilled in the same trade, promise to perform the same labor, and become joint-promisors.

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

If I expect to have two joint-promisors, and interrogate both of them but only one answers, I think that the better opinion is that the one who answers is liable; for the interrogatory is not put to both of them under the condition that no obligation will be incurred if only one should reply.

(1) Where there are two joint-promisors, I entertain no doubt that the stipulator is at liberty to receive a surety from both, or only from one of them.

(2) Where anyone who is interrogated by two joint-stipulators answers one of them that he promises, he will be liable to him alone.

(3) Two joint-promisors can undoubtedly be bound in such a way that the time in which each of them gives his answer shall be taken into consideration. A reasonable interval of time, as well as an ordinary transaction (provided it is not contrary to the obligation), does not prevent two joint-promisors from becoming liable. A surety, also, who having been interrogated, answers between the two replies of the joint-promisor, is not considered to have interfered with their liability, because a long period of time has not intervened, and no act at variance with the terms of the obligation has been performed.

7. *Florentinus, Institutes, Book Vill.*

One of two joint-promisors can be bound from a specified day, or conditionally, for neither the day nor the condition will present any obstacle to prevent him who is absolutely liable from being sued.

8. *Ulpianus, Opinions, Book I.*

The intention of the contracting parties must be determined from the following words, "What we have promised to furnish you, as stipulator," for if both of them have become joint-promisors, and one is absent, he will not be bound, but the one who is present will be liable for the entire amount; or if they are not joint-promisors, he only will be liable for his share.

9. *Papinianus, Questions, Book XXVII.*

If I deposit the same article, at the same time, with two persons, relying upon the good faith of both of them, for its full value: or.

if I loan the same article, in like manner, to two persons, they become joint-promisors; for the reason that liability is incurred not only under the terms of the stipulation, but also in other contracts, for instance, purchase, sale, hiring, lease, deposit, loan, or will; just as if, for example, a testator, after having appointed several heirs, had said, "Let Titius and Msevius pay ten *aurei* to Sempronius."

(1) If anyone, while depositing property with two persons, provides that only one of them shall be liable for negligence, it is perfectly evident that they are not joint-promisors, as different obligations have been imposed upon them.

The same opinion should not, however, be adopted where both of them promised to be liable for negligence, if afterwards, under an agreement, one of them was released from liability for negligence; because the subsequent agreement made with one of them cannot change the legal position and natural obligation which rendered them both joint-promisors in the beginning. Therefore, if they are partners, and were both guilty of negligence, the agreement made with one of them will also benefit the other.

(2) When I stipulate with two joint-promisors that money shall be paid to me at different places in Capua, the time having reference to each one of them must be taken into consideration. For although they have assumed what is in fact a single obligation, it is still susceptible of modification, so far as each of the promisors is concerned.

10. *The Same, Questions, Book XXXVII.*

If two joint-promisors are not partners, the fact that the stipulator owes a sum of money to one of them will be of no advantage to the other.

11. *The Same, Opinions, Book XI.*

It is established that the acceptance of joint-promisors, who have become sureties for one another, is not illegal. Therefore, if the stipulator wishes to divide his action (for he is not compelled to divide it) he can sue the same person both as principal debtor, and surety for the other, to recover different parts of the amount due; just as if he proceed by separate actions against the two principal joint-promisors.

(1) Where it was stated in a written contract that So-and-So and So-and-So stipulated for a hundred *aurei,* and it was not added that they jointly stipulated, it was held that each of them had only stipulated for his share.

(2) On the other hand, where it is provided as follows, "Julius Carpus stipulates to pay so many *aurei,* and we, Antoninus Achilles, and Cornelius Dius, promise to pay them," each of the promisors will owe his respective share; because it was not added that each had promised to be liable in full, so as to render them all jointly responsible.

12. *Venuleius, Stipulations, Book II.*

If, of two persons who are about to bind themselves by a promise, one answers to-day, and the other on the following day, they will not be jointly liable, and he who has answered on the next day is not even regarded as liable at all—as the stipulator, or the promisor turned aside for the transaction of other business—even though he made his reply after the said transaction

had been concluded.

(1) If I stipulate for ten *aurei* with Titius and a ward without the authority of his guardian, or with a slave, and I have accepted them as two jointly liable promisors, Julianus says that Titius alone will be bound; although if a slave should promise, the same rule must be observed in an action for his *peculium,* as if he had been free.

13. *The Same, Stipulations, Book III.*

If a promisor should become the heir of the person jointly liable .with him, it must be said that he is bound by two obligations; for where there is some difference between the obligations, as in the case of a surety and the principal debtor, it is established that one obligation is annulled by the other. When, however, the obligations are of the same nature, it cannot be determined why one of them should be disposed of rather than the other. Hence, if one joint-stipulator should become the heir of the other, he will be entitled to two distinct obligations.

14. *Paulus, Manuals, Book II,*

And, even in praetorian stipulations, there can be two joint-stipulators.

15. *Gaius, On Oral Obligations.*

If Titius and I stipulate for anything, and it is understood to have reference to one of us in particular, we cannot act as joint-stipulators for the entire amount; as, for example, where we stipulate for an usufruct, or that property shall be given us by way of dowry, and this was stated by Julianus. He also says that if Titius and Seius stipulate for ten *aurei,* or Stichus, who belongs to Titius, they should not be considered as two joint-stipulator s, as only ten *aurei* will be due to Titius, and Stichus, or ten *aurei* will be due to Seius. The result of this opinion is, that whether he pays either of the stipulators ten *aurei,* or delivers Stichus to Seius, he will still remain liable to the other; but it must be held that if he pays ten *aurei* to either of them, he will be released from liability, so far as the other is concerned.

16. *The Same, On Oral Obligations, Book HI.*

If only one of two joint-stipulator s institutes legal proceedings at a time, the promisor will not be released by tendering money to the other.

17. *Paulus, On Plautius, Book Vill.*

Where certain heirs are specifically charged with a legacy, or all are charged excepting one, Atilicinus, Sabinus and Cassius say that they are all liable for the legacy in proportion to their respective shares'of the estate, because the estate binds them.

The same rule applies where all the heirs are mentioned.

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

Where two joint-promisors are bound to deliver the same slave, the act of one prejudices the other.

19. *The Same, On Quintus Mucius, Book XXXVII.*

Where two joint-promisors owe the same sum of money, and one of them is released from his obligation through having forfeited his civil rights, the other will not be released. For it makes a great deal of difference whether the money itself is paid, or the person is released; since when one is released and the obligation continues to exist, the other will remain liable; therefore, if one of them has been excluded from water and fire, the surety of the other will afterwards be liable.

## TITLE III.

## CONCERNING THE STIPULATIONS OF SLAVES.

1. *Julianus, Digest, Book LII.*

When a slave stipulates, it makes no difference whether he does so for himself, or for his master; or indeed whether he agrees to make payment, without mentioning any of the parties interested.

(1) If your slave, who is serving me in good faith, should have a *peculium* which belongs to you, and I make a loan out of it to Titius, the money will still remain yours; and if the slave should stipulate that the same money shall be paid to me, he will not perform a valid act. Hence you can recover the money by an action.

(2) If a slave, who is owned in common by yourself and me, lends money out of his *peculium,* which belongs to you alone, he will acquire an obligation for you; and if he stipulates for the same money to be paid to me, he will not release the debtor, so far as you are concerned, but both of us will be entitled to actions; I, on account of the stipulation, and you, because your money has been lent; the debtor, however, cannot bar me, except by an exception on the ground of fraud.

(3) What my slave stipulates to be paid to my slave is considered to be the same as if he had stipulated for my benefit. Likewise, whatever he stipulates for your slave is the same as if he had stipulated for your benefit; so that the first stipulation creates an obligation, but the second is of no force or effect whatever.

(4) A slave owned in common sustains the part of two slaves; therefore, if my own slave stipulates for the benefit of another slave owned jointly by myself and you, the same rule will apply in a verbal contract of this kind, as if two stipulations had been made, one for my slave individually, and the other for yours in the same manner. And we should not think that only half is acquired for my benefit, and that the other half is not acquired at all, because the position of a slave owned in common is such that where one joint-owner can acquire by his agency, and the other cannot, it is just the same as if the former alone had the power of acquisition.

(5) Where a slave, subject to an usufruct, stipulates for the usufructuary, or the owner; for instance, if he only stipulates for the interest of the usufructuary, the stipulation will be void, because he would have been able to acquire a right of action for both parties through the property of the usufructuary. If, however, he stipulates for something else, the proprietor can bring the action, and if the promisor pays the usufructuary, he will be released from liability.

(6) When a slave, jointly owned by Titius and Msevius, stipulates as follows, "Do you promise to pay Titius ten *aurei,* on the *kalends,* and if you do not pay him ten *aurei* on the *kalends,* do you promise to pay twenty to Magvius?" there appear to be two stipulations. If the ten *aurei* should not be paid on the *kalends,* either of the joint-owners can bring suit under the stipulation; but, on account of the second obligation promised by Msevius, Titius will be barred by an exception on the ground of fraud.

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

A slave jointly owned by two persons cannot stipulate for himself, although it is well established that he can do so for his master, as he does not acquire directly for his master, but acquires an obligation through himself for his benefit.

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

If a slave belonging to the Roman people, to a municipality, or to a colony, stipulates, I think that the stipulation will be valid.

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

If a slave owned in common stipulates for himself and one of his masters, it is the same as if he stipulated for all his masters, and one of them; as, for example, if he stipulates for Titius and Maevius, and for Msevius, it may be held that three-fourths are due to Titius, and one-fourth to Maevius.

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

A slave owned in common is the property of all his masters, and does not, so to speak, entirely belong to any of them, but belongs to each in proportion to his undivided interest; so that they hold their shares rather by a mutual understanding than corporeally. Hence, if he stipulates for something, or makes an acquisition in some other way, he acquires for all his owners in proportion to their interest in him.

He is, however, allowed to stipulate specifically for any one of his masters, or to receive the property delivered in order to acquire it for him alone. If, however, he does not stipulate specifically for one master, but, by the order of one of them, it is our practice to hold that he acquires the property for the one alone by whose order he made the stipulation.

6. *Pomponius, On Sabinus, Book XXVI.*

Ofilius very properly says that, in receiving by delivery, in depositing for safe-keeping, and in lending for use, acquisition is only made for the benefit of the person who directs this to be done. This opinion is also held by Cassius and Sabinus.

7. *Ulpianus, On Sabinus, Book XLVIII.*

Hence, if a slave should happen to have four masters, and stipulates by the order of two of them, he will only acquire for the benefit of those who gave the order; and the better opinion is that he does not acquire for them equally, but in proportion to their ownership. I hold the same opinion, if it is stated that he stipulated for them by name. For if he did not stipulate by the order of all, or for each and all of them by name, we should entertain no doubt that he acquired for all in proportion to their ownership, and not in equal shares.

(1) If a slave owned in common stipulates with one of two partners specifically for the benefit of the other, payment will be due to him alone. If, however, he stipulates absolutely, without adding anything, the slave will acquire the shares for the other partners, excepting the one of which the promisor is the owner.

When he stipulates by order of one of the partners, the rule will be the same as if he had specifically stipulated that payment should be made to the said partner. Sometimes, although he may not stipulate specifically for the benefit of any one of his masters, or by his order, still, it is held by Julianus that he will acquire for him alone; just as where he stipulates for something which cannot be acquired by both, as, for instance, a servitude attaching to the Cornelian Estate which belongs to Sempronius, one of his two masters, he also acquires it for him alone.

8. *Gaius, On Cases.*

The same will apply, if one of his masters should marry, and is promised a dowry by this slave.

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

Likewise, if the slave of two masters, Titius and Maevius, stipulates for a slave of Titius, he acquires him for the one alone to whom he does not belong. If, however, he stipulates for Stichus as follows, "Do you promise to deliver him to Msevius and Titius?" he acquires him entirely for MaBvius, for what he cannot acquire for one of his masters, belongs entirely to the other who is interested in the obligation.

(1) If, when a slave has two masters, and stipulates for "one or the .other" of them; the question arises whether the stipulation is valid. Cassius says that it is void, and Julianus adopts his opinion, which is our practice.

10. *Julianus, Digest, Book LII.*

Where, however, a stipulation is made as follows, "Do you pronv ise to pay Titius ten *aurei,* or transfer a tract of land to Maevius?" for the reason that it is uncertain for which one of them he acquires the right of action, the stipulation is considered to be void.

11. *Ulpianus, On Sabinus, Book XLVIII.*

If he stipulates for "himself," or for "one or the other of his masters," in this instance, the statement of Julianus that the stipulation is void, must be accepted. But is it the addition which is void, or is the entire stipulation of no force or effect? I think that the addition alone is void, for when he utters the words, "for me," he acquires a right of action under the stipulation for all his masters; but can payment be made to others, for instance, to a stranger ? I think that payment can be made to them, just as when I stipulate for myself, or for Titius. Therefore, when a stipulation is made for "one or the other of his masters," why is it not valid, or why will not payment be valid ? The reason for this is that we cannot ascertain the person to whom the stipulation refers, and who is entitled to payment.

12. *Paulus, Questions, Book X.*

For when both the parties are capable of assuming the obligation, we cannot find out which one was added, because there is no one who can bring suit.

13. *Ulpianus, On Sabinus, Book XLVIII.*

Where a slave stipulates for his master, or a stranger, both parts of the contract exist, the stipulation for the benefit of the master, and the payment with reference to the stranger; but, in this instance, the equality annuls both the stipulation and the payment.

14. *Julianus, On Urseius Ferox, Book III.*

My slave, being in the hands of a thief, stipulated that he should be given to him. Sabinus denies that he is due to the latter, because when he made the stipulation, he was not serving him as a slave. I, however, cannot bring suit by virtue of this agreement, because at the time that the slave made it, he was not serving me. But if he made a stipulation without mentioning the thief personally, the right of action will be acquired by me, but neither a suit on mandate, nor any other, should be granted the thief against me.

15. *Florentinus, Institutes, Book Vill.*

If my slave stipulates that property shall be given to me, to himself, or to a fellow-slave, or does not designate any particular person, he will acquire for my benefit.

16. *Paulus, Rules, Book IV.*

A slave belonging to an estate, who stipulates specifically that payment shall be made to a future heir, creates no obligation, because, at the time that the stipulation was entered into, the heir was not his owner.

17. *Pomponius, On Sabinus, Book IX.*

If a slave, owned in common by yourself and me, stipulates for a right of way of any description, without mentioning our names, and I alone have the adjoining land, he will acquire the right of way solely for me. If you, also, have a tract of land, the servitude will likewise be acquired for me in its entirety.

18. *Papinianus, Questions, Book XXVII.*

Where a slave is jointly owned by Msevius and a *peculium cas-trense,* and the son under paternal control to whom the *peculium* belongs dies while in the army, and, before the appointed heir enters upon the estate, the said slave stipulates, the entire stipulation will enure to the benefit of the partner who in the meantime is the sole owner of the slave; because the estate, not yet being in existence, is not susceptible of division. For if anyone should venture to allege that the son under paternal control has an heir, the estate would not, in consequence, be considered already in existence, since the benefit of the Imperial Constitution permits a son under paternal control to dispose of his *peculium* by will. This privilege remains in suspense, before the will is confirmed by the acceptance of the estate.

(1) If the slave of Titius and Msevius should stipulate that the share of Msevius shall be given to him, the stipulation will be void; but if he stipulated that it should be given to Titius, it will be acquired by Titius. If the stipulation is formulated simply, for instance, "Do you promise to give the share which belongs to Msevius?" without adding the words "to me," it is probably true that, as the stipulation was in no way defective, it will profit the person who is entitled to the benefit of the same.

(2) A slave, whose master was taken by the enemy, stipulated for something to be given to his master. Although what he simply stipulated for or received from another would belong to the heir of the captive, the rule is different with reference to the son personally, because he was not under paternal control at the time when he made the stipulation, and was not, like the slave, afterwards included among the property of the estate. Still, in the case stated, it may be asked whether, under this stipulation, he will be held to have acquired nothing for the heir, just as if a slave belonging to an estate had stipulated for the deceased, or even for his future heirs. But, in this instance, the slave will be on the same footing with the son, for if the latter should stipulate for him to be given to his father, who was a captive, the matter will remain in abeyance, and if the father should die while in the hands of the enemy, the stipulation will be considered to be of no force or effect, as the son stipulated for another, and not for himself.

(3) Where a slave, who is the subject of an usufruct, hires his own services, and for this reason stipulates for the payment of money every year, Julian says that, on the termination of the usufruct, the stipulation for the remainder of the time will be acquired by the owner of the property. This opinion seems to me to be supported by the very best of reasons. For, if the agreement for his services was made, for example, for five years; as it is uncertain how long the usufruct will continue to exist, then, at the beginning of each year, the money due at the time would belong to the usufructuary. Hence, the stipulation does not pass to another, but is only acquired for each person to the extent permitted by the law. For, if a slave should stipulate as follows, "Do you promise to pay me as much money as I have paid you up to that time?" it remains undetermined who will be entitled to an action under the stipulation, since if I should pay the money out of the property belonging- to the usufructuary, or what was obtained by the labor of the slave, it would belong to the usufructuary; but if it was derived from some other source, it would be acquired for the benefit of the owner.

19. *Scsevola, Questions, Book XIII.*

If the slave of another who is serving two masters in good faith makes an acquisition by means of the property of one of them, reason dictates that he acquires it entirely for the benefit of him whose property was employed, whether he was serving one or both of his masters at the time; for in the case of genuine masters, whenever anything is acquired for the benefit of both, it is acquired for each one in proportion to his share, but if it is not acquired for one of them alone the other will be entitled to all of it.

Therefore, the same rule will apply to the case stated and the slave who belongs to another, and is serving yourself and me in good faith, will acquire for me alone whatever is obtained by the use of my property, and he cannot acquire for you, because the profit was not derived from anything that was yours.

20. *Paulus, Questions, Book XV.*

A freeman who is serving me in good faith makes a stipulation with reference to my property, or his own labor, for the benefit of Stichus, who belongs to him. The better opinion is that he acquires for me,, because if he was my slave he would acquire for my benefit, and it should not be said that he is, as it were, included in his own *peculium.* If, however, he should stipulate for Stichus, who belongs to me, with reference to my property, he will acquire for himself.

(1) The following case was stated by Labeo. A father, dying intestate, left a son and a daughter who were under his control. The daughter had always supposed that she would obtain nothing from her father's estate, and, afterwards, her brother had a daughter, and, dying, left her in infancy. The guardians ordered a slave who had belonged to her grandfather to stipulate with a man who had sold the property of the grandfather's estate for all the money which would come into his hands. I ask you to give me your opinion in writing as to whether anything was acquired for the female ward under the terms of this stipulation.

Paulus: It is true that a slave who is possessed in good faith and stipulates with reference to the property of the master whom he serves acquires for his possessor. If, however, the property derived from the estate of the grandfather was owned in common, and formed part of the estate which was sold, the slave will not be held to have stipulated for the entire amount of the property belonging to the ward, and therefore he will acquire for both owners.

21. *Venuleius, Stipulations, Book I.*

If a slave owned in common stipulates as follows, "Do you promise to pay on the *Kalends* of January ten *aurei* to either Titius or Msevius, whichever one of them may be living at the time?" Julianus says that the agreement is void, because a stipulation cannot remain in suspense, and it does not appear by which of the two persons the money will be acquired.

22. *Neratius, Opinions, Book II.*

A slave, subject to an usufruct, cannot, by employing the property of his master, make a valid stipulation for the benefit of the usufructuary, but he can make a valid one for the benefit of his owner, by •employing property belonging to the usufructuary.

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

The same rule applies to a case where the use of property has been bequeathed to someone.

24. *Neratius, Opinions, Book II.*

If the usufruct belongs to two persons, and the slave stipulates for his services with one of them, the latter will acquire only to the extent of his share in the usufruct.

25. *Venuleius, Stipulations, Book XII.*

Where a slave forming part of an estate stipulates and receives sureties, and after the estate has been entered upon, a doubt arises whether the time begins to run from the date when the stipulation was made, or from the time when the estate was accepted, just as where a slave whose master is in the hands of the enemy has received sureties, Cassius thinks that the time should be computed from the date when proceedings can be instituted against the parties; that is to say, after the estate has been entered upon, or the master returns from captivity under the right of *postliminium.*

26. *Paulus, Manuals, Book I.*

An usufruct cannot exist without a person, and therefore a slave belonging to an estate cannot legally stipulate for an usufruct. It, however, is said that an usufruct can be bequeathed to him, for the reason that its time does not begin immediately, while an unconditional stipulation cannot remain in abeyance. But what if the stipulation was made under a condition? It will not

be valid, even in this instance, because a stipulation receives its power from the present time, although the right of action to which it gives rise may remain in suspense.

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

A slave owned in common, whether he makes a purchase or stipulates, even though he may pay the money out of his *peculium* which belongs to one of his masters, will, nevertheless, acquire for both of them. The case of a slave subject to an usufruct is, however, different.

28. *Gaius, On Oral Obligations, Book HI.*

If a slave stipulates for his master, or for his usufructuary, with reference to property belonging to his master, Julianus says that he acquires the obligation for the benefit of his master, and that the usufructuary can be paid just as anyone who has been joined.

(1) If a slave owned in common should stipulate with reference to property belonging to one of his masters, the better opinion is that the stipulation is acquired for both of them; but he whose property was made use of in making the stipulation can properly avail himself of an action in partition, or the action on partnership, in order to recover his share.

The same rule applies, if a slave acquires for one of his masters by means of his labor.

(2) If each one of his two masters stipulates that the same ten *aurei* shall be given to a slave, jointly owned by them, and but one answer was made, there will be two joint stipulators, as it is established that a master can stipulate for payment to his slave.

(3) Just as a slave acquires for one of his masters alone, if he stipulates for him by name, so it is decided that if he purchases property in the name of one of his masters, he will acquire it for him alone. In like manner, if he lends money to be paid to one of his masters, or transacts any other business whatever, he can expressly provide that the property shall be restored, or payment be made to one of them alone.

(4) The question arose whether a slave forming part of an estate can stipulate for the benefit of the future heir. Proculus says that he cannot, because at that time he was a stranger. Cassius is of the opinion that he can, as he who afterwards becomes the heir is held to have succeeded to the deceased at the time of his death. This reason is supported by the fact that the entire body of slaves is understood to represent the deceased at the time of his death, although the heir may not appear for some time. Hence it is clear that the benefit of the slave's stipulation is acquired for the heir.

29. *Paulus, On the Edict, Book LXXII.*

If a slave owned in common stipulates as follows, "Do you promise to pay ten *aurei* to my master and the same ten to another?" we say that there are two joint-stipulators.

30. *The Same, On Plautius, Book I.*

The slave of another, by expressly stipulating for a third party, does not acquire for his master.

31. *The Same, On Plautius, Book Vill.*

If a slave stipulates by order of an usufructuary, or a *bona fide* possessor, under such circumstances that he cannot acquire for them, he will acquire for his master.

The same rule does not apply if their names are inserted in the stipulation.

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

If two persons have an usufruct of a slave, and the said slave stipulates expressly for one of them, with reference to property belonging to both, Sabinus says that although he is only liable to one, it should be considered how the other usufructuary can obtain the share to which he is entitled, as no community of right exists between them. The better opinion is, to hold

that a praetorian action in partition can be brought.

33. *The Same, On Plautius, Book XIV.*

If a man who is free, or a slave who belongs to another and is serving in good faith, stipulates with reference to the property of a third party, by the order of the person who has him in possession, Julianus says that the freeman will acquire for himself, but the slave will acquire for his master, because the right to order is only vested in his master.

(1) If two joint-stipulators have an usufruct in a slave, or he is serving them in good faith, and by the order of one of them he makes a stipulation with his debtor, he will acquire for the benefit of that master alone.

34. *Javolenus, On Plautius, Book II.*

If a slave who has been manumitted by will, but is not aware that he is free, remains as part of the estate, and stipulates for money for the heir, the heirs will not be entitled to anything, provided they knew that he had been manumitted by the will, because his servitude cannot be considered lawful where he serves those who knew that he was free.

This case differs from that of a freeman who, having been purchased, serves in good faith as a slave; because, in this instance, the opinion of himself and the purchaser agree as to his condition. He, however, who knows a man to be free, although he may be ignorant of his condition, cannot be held to possess him.

35. *Modestinus, Rules, Book VII.*

A slave belonging to an estate can legally stipulate for the benefit of the future heir, as well as for the benefit of the estate.

36. *Javolenus, Epistles, Book XIV.*

Where a slave, whom his master has considered as abandoned by him, stipulates for something, his act is void; because anyone who looks upon property as abandoned rejects it altogether, and cannot make use of the services of anyone whom he is unwilling shall belong to him. If, however, he has been seized by another, he can acquire for his benefit by means of a stipulation, for this is a kind of donation. A' great difference exists between a slave forming a part of an estate and one who is considered as abandoned; for one of them is retained by hereditary right, and he cannot be considered as abandoned who is subject to the entire right of inheritance, while the other having been intentionally abandoned by his master, cannot be held to be available for the use of him by whom he was rejected.

37. *Pomponius, On Quintus Mucius, Book HI.*

When a slave owned in common stipulates as follows, "Do you promise to pay Lucius Titius, and Gaius Seius?" (who are his masters), they will be entitled to equal shares under the terms of the agreement. If, however, he should stipulate as follows, "Do you promise to pay my master?" they will be entitled to share in proportion to their respective ownership. But when he stipulates as follows, "Do you promise to pay Lucius Titius, and Gaius Seius?" it may be doubted whether they will be entitled to equal shares, or only in proportion to the amount of the interest of each.

It is also important to ascertain what was added merely for the purpose of explanation, and what the other part of the stipulation, which is the principal one, provides. But as the names are first mentioned, it seems to be more reasonable that the stipulation was acquired for their benefit equally, because the names of the masters are given for the purpose of designation.

38. *The Same, On Quintus Mucius, Book V.*

If my slave stipulates with my freedman for "services to be rendered him," Celsus says that the stipulation is void. It would, however, be otherwise if he had stipulated without adding the

word "him."

39. *The Same, On Quintus Mucius, Book XXII.*

When a slave in whom we have the usufruct stipulates expressly for the benefit of the owner, for something to be derived from the property of the usufructuary, or from his own services, it is acquired for the benefit of the owner of the property. Means should, however, be taken to ascertain by what action the usufructuary can recover it from the owner of the property.

Again, if a slave serves us in good faith, and stipulates expressly for the benefit of his master for something which he can acquire for us, he will acquire it for him. We must examine by what action we can recover it from him, and what our Gaius has stated on this point is not unreasonable, namely: that, in both cases, the property can be recovered from the owner by a personal action.

40. *The Same, On Quintus Mucius, Book XXXIII.*

Any obligation which a slave has contracted while in our service, although the effect of the stipulation may have been deferred until the time of his alienation or manumission, he will still acquire for our benefit; because when he made the contract his power to do so was ours.

The same rule applies where a son under paternal control enters into an agreement, for even if he should postpone its accomplishment until the time of his emancipation, we shall be entitled to the benefit of the same; provided, however, that he acted fraudulently.

# THE DIGEST OR PANDECTS.

## BOOK XLVI.

## TITLE I.

## CONCERNING SURETIES AND MANDATORS.

1. *Ulpianus, On Sabinus, Book XXXIX. A* surety can be added to every obligation.

2. *Pomponius, On Sabinus, Book XXII.*

*A* surety can be taken for property which was loaned for use, or deposited, and he will be liable; even if the deposit or the loan was placed in the hands of a slave, or a ward, but only where those for whom security was given have been guilty of fraud or negligence.

3. *Ulpianus, On Sabinus, Book XLIII.*

He who has promised to furnish security is considered to have complied with the stipulation, if he gives anyone for this purpose who can be rendered liable and be sued. If, however, he gives a slave, or a son subject to paternal authority, under circumstances when an action *De peculia* cannot be granted, or a woman, who can avail herself of the aid of the Decree of the Senate, it must be said that he has not complied with the stipulation to furnish security. If he gives a surety who is not solvent, it is clear that he should be considered to have complied with the agreement, because he who accepted the surety approved him as solvent.

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

*A* surety can be taken in an action on mandate, or in one for business transacted, which I am about to bring against the person for whom I became surety.

(1) A surety is not only liable himself, but he also leaves his heir liable, because he occupies the position of a debtor.

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

Julianus says that, generally speaking, he who becomes the heir of a person for whom he appeared as surety is released so far as the latter is concerned, and is only liable as the heir of the principal debtor. Finally, he says that if the surety becomes the heir of him for whom he made himself responsible, he will be liable as the principal debtor, but will be released as surety; still a principal debtor who succeeds a principal debtor is liable under two obligations; for it cannot be ascertained which one of them annuls the other; but, in the case of a surety and a principal debtor, this can be easily determined, because the obligation of the principal debtor is the more binding. When any difference exists between the obligations; it can be held that one is annulled by the other. Where, however, they are both of the same force, and it cannot be ascertained why one of them should be annulled rather than the other, he refers this matter to an example in which he desires to show that there is nothing new in the fact that two obligations may exist in the same person at the same time. This is his example. If one of two joint-promisors becomes the heir of the other, he will be liable to two obligations. Likewise, if one joint-stipulator becomes the heir of the other, he will benefit by two distinct obligations. It is evident that, if he instituted proceedings under one of them, he will make use of both; that is to say, because the nature of the two obligations which he had is such that, if one of them is brought into court, the other will also be disposed of.

6. *The Same, On Sabinus, Book XLVII.*

I stipulate with a debtor, but do not take a surety, and afterwards I wish a surety to be furnished. If I add a surety, he will be liable.

(1) It makes little difference whether I bind the surety absolutely, or from a certain time, or under some condition.

(2) A surety can, moreover, be furnished for a future as well as for a past obligation, provided this obligation is a natural one.

7. *Ulpianus, Digest, Book LHI.*

For where what has been paid cannot be recovered, it is proper that a surety for this natural obligation should be received.

8. *Ulpianus, On Sabimis, Book XLVII.*

In Greek, a surety is taken as follows: "In my good faith, I order, I say, I wish," or "I wish, with a certain determination of mind." If, however, anyone should say "I affirm," it will be the same as if he had uttered the words, "I say."

(1) It should also be remembered that a surety can be furnished for every kind of obligation, whether with reference to the property, verbally, or by consent.

(2) It should also be remembered that a surety can be taken for anyone who is liable under the Praetorian Law.

(3) A surety can be received after issue has been joined in the case, because the civil and natural obligation remains. This was admitted by Julianus, and is our practice. Hence, if the principal debtor loses his case, the question arises whether he can have recourse to an exception, for he is not released by operation of law. If he is not accepted for the payment of the judgment, but merely for the proceedings in court, it is very properly held that he can make use of an exception. Where, however, he has been taken for the entire case, he will not be entitled to an exception.

(4) Where a surety is given by a testamentary guardian he will be liable.

(5) If, however, the action is derived from a crime, we think that the better opinion is that the surety will be liable.

(6) And, generally speaking, no one doubts that a surety can be received in all kinds of obligations.

(7) The following rule is applicable to all those who are liable for others: namely, if they are made use of in order to impose more severe terms upon them, it has been decided that they will not be at all responsible. It is clear that they can be accepted in matters of inferior importance, for which reason a surety is very properly taken for a small amount. Again, the principal debtor being absolutely liable, the surety can be bound from a certain time, or under some condition. If, however, the principal debtor should be liable under a condition, and the surety absolutely, he will be released.

(8) If anyone should stipulate for Stichus, and receive a surety as follows, "Do you promise, on your good faith, to deliver Stichus, or pay ten *aurei?"* Julianus says that the surety will not be bound, because his condition is rendered harder, so that if Stichus should happen to die, he would still be liable.

Marcellus, however, says that he is not liable, not only because his condition is rendered more onerous, but also for the reason that he has been accepted rather for another obligation. Finally, a surety cannot be received for a person who has promised to pay ten *aurei,* as follows, "Do you promise to pay ten *aurei,* or deliver Stichus?" although, in this instance, his condition is not rendered more burdensome.

(9) Julianus also says that where anyone has stipulated for a slave, or ten *aurei,* and takes a surety as follows, "Do you promise to deliver a slave, or pay ten *aurei,* whichever I wish?" the surety will not be bound, because his condition is rendered more onerous.

(10) On the other hand, where anyone stipulates for "A slave, or ten *aurei,* whichever the stipulator wishes," he can properly take a surety under the following terms, "Ten *aurei,* or a

slave, whichever you wish," for Julianus says that in this way the condition of the surety is improved.

(11) But if I interrogate the principal debtor as follows, "Stichus and Pamphilus?" and the surety as follows, "Stichus, or Pamphilus?" I shall put the question properly, because the condition of the surety is rendered less burdensome.

(12) There is no doubt whatever that one surety can be taken for another surety.

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

Sureties can properly be taken for a part of the money, or for a part of the property.

10. *Ulpianus, Disputations, Book VII.*

When a creditor doubts whether the sureties are solvent, and one of them, who is selected by him to be sued, is ready to give security, so that his fellow-sureties may be sued for their shares at his risk, I hold that he should be heard; but only provided he offers security, and that all his fellow-sureties who are said to be solvent are at hand. For the purchase of the claim is not always easy when the payment of the entire debt is not free from difficulties.

(1) The action is divided between the sureties, where they do not deny their liability. For, if they do deny it, the benefit of division should not be granted. A son under paternal control can give security for his father, and his act will not be without effect. In the first place, because, when he becomes his own master, he can be held liable to the extent of his means; and, besides this, judgment can be rendered against him, even if he remains subject to his father's authority. Let us see, however, whether his father will be liable for the reason that he is held to have acted by his order. I think that this rule is applicable to all contracts; but if he became surety for his father without the knowledge of the latter, this action will not lie; still suit can be brought against his father on the ground that the proceeding was for the benefit of his property. It is clear that, if the emancipated son has paid the debt, he should be entitled to an equitable action, and the same action can be brought by him if he remains under the control of his father, and has paid the money for the latter, out of his *peculium castrense.*

11. *Julianus, Digest, Book XII.*

Where anyone has lent money to a son under paternal control in violation of the Decree of the Senate, and the son is dead, he cannot take a surety from his father, because he is entitled to no action, either civil or praetorian, against his father, and there is no estate for which sureties can become liable.

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

It is evident that a surety can properly be taken on account of the action *De peculio,* which will lie against the father.

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

If you lend ten *aurei* to Titius, by my direction, and bring an action on mandate against me, Titius will not be released from liability; but I ought not to have judgment rendered against me in your favor, unless you assign to me the rights of action which you have against Titius.

Likewise, if you bring an action against Titius, I will not be released, but I will only be liable to you for the amount which you cannot collect from Titius.

14. *The Same, Digest, Book XLVII.*

When the principal debtor becomes the heir of his surety, the obligation of suretyship is extinguished. What, then, must be done? If the principal debtor is sued for the claim, and makes use of the exception to which the surety was entitled, a replication *in factum* should be granted, for recourse can be had to one on the ground of fraud.

15. *The Same, Digest, Book LI.*

If you' have stipulated with me without any consideration, and I have given a surety, and am unwilling for him to make use of an exception, but prefer that he shall pay, in order that he may bring an action on mandate against me, the exception should be granted him, even against my consent; for he has more interest in keeping his money than in recovering it from the principal debtor, after having paid the stipulator.

If one of two sureties who have become liable to you for twenty *aurei* should either pay you, or promise to pay you five *aurei,* to prevent you from suing him, the other will not be released; and if you proceed to collect fifteen *aurei* from him, you will not be barred by an exception. If you attempt to collect the remaining five *aurei* from the former surety, you can be barred by an exception on the ground of fraud.

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

A surety cannot be rendered liable to a person to whom the principal debtor is not liable. Wherefore, if a slave owned in common by Titius and Sempronius is specifically stipulated to be given to Titius, and his surety should be asked, "Do you promise to give this to Titius, or Sempronius?" Titius, indeed, can demand it from the surety, but Sempronius appears to have been introduced for the sole purpose that payment might be made to him before issue is joined in the case, while Titius is not aware of the fact, or is unwilling that this should be done.

(1) A person who has promised to pay at a certain place is, to some extent, subjected to a more severe condition than if he had been simply interrogated, for he cannot make payment in any other place than that in which he agreed to pay, if the stipulator is unwilling for him to do so. Wherefore, if I interrogate the principal debtor absolutely, and I accept the surety with the addition of payment in a certain place, the surety will not be liable.

(2) Even if the principal debtor, while at Rome, should promise to make payment at Capua, and the security at Ephesus, the surety will not be liable any more than if the principal debtor had promised to pay under a condition, and the surety had agreed to do so on a certain day, or had promised absolutely.

(3) A surety can be accepted whenever any civil or natural obligation, which is applicable to him, exists.

(4) Natural obligations are not estimated solely by the fact that some action can be brought on account of them, but also where the money, once paid, cannot be recovered. For although natural debtors cannot strictly be said to be indebted, still they may be considered such, and those who receive money from them to have obtained that to which they were entitled.

(5) Where a stipulation has been entered into which is to take effect at a specified time, and a surety has been accepted under a condition, the rights of the latter will remain in suspense, so that, if the condition is complied with before the time prescribed, he will not be liable; but if the time and the condition should coincide, or if the. condition should be fulfilled after the specified time has elapsed, he will be liable.

(6) When a surety is accepted under the following terms, "Will you be responsible if the principal debtor does not pay the forty *aurei* which have been lent to him?" it is probable that the intention was that if the principal debtor did not pay when called upon, the surety would be liable; but if the principal debtor, before being notified to pay, should die, the surety will be liable, because, even in this case, it is true that the principal debtor did not make payment.

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

It is usual to grant relief to sureties by compelling the stipulator to sell any rights of action which he may have against the others to him who is ready to pay the entire debt.

18. *The Same, Digest, Book XC.*

He who delegates his debtor is understood to pay as much money as is due to him; and therefore, if a surety delegates his debtor, even though he may not be solvent, an action on mandate can immediately be brought.

19. *The Same, On Minicius, Book IV.*

A slave became surety for a certain person without the knowledge of his master, and paid the money due, in his name. The question arose whether or not the master could recover the amount from the person to whom it had been paid.

The answer was that it was important to ascertain in whose name the slave had become surety, for if he had done so with reference to his *peculium,* then his master could not recover what he had paid out of his *peculium,* but anything which he had paid on account of his master could be recovered by him. If, however, he became surety for an amount greater than his *peculium,* any money belonging to his master, which he had paid, could also be recovered, and what he paid out of his *peculium* could be recovered by a personal action.

20. *Javolenus, Epistles, Book XIII.*

But where the owner of the slave paid the money, he cannot recover it from him for whom he became surety, but he can do so from the person to whom he paid it, since a slave cannot become liable as surety. Hence it follows that he cannot recover it from him for whom he became surety, as he himself is liable for the debt, and will not be released by the payment of money due under an obligation for which the slave was not responsible.

21. *Africanus, Questions, Book VII.*

An heir received a surety from the debtor of an estate, and then transferred the estate under the Trebellian Decree of the Senate. It is held that the obligation of the surety remains unimpaired. The same rule should be observed in this case which is applicable when an heir, against whom an emancipated son obtains praetorian possession of an esta'te, accepts a surety. Therefore, in both instances, the rights of action pass with the estate.

(1) There is nothing new in the fact that a surety is liable under two different obligations for the payment of the same sum of money; for if he was accepted from a certain day, and afterwards accepted absolutely, he will be bound by both obligations; and if a surety becomes the heir of his fellow-surety, the result will be the same.

(2) I lent money to your slave, you manumitted him, and then I accepted him as surety. If he gave security for the obligation which is payable to you within a year, the slave is said to be liable. If, however, it was done on account of the natural obligation, which is his own, it is better to hold that the agreement is void; for it is incomprehensible that a surety can become liable for himself.

But if this slave, after manumission, should become the heir of his surety, it is held that the obligation of suretyship continues to exist, and that the natural obligation will still remain, so that if the civil obligation is extinguished, he cannot recover what has been paid.

Nor can it properly be alleged in opposition to this, that when a principal debtor becomes the heir of his surety, the obligation of the surety is extinguished; for the reason that then the double civil obligation cannot exist with reference to the same person. And, on the other hand, if the surety should become the heir of the manumitted slave, the same obligation against him will continue to exist, although he is naturally liable, and no one can become surety for himself.

(3) If the stipulator should appoint his debtor his heir, he absolutely annuls the liability of the surety, whether the obligation of the debtor was a civil or a natural one; as no one can bind himself with reference to a third party while acting for the latter. When, however, the same stipulator appoints the surety his heir, there is no doubt that he, at once, cancels the sole

obligation of the surety. The proof of this is, that if possession of the property of the debtor is delivered to the creditor, it must also be said that the surety will still remain liable.

(4) When you and Titius are jointly liable for the same sum of money, he who became surety for you can also answer as surety for Titius, although the same money is due to the same person; and this obligation will not be void, so far as the creditor is concerned. Indeed, in some cases, it will be productive of benefit, for instance, if he should become the heir of him for whom he previously became surety; for then, the first obligation having been extinguished through merger, the second one will continue to exist.

(5) When the surety becomes the heir of the stipulator, the question arises whether, as he himself has required payment, so to speak, from himself, he will be entitled to an action on mandate against the principal debtor. The answer was that, as the principal debtor remains liable, the creditor cannot be understood to have collected the money from himself, as surety. Therefore, he should bring an action under the stipulation, rather than one on mandate.

22. *Florentinus, Institutes, Book Vill.*

A surety can be accepted even before the estate has been entered upon, if the principal debtor is dead, because the estate performs the function of a person in the same way as a municipality, a decurion, and a partnership.

23. *Marcianus, Rules, Book IV.*

*"If* I stipulate for ten *aurei* for myself, or for Titius," Titius cannot take a surety, because he was added only for the purpose of payment.

24. *Marcellus, Opinions.*

Lucius Titius, desiring to become surety to Septicius for his brother, Seius, wrote to him as follows: "If my brother asks you, I request you to pay him the money, on my responsibility, and at my risk." After having written this letter, Septicius paid the money to Seius; and Titius, having afterwards died, left certain heirs, and among them his brother, Seius, a third part of his estate. If, because the action to which Septicius was entitled against his brother Seius was extinguished by merger, on account of the third part of the estate to which Seius had become the heir to his brother Titius, I asked whether Septicius could bring an action for the entire amount against the other heirs. Marcellus answered that an action on mandate could not be brought against the co-heirs of Seius for the larger part of the estate, but only for their hereditary shares.

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

Marcellus says that if anyone should become surety for a ward who has incurred liability without the authority of his guardian, or for a spendthrift, or an insane person, the better opinion is, that he will not be entitled to relief, as an action on mandate will not lie in their favor.

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

According to a Rescript of the Divine Hadrian, an obligation is not divided among sureties by operation of law. Therefore, if any one of them should die, without having an heir, before paying his share of the indebtedness, or should become poor, his portion of the liability will be added to that of the others.

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

Where there are several sureties, and one of them has been accepted absolutely, and another from a certain time, or under some condition, the one who was accepted absolutely is entitled to relief, as long as the condition can be fulfilled; that is, in such a way that, in the meantime, he can only be sued for an individual share.

If, however, he who was accepted under a condition should not be solvent at the time when it is fulfilled, Pomponius says that the case must be restored to the previous condition of absolute suretyship.

(1) Moreover, if one surety appears for another, or if there are several, the same rule which was established by the Divine Hadrian must be observed with reference to them.

(2) Again, if there is any doubt whether the principal surety is solvent or not, the means of the following surety must be added to his own.

(3) Pomponius says that relief should be granted to the heirs of a surety, just as it would be granted to the surety himself.

(4) If there is a surety who is at once the principal debtor, and a surety of the surety, the original surety cannot ask that the obligation be divided between himself and the one who has become responsible for him, for the original surety occupies the position of a debtor, and a debtor cannot request that the obligation be divided between him and his surety. Hence, if one of two sureties gives a surety, the obligation is not divided with reference to him for whom he became responsible; but the better opinion is, that it is divided so far as the surety himself is concerned.

28. *Paulus, On the Edict, Book XXV.*

If one surety maintains that the others are solvent, the exception should be granted him that he will pay, "If the others should prove insolvent."

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

If I have stipulated under an impossible condition, I cannot be compelled to furnish a surety.

30. *Gaius, On the Provincial Edict, Book V.*

Anyone can become surety for another, even if the promisor is not aware of the fact.

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

If a surety or anyone else wishes to pay the creditor for the debtor, before the time when the claim becomes due, he should wait for the day when payment must be made.

32. *The Same, On the Edict, Book LXXVI.*

The exception relating to the principal debtor, and, indeed, where he is unwilling, as well as all the other advantages attaching to the case, are available by the surety and the other accessories who are liable.

33. *The Same, On the Edict, Book LXXVII.*

If Titius should bequeath a slave his freedom, and appoint him his heir, and I had previously asked for him, and had received security on.his account in case he actually belonged to Titius, it must be said that the right of action against him should be transferred, and if this is not permitted to be done, the stipulation will become operative.

If, however, the slave belonged to me, the plaintiff, and he should not enter upon the estate by my order, the sureties will be liable on the ground that no defence was made. But where the slave enters upon the estate by my order, the stipulation disappears.

It is clear that if the slave was mine, and I deferred the acceptance of the estate until I obtained a favorable decision in court, and then I order him to accept it, and, in the meantime, I wish to institute proceedings because the suit was not defended, the stipulation will not become operative, because an arbiter would not decide in this manner.

34. *Paulus, On the Edict, Book LXXII.*

Those who promise responsibility as sureties can assume a lighter, but not a heavier, burden.

Therefore, if I stipulate for myself with the principal debtor, and I cause a surety to promise for me, or for Titius, Julianus thinks that the condition of the surety is better, because he can even pay Titius. If I have stipulated with the principal debtor for payment to myself, or to Titius, and with the surety only for payment to me, Julianus says that the condition of the surety is more onerous. But what if I should stipulate with the principal debtor for Stichus, or Pamphilus, and with the surety only for Stichus ? Will the surety be in a better or in a worse condition if he does not have the right of selection? It is true that his condition will be better, because he will be released from liability by the death of Stichus.

35. *The Same, On Plautius, Book II.*

When anyone becomes surety for a slave he is liable in full, even if there is nothing in the *peculium* of the slave. It is clear that if he becomes surety for the master, against whom he has a right of action *De peculia,* he will only be liable for the amount of the *peculium* at the time when judgment was rendered.

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

Where a creditor, who has a principal debtor and sureties, receives the money due from one of the sureties, and transfers to him his rights of action, it may be said that they no longer exist, as he has received what he was entitled to, and all the others are released by the payment; but this is not the case, for he did not receive it by way of payment, but he, as it were, sold the claim on the debtor, and he still had the right of action, because he was obliged to assign these rights to the person who paid him.

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

If anyone who has been released after the time has passed for the collection of a debt gives a surety, the surety will not be liable, as security given by mistake is void.

38. *Marcellus, Digest, Book XX.*

If I stipulate "For Stichus or Pamphilus, whichever the promisor may select," I cannot take a surety for Stichus or Pamphilus, whichever the surety may choose to be responsible for; because it would be in his power to give a different one from that which the principal debtor might select.

(1) I received a surety from Titius, who owed me ten *aurei* conditionally under the terms of a will, and I became his heir, and afterwards the condition upon which the legacy depended was fulfilled, I ask whether the surety is liable to me. The answer was, that if the legacy was bequeathed to you under a condition, and, after having received a surety from the testator you became his heir, you cannot consider the surety as liable, because there is no debtor for whom the surety can be liable, and there is nothing that is due to you.

39. *Modestinus, Rules, Book II.*

An action should not be granted to permit this surety to proceed against his fellow-surety; and therefore, if, of two sureties for the same amount, one, after having been selected by the creditor, makes payment in full, and the rights of action are not assigned to him, the other surety cannot be sued either by the creditor or by his fellow-surety.

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

Where there are two joint-debtors, and a surety is given by one or both of them, he can properly be accepted for the whole amount of the debt.

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

If sureties have been accepted for a sum which cannot be collected by a curator, and after the minor became of age, the amount could have been collected by the same curator, or by his heirs, and he who was a minor fails to assert his rights and becomes insolvent, a praetorian

action can properly be brought against the sureties.

(1) The same authority gave it as his opinion, that if one of several mandators has judgment rendered against him in full and is notified to make payment, he can petition that all rights of action available against those who directed the same act to be performed be assigned to him.

42. *Javolenus, Epistles, Book X.*

If I accept a surety under the following terms, "Do you agree to be responsible for the delivery of a thousand measures of wheat, to be paid for with your money, as security for the ten *aurei* which I have lent?" the surety will not be liable, because he cannot become responsible for something different from what has been lent, because the estimate of the value of the property which is considered as merchandise can be made in money; just as a sum of money can be estimated in merchandise.

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

If, having stipulated with Titius, I accept you as surety, and afterwards I stipulate with another for the same money, and receive another surety, they will not be joint-sureties, for the reason that they are sureties in two different stipulations.

44. *Javolenus, Epistles, Book XI.*

You stipulated that certain work should be done to your satisfaction before a certain date, and you received sureties who, if it should not be done within the prescribed time, agreed to be liable for the amount that you would have paid for having it done; and because the work was not performed, you gave it to a contractor, and as the latter did not furnish security, you did the work yourself. I ask whether the sureties will be liable. The answer was, that according to the terms of the stipulation mentioned by you, the sureties will not be liable, for you do not do what was agreed upon in the stipulation, that is to say, you did not contract for the work to be performed, although you did so afterwards; for the contract which was subsequently made was just the same as if it had not been entered into, since you immediately began to do the work yourself.

45. *Scsevola, Digest, Book VI.*

A surety for the vendor of two tracts of land, one of which was afterwards evicted, having been sued by the purchaser, had judgment rendered against him for a certain amount. The question arose whether he could bring suit against the heir of the vendor before the time when he could be forced to obey the judgment. The answer was that he could do so, but that there was good reason for the court to compel the surety either to be defended, or be released from liability.

46. *Javolenus, On the Last Works of Labeo, Book X.*

Whenever the law is opposed to sales, the surety is also released; and there is all the more reason for this, because the principal debtor can be reached by a proceeding of this kind.

47. *Papinianus, Questions, Book IX.*

If the penalty of deportation is imposed upon a debtor, Julianus says that a surety cannot be accepted for him, as the entire obligation against him is extinguished.

(1) If a son under paternal control accepts a surety in a matter having reference to his *peculium* as follows, "Do you become responsible for as much money as I may lend?" and, having become emancipated, he lends the money, the surety will not be liable to the father if the principal debtor is not, but on the ground of humanity he ought to be liable to the son.

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

If Titius and Seia should become sureties for Msevius, the woman having been discharged, we will grant an action for the entire amount against Titius, as he could have known, and ought

not to have been ignorant of the fact that a woman cannot become a surety.

(1) The following question seems to be similar; namely, if one surety obtains complete restitution on account of his age, should the other assume the entire burden of the obligation ? He, however, ought

only to be charged with it, if the minor should subsequently become security, on account of the uncertainty of restitution because of his age.

When, however, the minor was fraudulently induced by the creditor to become surety, relief should not be granted the creditor against the other surety; any more than if the minor, having been deceived by a novation, should desire a praetorian action to be granted him against his former debtor.

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

If an heir, omitting a debtor who has been released by a will, brings suit against his surety, the surety can take advantage of an exception based on fraud, on account of the dishonorable act of the heir; and the same exception would also have benefited the principal debtor, if he had been sued.

(1) If one of two heirs of a surety, through mistake, pays the entire amount due, certain authorities hold that he is entitled to a personal action, and therefore that his fellow-surety remains liable. They believe that the obligation of the co-heir continues to exist, even if suit should not be brought; because the creditor who, thinking that he is liable, pays a part to him who has discharged the entire indebtedness, will not be entitled to a personal action to recover this part.

Where, however, two sureties have been accepted, for example, for twenty *aurei,* and one of two heirs of the other surety pays the entire sum due to the creditor, he will, indeed, be entitled to a personal action to recover the ten *aurei* which he did not legally owe. But, could he recover the remaining five if the other surety was solvent, is a question which should be considered. For in the beginning, the heir or heirs of the surety should be heard, just as the surety himself should be; so that each of the sureties may be sued for his respective share. In both instances, the opinion that the payment of a sum of money which was not due should not be recovered is at once more harsh and more convenient, for a Rescript of the Divine Pius states this in the case of a surety who had paid the entire amount of the claim.

(2) Where a surety, who promised at Rome that he would pay a sum of money at Capua, and if the promisor should be at Capua, the question arose whether he could immediately be sued. I answered that the surety would not immediately be liable any more than if he had made the promise at Capua, when the principal debtor had not been able to reach that city, and that it makes no difference if no one "doubts that the surety would not yet be liable, for the reason that the promisor himself was not.

On the other hand, if anyone should say that because the debtor is at Capua the surety is immediately liable, without taking into consideration the time to which he was tacitly entitled; the result would be that, in this case, the surety could be sued at a time when the debtor himself could not be, if he were at Rome. Therefore, it is

our opinion that the obligation of suretyship includes the implied condition of necessary time to which both parties, that is to say, the promisor as well as his surety, are entitled; since if a different conclusion was arrived at, this would be understood to impose a more burdensome condition upon the surety, in violation of the rule of law.

50. *The Same, Questions, Book XXXVII.*

A creditor, who became the heir to a portion of the estate of his debtor, accepted his co-heir as surety. So far as his own share of the estate is concerned, the obligation is extinguished by

merger or (more correctly speaking) by the power of payment. But, with reference to the share of the co-heir, the obligation remains unimpaired, that is to say, not the obligation of his suretyship but the hereditary obligation, since the larger one has rendered the smaller of no force or effect.

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

The action should be divided between those sureties who have become responsible for the entire amount, and their own equal shares. The case would be different, where the following words were used, "Do you promise to be responsible for the entire amount, or your respective share of the estate," for then it is settled that each one will only be liable for his individual share.

(1) A surety who has paid a portion of the amount due either in his own name, or in that of a promisor, cannot refuse to have suit brought against him for the division of the remainder. For the amount which each of them owes individually should be divided between those who are solvent at the time of the judgment. It is, however, more equitable to come to the relief of the party who paid by means of an exception if the other was solvent at the time when issue was joined.

(2) Two joint-debtors gave separate sureties. The creditor is not obliged against his will to divide the actions between all the sureties, but only between those who became responsible for each of the debtors.

It is clear that if he wishes to divide his action among all of them, he cannot be prevented from doing so, any more than if he should sue the two debtors for their respective shares of the debt.

(3) A creditor is not compelled to sell a pledge, if, having abandoned the pledge, he wishes to sue the person who simply became surety.

(4) The action having been divided among the sureties, some of them, after issue was joined, ceased to be solvent; but this fact has no reference to the responsibility of one who is solvent, nor will the plaintiff be protected in case of his minority, for he is held not to have been deceived when he had recourse to the Common Law.

(5) Where the property of a surety against whom judgment has been rendered is claimed by the Treasury, and the action is afterwards divided between the sureties, the Treasury will be considered to occupy the position of an heir.

52. *The Same, Opinions, Book XI.*

The loss of a pledge by the ruin of a house affects the surety as well as the principal debtor. Nor does it make any difference if the surety was accepted as follows, "At least as much as may be realized over and above the value of the pledge, if sold," for, by these words it is agreed that the entire debt shall be included.

(1) The action having been divided among the sureties, if the party against whom judgment was rendered ceases to be solvent, the fraud or negligence of the guardians who could have obtained the execution of the judgment will prejudice them. For if it is established that the action having been divided between sureties who were not solvent, relief by means of complete restitution will be applied for in the name of the ward.

(2) It is settled that sureties who have been given by farm tenants are liable for the money expended in the cultivation of the land, because this kind of an agreement draws to itself the obligation of a lease. Nor does it make any difference whether they render themselves liable immediately, or after some time has elapsed.

(3) Where there are several mandators of the same sum of money, and one of them is selected to be sued, the others are not released from liability by his discharge, but all of them will be

released by the payment of the money.

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

The sureties of a person accused of a capital crime may properly be sued under a contract, and without being able to oppose an exception pleaded by the creditor, who has accused the principal debtor.

54. *Paulus, Questions, Book HI.*

If the creditor who received a surety for money lent is deceived in the contract of pledge, he can bring the contrary action on pledge; and, in this action, his entire interest will be included. This proceeding, however, does not affect the surety, for he has become responsible, not for the pledge, but for the money loaned.

55. *The Same, Questions, Book XI.*

If I stipulate as follows with Seius, "Do you promise to pay any sum of money which I may lend to Titius, at any time?" and I receive sureties, and afterwards very frequently lend Titius money, Seius, as well as his sureties, will certainly be liable for all the sums loaned, and anything that can be obtained from his property should be credited equally upon all the debts.

56. *The Same, Questions, Book XV.*

If anyone should swear that he will give his services for a person who is not a freedman, and becomes his surety, he will not be liable.

(1) Likewise, when a son stipulates with his father, or a slave with his master, and a surety is accepted, he will not be liable; for no one can be bound to the same person for the same thing. On the other hand, when a fattier stipulates for his son, or a master for his slave, the surety will be liable.

(2) If you lend money belonging to another, as if it was your own, without any stipulation, Pomponius says that the surety will not be liable. But what if the money having been expended, the right to bring a personal action for recovery is established? I think that the security will be liable, for he is considered to have been accepted in order to be responsible for everything which might arise out of the payment of the money.

(3) A surety can be taken in an action of theft, and also for anyone who has violated the Aquilian Law. The rule is different in popular actions.

57. *Scsevola, Questions, Book XVIII.*

A surety cannot be sued before the principal debtor becomes liable.

58. *Paulus, Questions, Book XXII.*

If, having stipulated with a tenant, I received a surety, the stipulation provides for all payments of rent, and therefore the surety will be liable for all of said payments.

(1) When, by his act, the principal debtor perpetuates the obligation, that of the surety also continues to exist; for instance, if he was in default in delivering Stichus, and the latter died.

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

Paulus gave it as his opinion that a surety to whom pledges given by his fellow-sureties have been transferred, does not appear to be substituted in the place of the purchaser, but only in that of him who received the pledges, and therefore he must be accountable for the crops and the interest.

60. *Scsevola, Opinions, Book I.*

He also held that whenever the principal debtor was discharged by his creditor, in such a way that a natural obligation remained, the surety continued to be liable; but when the obligation

passed by a species of novation, the surety should be released either by law, or by means of an exception.

61. *Paulus, Opinions, Book XV.*

If, as has been stated, when money is lent it was agreed that it should be paid in Italy, it should be understood that the mandator has contracted in the same manner.

62. *Scsevola, Opinions, Book V.*

If the surety has notified the creditor to compel the debtor to pay the money, or sell the pledge, and he does not attempt to collect the claim, can the surety bar him by an exception on the ground of fraud ? The answer was that he can not do so.

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

It was agreed between a creditor and her debtor, that if the hundred *aurei* which she had lent were not paid as soon as they were demanded, that the creditor should be permitted within a specified time to sell certain ornaments which had been given by way of pledge, and, if the proceeds of the sale amounted to less than what was due as principal and interest, the difference should be paid to the creditor; and a surety was furnished. The question arose whether the surety would be liable for the entire amount. The answer was, that, according to the facts stated, the surety would be liable only for whatever was not realized by the sale of the pledge.

64. *Hermogenianus, Epitomes of Law, Book II.*

A surety who has tendered money to a minor of twenty-five years of age, and, apprehensive of complete restitution, has sealed and deposited it in a public place, can immediately bring an action on mandate.

65. *The Same, Epitomes of Law, Book VI.*

Just as the principal debtor is not liable unless he makes a personal promise, so likewise sureties are not bound unless they themselves agree to pay something or perform some act; for they promise without effect when they contract for the principal debtor to pay, or do something, because to promise the act of another is void.

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

If a slave belonging to another becomes surety for Titius, and pays the debt, Titius will be released from liability, if the master of the slave brings an action on mandate against him; for he who brings such an action is considered to have ratified the payment.

67. *The Same, On Neratius, Book III.*

After having made use of an exception, which should have benefited you, an unjust decision was rendered against you. You can recover nothing by virtue of the mandate, for the reason that it is more equitable that the wrong done to you should not be redressed rather than be transferred to another; provided that, through your own negligence, you caused the unjust decision to be rendered against you.

68. *The Same, Decrees, Book III.*

It has been decided that the sureties of magistrates, who have not promised to be liable for penalties or fines, should not be sued.

(1) Petronius Thallus and other persons became sureties for Aurelius Romulus, a farmer of the revenue, for the sum of a hundred *aurei* annually. The Treasury seized the property of Romulus as having a claim upon it, and sued the sureties for both principal and interest, which they refused to pay. The obligation of the sureties having been read, and they having bound themselves only for a hundred *aurei* every year, and not for the entire amount of the lease, it

was decided that they were not liable for the interest, but that everything which had been collected from the property of Romulus should first be credited upon the interest, and the balance upon the principal; and if there was any deficit, recourse should be had to the sureties, just as in the case of the sale of pledges by a creditor.

(2) Sureties cannot be sued when the principal debtor has been released by a compromise.

69. *Tryphoninus, Disputations, Book IX.*

A guardian appointed for the son of a man to whom he was liable as surety should collect payment from himself, and even though released by lapse of time, he, as well as his heir, will still be liable in an action on guardianship, because proceedings are instituted against him on account of the guardianship and not as surety.

And if the guardian makes payment, not as surety, but in his fiduciary capacity, even though he may have been released by lapse of time, I held that he would be entitled to an action on mandate against the principal promisor; for the right to collect the debt attaches to both of these conditions; as, by payment, he has released the principal promisor from the obligation with reference to which he became surety for him, and not the title of the action, but the consideration of the debt should be taken into account. For although the guardian, who is also liable to his ward as surety, made payment with the authority of his ward, because the principal promisor was released, he who is both guardian and surety will also be freed from liability; which cannot be done by his own authority, even if he made payment, not with the intention of releasing himself, but especially for the purpose of releasing Titius, and he will be entitled to an action on mandate against him.

70. *Gaius, On Oral Obligations, Book I.*

If I stipulate conditionally with a principal debtor, I can bind a surety for both this condition and another, provided I unite .them; for, unless both of them should be fulfilled, he will not be liable, as the principal debtor is bound by one condition alone. If, however, I separate them, the condition of the surety will become more onerous, and on this account he will not be liable; because, whether a condition will affect both of the parties bound, or only one of them, it will be considered to hold him; while the principal debtor will not be liable unless the common condition is fulfilled. Therefore, either the surety will not be liable at all, or, which is the better opinion, he will be liable if the common condition is previously fulfilled.

(1) When sureties are interrogated under different conditions, it is a matter of importance to ascertain which one was first complied with. If it was the one imposed upon the principal debtor, the surety will also be liable when this condition is fulfilled, just as if from the very beginning the principal debtor had been absolutely bound, and the surety had been bound under a condition. On the other hand, however, if the condition of the surety should first be complied with, he will not be liable, just as if he had been absolutely bound from the beginning, and the principal debtor was only bound conditionally.

(2) When the principal debtor is liable for a tract of land, and the surety is accepted for the usufruct, the question arises whether the surety is liable to a less extent, or, indeed, whether he is liable at all, as having promised something else. It does seem to us to be doubtful whether the usufruct is a part of the property, or something which exists by itself. But as the usufruct is a right attaching to the land, it would be contrary to the Civil Law for the surety not to be bound by his promise.

(3) A surety can be accepted by a slave, just as his master, himself, can legally accept one for the amount due to him; and there is no reason why the surety should not be interrogated by the slave himself.

(4) If you should stipulate with an insane person, it is certain that you cannot take a surety; for not only is the stipulation itself void, but no business at all is understood to have been

transacted. If, however, I should accept a surety for an insane person, who is liable by law, the surety will also be liable.

(5) When it is commonly asserted that a surety cannot be received for criminal offences, it should not be understood that anyone who has been robbed cannot take a surety for the payment of the penalty for theft, as there is a good reason that penalties incurred by crimes should be paid; but rather in the sense that a person cannot bind the surety for part of the proceeds of a theft, which he desires to be given to him by someone with whom he committed the offence; or where, by the advice of another, he was induced to perpetrate a theft, he cannot take a surety from him with reference to the penalty for the crime.

In these instances, the surety does not become liable, because he is not furnished in a valid transaction, and partnership in an illegal act is of no force or effect.

71. *Paulus, Questions, Book IV.*

Uranius Antoninus became mandator for Julius Pollio and Julius Rufus, for money which the latter had borrowed from Aurelius Palma, they being joint-debtors of the latter. The property of Julius escheated to the Treasury, and at the same time, the Treasury became the successor of the creditor. The mandator alleged that he was relieved of liability by the law of merger, because the Treasury had succeeded the creditor, as well as the debtor. And, indeed, if there was but one debtor, I do not doubt that the surety, as well as the mandator, would be released; for even if an action should be brought against the principal debtor, the mandator would not be released, still, when the creditor succeeded the debtor, the obligation was disposed of, as it were, by the right of payment, and the mandator was also released, for the-additional reason that no one can be mandator for the same person to the same person.

But when there are two joint-promisors, and the creditor of one of them becomes his heir, there is good reason to doubt whether the other is not also released; just as if the money had been paid, or the person having been removed, whether the obligation is merged. I think that, by the acceptance of the estate, the principal debtor is released by the merger of the obligation, and that, on this account, his sureties are also released, because they cannot be liable to a person for himself, and, as they cannot begin to be in that position, so they cannot remain in it. Therefore, the other joint-debtor for the same sum of money is not released, and on this account, neither his surety nor his mandator can be relieved of liability. It is evident that, because he who had judgment rendered against him in the action on mandate can even select his creditor, he will be entitled to an exception on the ground of fraud, if suit is brought against him.

The creditor can proceed against the other debtor, either for the whole amount of the claim, if no partnership existed, or for a portion of it if the debtors were partners. If, however, the creditor should become the heir of the surety, or the surety the heir of the creditor, I think that it is settled that the principal debtor will not be released by the merger of the obligation.

(1) If we suppose that one of certain joint-debtors agreed that suit should not be brought against him, and the mandator afterwards made payment, he can also bring an action on mandate against the person with whom he made the agreement, for the agreement of the creditor does not deprive him of his right of action against a third party.

(2) It is established that a mandator is liable even if he directs a creditor to lend money, who is about to lend it at interest.

72. *Gaius, On Oral Obligations, Book HI.*

If a surety should bind himself under the condition that a ship will arrive from Asia, and I accept him with the understanding that the obligation will only render him liable during his lifetime, and while the condition is pending he receives a release from me, and the surety dies before the condition is fulfilled, I can immediately bring suit against the principal debtor,

because even if the condition should be fulfilled, it could never establish an obligation against one who is already dead, and could not confirm the release which I had granted.

73. *Paulus, On the Edict, Book LXXVI.*

An agent brought a real action, and gave security that his principal would ratify what he had done. Having afterwards lost his case, his principal, on his return, brought suit for the same property, and the defendant, being in possession, refused to surrender it, and for this reason judgment was rendered against him for a considerable sum. The sureties are not liable for any more, as they are not to blame because the party in possession paid a penalty.

## TITLE II.

## CONCERNING NOVATIONS AND DELEGATIONS.

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

Novation is the transfer and transmission of a former debt into another civil or natural obligation; that is to say, when from the preceding liability a new one is created in such a way that the former is destroyed; for novation derives its name from the term "new," and from a fresh obligation.

(1) It is of no importance what the character of the first obligation may be, whether it is natural, civil, or praetorian, or whether it is oral, real, or based on consent. Therefore, whatever it is, it can be verbally renewed, provided the following obligation is binding either civilly or naturally, for instance, where a ward promises without the authority of his guardian.

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

All matters are susceptible of novation, for every contract, whether verbal or otherwise, can be substituted in this manner, and pass from any kind of an obligation whatsoever into an oral one, provided we know that this is done in such a way that the obligation is changed in this way. If, however, this is not the case, there will be two obligations.

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

*A* person who has been deprived of the management of his property cannot renew his obligation, unless he renders his position better.

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

If I delegate to you someone who owes me an usufruct, my obligation is not altered by novation, although he who has been delegated can protect himself against me by an exception on the ground of bad faith, or by one *in factum;* not only while the usufruct is enjoyed by the person to whom I delegated him, but even after his death, because, after I die, he to whom the usufruct was delegated will continue to hold it to the disadvantage of the debtor.

This also applies to all obligations attaching to the person.

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

An obligation can be subjected to novation at a prescribed time, and even before the time arrives. Generally speaking, it is settled that a stipulation made for a specified period can become a novation; but that suit cannot be brought under the stipulation before the time arrives.

6. *The Same, On Sabinus, Book XLVI.*

If I should stipulate as follows: "Will you be responsible for any amount which I may not be able to collect from Titius, my debtor?" a novation is not created, because the transaction is not for that purpose. When anyone has lent money without a stipulation and immediately makes one, there is but one contract. The same thing must be said where the stipulation was made first, and the money counted afterwards.

7. *Pomponius, On Sabinus, Book XXIV.*

For, when we stipulate for a loan, I do not think that the obligation arises from the counting of the money, and that afterwards the novation is created by the stipulation; because the intention is that there should be but one stipulation, and the counting of the money is understood to be done merely for the purpose of completing the contract.

8. *Ulpianus, On Sabinus, Book XLVI.*

If I stipulate for the delivery of Stichus to me, and when the promisor fails to deliver him, I again stipulate for him, the promisor is no longer responsible for the risk, as liability for the default has been released.

(1) Where legacies or trusts are included in the stipulation, and the intention was that it should be subjected to novation, this will take place; and if they were bequeathed absolutely, or to take effect at a certain time, novation occurs immediately. When, however, they were conditional, it will not take place at once, but when the condition is complied with; for, otherwise, where anyone stipulates for a prescribed time, he immediately creates a novation, if such was the intention, as it is certain that the date will arrive at some time or other. But where anyone stipulates under a condition, novation does not become operative immediately unless the condition is fulfilled.

(2) Where anyone stipulates with Seius, as follows, "Do you promise to pay whatever I stipulate for with Titius?" and I afterwards stipulate with Titius, does a novation take place so that Seius alone will liable? Celsus says that a novation does take place, provided this was the intention, that is to say that Seius should owe what Titius promised to pay. For he asserts that the condition of the first stipulation is complied with and novation occurs at the same time. This is our practice.

(3) Celsus also says that by the stipulation of paying the judgment, the action to enforce judgment is not subjected to novation; and this is reasonable, because in this stipulation the only thing involved is that a surety shall be provided, and that there shall be no departure from the obligation of the judgment.

(4) If I stipulate with a third party for the ten *aurei* which Titius owes me, or the ten which Seius owes me, Marcellus thinks that neither one of them is released, but that the third party can select him for whom he wishes to pay the ten *aurei.*

(5) When a husband stipulates with his wife for a dowry which was promised to her by a stranger, the dowry will not be doubled, but it has been decided that a novation will take place, if this was the intention. For what difference does it make whether she or someone else makes the promise? For if another person promises to pay what I owe, he can free me from liability, if this is done for the purpose of novation. If, however, he did not intervene in order to make a novation, both parties will, in fact, be liable; but if one of them pays, the other will be released. Still, if anyone stipulates for what is due to me, he does not deprive me of my right of action, unless he stipulates with my consent; but he who promises what I owe releases me from liability, even if I am unwilling that this shall be done.

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

If a ward, having stipulated without the authority of his guardian, arrives at puberty, and ratifies the stipulation for the purpose of making a novation, the right of action on guardianship will be extinguished. If he does not ratify it, even though he brings suit on guardianship, he will also be entitled to one under the stipulation; but the judge, who has jurisdiction of the action on guardianship, ought not to render a decision against the guardian, without releasing him from the stipulation.

(1) Anyone who stipulates under a condition which is certain to be fulfilled is considered to have stipulated absolutely.

(2) Where anyone stipulates for a driveway, and afterwards for a right of passage, his act is void. Again, where anyone stipulates for an usufruct, and also for an use, his act will be void. Where, however, he stipulates for a right of passage, and afterwards for a driveway, he stipulates for something in addition, for a right of passage is one thing and the right to drive is another.

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

He to whom payment can legally be made can also make a novation, except in the case where I stipulate for myself, or for Titius; for Titius cannot make a novation, although payment can be legally made to him.

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

To delegate is to give another debtor to a creditor, or to one whom he may direct, instead of one's self.

(1) Delegation takes place either by stipulation, or by joinder of issue in court.

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

If anyone should delegate a debtor whom he knew could protect himself by an exception on the ground of fraud, he will resemble a person who makes a gift under such circumstances, as he is considered to rely upon an exception to annul his act. If, however, he promises his creditor through ignorance, he cannot have recourse to an exception against him because the latter receives what is his own; but he who delegated him will be liable in a personal action for recovery, or one for an uncertain amount, if the money was not paid, or for a certain amount if it was paid; and therefore, when he has paid it, he can bring an action on mandate.

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

If I delegate to my creditor, as my debtor, someone who does not owe me, there will be no ground for an exception, but a personal action will lie against the person who delegated him.

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

Whenever anything which is absolutely due is promised conditionally, for the purpose of creating a novation, the novation does not take place immediately, but only after the condition has been complied with. Therefore, if Stichus should happen to be the subject of the obligation, and should die while the condition is pending, the novation will occur, because the property, which was the object of the stipulation, was not in existence at the time when the condition was fulfilled. Hence Marcellus thinks that, even if Stichus was included in the conditional obligation, after he who promised him was in default, the default will be purged, and Stichus will not be included in the ensuing obligation.

(1) But where anyone, for the purpose of making a novation, stipulates absolutely for something which is due under a condition, he does not immediately create the novation, although an absolute stipulation seems to produce some effect, but the novation takes place when the condition is fulfilled. For a condition, once having been complied with, renders the first stipulation operative, and transfers it to the second. Therefore, if the promisor should be deported while the condition is pending, Marcellus says that novation will not take place, even if the condition is fulfilled, because there is no one who will be liable when this occurs.

15. *Julianus, Digest, Book XIII.*

Where a creditor stipulates for a penalty if payment should not be made at the designated time, and a novation takes place, the stipulation does not become operative.

16. *Florentinus, Institutes, Book Vill.*

A slave cannot make a novation without the consent of his master, even where the obligation involves his *peculium,* but he rather creates a new obligation than renews the former one.

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

Anyone can delegate his debtor, either by writing or by a gesture, when he is unable to speak.

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

When novation is properly made, all liens and pledges are released, and interest ceases to be due.

19. *The Same, On the Edict, Book LXIX.*

The exception on the ground of fraud, which can be opposed to anyone who delegates his debtor, does not affect the creditor to whom the debtor is delegated.

The same rule applies to all similar exceptions, and, indeed, even to that which is granted a son under paternal control by the Decree of the Senate. For he cannot make use of the exception against the creditor to whom he has been delegated by one who lent money contrary to the Decree of the Senate, because, making this promise, nothing is done in violation of the Decree of the Senate, and therefore he cannot recover what he has paid, any more than he can recover what he has paid in court.

The case is different where a woman has promised to pay contrary to the Decree of the Senate, for security is included in the second promise. The same rule applies to a minor who, having been deceived, is delegated; for, if he is still a minor, he is deceived a second time. It is otherwise if he has passed the age of twenty-five years, although he still can obtain restitution against his first creditor. Therefore, exceptions against his second creditor are refused him; because in private contracts and agreements the claimant cannot readily ascertain what transactions have taken place between the person delegated and his original debtor; or, even if he does know, he should simulate in order not to appear too inquisitive; and hence it is but reasonable that the exception against the original debtor should be refused him.

20. *The Same, On the Edict, Book LXXII.*

We can make a novation ourselves, if we are our own masters, or by others who stipulate with our consent.

(1) A ward cannot make a novation without the authority of his guardian; a guardian can do so, if it is to the interest of his ward, and as agent likewise, if he has charge of all the property of his principal.

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

If I order my debtor to pay you, you cannot immediately, while you are stipulating, make a novation, although the debtor, by paying you, will be released.

22. *Paulus, On Plautius, Book XIV.*

If anyone, during my absence, stipulates with my debtor for the purpose of making a novation, and I afterwards ratify his act, I renew the obligation.

23. *Pomponius, On Plautius, Book III.*

A son under paternal control cannot make a novation of the action of his father, without the knowledge of the latter.

24. *The Same, On Plautius, Book V.*

A novation cannot arise from a stipulation which does not become operative. Nor can it be stated, in opposition to this, that if I stipu-

late with Titius, with the intention of renewing the debt which Sempronius owes me, under a condition, and while the condition is pending Titius should die, although the condition may have been fulfilled before the estate was entered upon, novation will take place; for, in this

instance, the stipulation is not extinguished by the death of the promisor, but passes to the heir who, in the meantime, represents the estate.

25. *Celsus, Digest, Book I.*

No one has a right to renew an old debt by novation, solely because payment can sometimes legally be made to him. For payment can sometimes properly be made to those who are under our control, when none of them can, by himself, in accordance with law, substitute a new obligation for the old one.

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

Where a man to whom Titius owes ten *aurei,* and Seius fifteen, stipulates with Attius that he shall pay him what one or the other of them owes, both the obligations are not subjected to novation; but it is in the power of Attius to pay for whichever one he wishes, and release him.

Suppose, however, that it had been agreed that he should pay one or the other of the claims; for otherwise, he would be considered to have stipulated for both, and both would have been subjected to novation, if this had been intended.

27. *Papinianus, Opinions, Book III.*

When a purchaser, having been delegated by the vendor, promises money as follows, "Whatever it is necessary to pay, or to do, on account of the sale," novation takes place; and he does not owe to anyone interest for the following time.

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

Having stipulated for the Cornelian Estate, I afterwards stipulated for the value of the land. If the second stipulation was not made with the intention of creating a novation, the novation will not take place; but the second stipulation, by the terms of which not the land, but the money is due, will stand. Therefore, if the promisor should convey the land, the second stipulation will not be extinguished by operation of law, not even when the plaintiff institutes proceedings under the terms of the first one.

Finally, if the land, being improved, or having subsequently deteriorated without the fault of the debtor, is claimed, the present estimate may properly be considered; and if, on the other hand, its value is demanded, the appraisement at the time of the second stipulation should be accepted.

29. *Paulus, Questions, Book XXIV.*

There are many examples which show the distinction existing between" a voluntary novation, and one derived from a judgment. The privileges of dowry and guardianship are lost, if the dowry is included in the stipulation after a divorce has taken place, or the action of guardianship is renewed by novation after puberty; if this was the express intention which was not referred to by anyone when issue was joined. For, in bringing suit, we do not render our position worse but better, as is usually said with reference to actions which can be terminated by lapse of time, or by death.

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

Paulus gave it as his opinion that if a creditor, with the intention of making a novation, should stipulate with Sempronius in such a way as to entirely abandon the first obligation, the same property could not be encumbered by the second debtor without the consent of the first.

31. *Venuleius, Stipulations, Book III.*

If I stipulate for something to be given me, and I afterwards stipulate for the same thing with the same person under a condition, with the intention of making a novation, the property must remain in existence in order for there to be ground for the novation, unless the promisor was required to give it. Therefore, if you are obliged to deliver me a slave, and you are in default in

doing so, you will be liable even if the slave should die, and if, before he dies, you are already in default, and I stipulate with you for the same slave under a condition, and the slave afterwards dies, and then the condition is fulfilled, as you are already liable to me under the stipulation, novation will alscr take place.

(1) Where there are two joint-stipulators, the question arises whether one of them has the right to make a novation, and what right each acquires for himself. Generally speaking, it is established that payment may properly be made to one, and that if one institutes proceedings he brings the entire matter into court, just as where one is released, the obligation of both is extinguished. From this it may be gathered that each of them acquires for himself, just as if he alone had stipulated; except that each of them, by the act of him with whom the stipulation was jointly made, can lose his debtor. According to this, if one of the joint-stipulators enters into another agreement with a third party, he can, by novation, release him from liability to the other joint-stipulator, if such was his express intention; and there is all the more reason for this, as we think that the stipulation resembles payment.

Otherwise, what shall we say if one of them delegates the common debtor to his creditor, and the latter stipulates with him; or a woman orders a tract of land to be promised to her husband by way of dowry; or, if she was about to marry him, she should promise him the land as dowry? The debtor would be released, so far as both parties are concerned.

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

You are obliged to deliver me a slave, and Seius must pay me ten' *aurei.* I stipulate for the purpose of making a novation with one of you, as follows, "What you, or Seius must give." Both obligations are subjected to novation.

Paulus: This is reasonable, because both of them are included in the last stipulation.

33. *Tryphoninus, Disputations, Book VII.*

If Titius, desiring to make a donation to me, and having been delegated by me, promises my creditor, who is the stipulator, he will not be entitled to use the exception against him in such a way as to have judgment rendered against him to the extent of his means; but he can properly make such a defence against me, because I demanded what he had already given him. The creditor, however, can collect the debt.

34. *Gaius, On Oral Obligations, Book HI.*

It cannot be doubted that a son under paternal control or a slave who is permitted to manage his own *peculium* has also the right to make the debts of the *peculium* the subject of novation, if the parties stipulate; and this is by all means the case if his condition will be improved by doing so. For if he directs a third party to stipulate, it makes a difference whether this is done with the intention of making a donation, or in order that he may transact the business of the son or the slave, and on this ground the action on mandate with reference to the *peculium* is acquired by them.

(1) There is no doubt whatever that the relative ,qf an insane person, or the curator of a spendthrift, has the right of novation, if this is to the advantage of the said insane person or spendthrift.

(2) In a word, we should remember that there is nothing to prevent the novation of several obligations by one agreement, as for instance, if we stipulate as follows, "Do you promise to pay what Titius and Seius are obliged to pay me?" for although they are liable for different reasons, still both are released by the right of novation, as the liability of both is united in the person of him with whom we now stipulate.

## TITLE III.

## CONCERNING PAYMENTS AND RELEASES.

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

Whenever a debtor, who owes several debts, pays one of them, he has the right to state which obligation he prefers to discharge, and the one which he selects shall be paid, for we can establish a certain rule with reference to what we pay. When, however, we do not indicate which debt is paid, he who receives the money has the right to say on what claim he will credit it, provided he decides that it shall be credited on a debt which, if he himself owed it, he would have paid, and be discharged from liability, where he actually owed it, that is to say a'n obligation which is not in dispute; or one for which no surety has been given, or which has not yet matured; for it appears perfectly just for the creditor to treat the property of the debtor as he would treat his own. Therefore, the creditor is permitted to select the debt which he desires to be paid, provided that he makes his selection as he would do with reference to his own property; he must, however, decide immediately, that is, as soon as payment is made.

2. *Florentinus, Institutes, Book Vill.*

When this is done, the creditor should be at liberty not to receive the money, or the debtor not to pay it, if either of them desires it to be applied to the settlement of some other claim.

3. *Ulpianus, On Sabinus, Book XLIII.*

This, however, is not permitted to be done, after any time has elapsed. The result is, that he who receives it should always be considered to have credited the payment on the most onerous debt, for he would have done this with reference to an obligation of his own.

(1) Where nothing has been said by either party on this point with reference to debts which are payable on a certain date, or under a specified condition, that debt will be considered to have been discharged whose day of payment has arrived.

4. *Pomponius, On Quintus Mucius, Book HI.*

And this preferably applies to a debt which I owe in my own name, rather than to one for which I have given sureties; and rather to one which a penalty is attached than to one in which no penalty is involved; and rather to one for which security has been furnished than to one which has been contracted without it.

5. *Ulpianus, On Sabinus, Book XLIII.*

With reference to debts which are due at the present time, it is decided that whenever any money is paid without stating on what debt it shall be credited, it should be considered to have been paid on the one which is most burdensome. If, however, one is not more burdensome than another, that is to say, if all the obligations are alike, it should be paid upon the oldest one. A debt which is given with security is considered more burdensome than one which has been contracted without it.

(1) If anyone has given two sureties, he can pay in such a way as to release one of them.

(2) The Emperor Antoninus, with his Divine Father, stated in a Rescript that when a creditor obtains his money by the sale of pledges, and interest is due, some of it by the Civil Law, and some by Natural Law, whatever is paid by way of interest shall be credited on both kinds of obligations; as, for instance, where some interest is due by virtue of a stipulation, and some is due naturally as the result' of an agreement.

If, however, the amount of the interest due under the Civil Law is not equal to that due under the other, what has been paid should be credited on both, but not *pro rata,* as the terms of the Rescript show. But where no interest is due under the Civil Law, and the debtor simply pays interest which was not stipulated for, the Emperor Antoninus, together with his Father, stated

in the Rescript that it ought to be credited on the principal. At the bottom of the Rescript was added the following clause, namely, "What has been generally decided as to the interest being first paid seems to have reference to such interest as the debtor is compelled to pay," and as interest paid under the terms of an agreement cannot be recovered, any more than if it had not been paid under that name, it will not be considered as paid at the desire of him who received it.

(3) The question is asked by Marcellus, in the Twentieth Book, if anyone agrees with a debtor that he will accept him for the principal and interest, whether the payment of the principal and interest shall be *pro rata,* or whether the interest should first be paid, and if anything remains, it should be credited upon the principal? I do not doubt that a provision of this kind with reference to the principal and the interest calls for the payment of the interest first, and that then, if there is any surplus, it ought to be credited on the principal.

6. *Paulus, On Plautius, Book IV.*

For it is not the order of the written instrument which should be considered, but what appears to be the intention of the parties must be determined according to law.

7. *Ulpianus, On Sabinus, Book XLIII.*

Where something is due, both on an obligation in which infamy is .involved, and on one which is not of that character, payment is held to be made on that which involves disgrace. Hence, if anything is due on account of a judgment, or on a claim for which judgment has not been rendered, I think that payment should be applied to the judgment; and Pomponius adopts this opinion. Therefore, in a case in which liability increases by denial, or in one involving a penalty, it must be said that payment should be considered to be made on the latter, by the settlement of which the release of the penalty will be effected.

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

Pomponius says that it has very properly been stated that when the terms and the contracts are the same payment will be held to have been made *pro rata* on all the sums in question.

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

I stipulate that payment shall be made to me or to Stichus, the slave of Sempronius. Payment cannot be made to Sempronius, although he is the master of the slave.

(1) A man who owes ten *aurei,* by the payment of half of this sum will be released from liability for half of his obligation, and only the remaining five *aurei* will be due. Likewise, where anyone owes Stichus and delivers a part of him, he is liable for the remainder. If, however, he owes a slave, and delivers a part of Stichus, he will not, for that reason, cease to owe a slave. Finally, an action can be brought against him to recover the slave. But when the debtor delivers the remaining part of Stichus, or the creditor is to blame for not accepting him, the former will be released.

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

When I stipulate for myself or for Titius, Titius cannot bring suit, or make a novation, or give a release; he can only be paid.

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

If I stipulate for payment to be made to me or to a ward, and the promisor pays the ward without the authority of his guardian, he will be released, so far as I am concerned.

12. *Ulpianus, On Sabinus, Book XXX.*

Payment can legally be made to a genuine agent. We should consider a genuine agent to be one who has been specially authorized, or to whom the management of all the property of the principal has

been entrusted.

(1) Sometimes, however, payment is legally made to a person who is not an agent; as, for instance, to one whose name is inserted in the stipulation, where someone stipulates for payment for himself or for Titius.

(2) If, however, anyone should direct me to pay Titius, and afterwards forbid him to receive the money, and I, not knowing that he had been forbidden to receive it, pay him, I will be released; but if I am aware of it, I will not be released.

(3) The case is different, if you suppose that someone has stipulated for himself, or for Titius. For even if he forbids me to pay Titius, I will, nevertheless, be released if I pay him; because the stipulation has a certain condition which the stipulator cannot alter.

(4) But even if I pay someone who is not a genuine agent, but the principal ratifies the payment, a release will take place; for ratification is equivalent to a mandate.

13. *Julianus, Digest, Book LIV.*

The principal, however, should ratify the act as soon as he is informed of it, but with some degree of latitude and allowance, and it should include a certain period of time. As in the case of a legacy, where either its acceptance or rejection is concerned, a certain period of time, which is neither too small or too great, and which can better be understood than expressed in words, should be permitted.

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

If anyone should make payment under the condition that he can' recover the money by a personal suit, if the principal does not ratify the act of the agent, and he does not ratify it, an action will lie in favor of him who made payment.

(1) There are some guardians who are called honorary; there are others who are designated for the purpose of giving information; others still, are appointed to transact business; or the father prescribes this, so that, for instance, one of them shall administer the guardianship, or the transaction of business is entrusted to a single guardian, with the consent of the others; or the Praetor issues a decree with reference to this effect. Therefore, I say that no matter to what kind of a guardian payment may be made, even to an honorary guardian (for responsibility attaches to him), it is properly done; unless the administration of the guardianship has been forbidden him by the Praetor, for if this is the case, payment cannot legally be made to him. I hold that the same rule applies where anyone knowingly pays guardians accused of being suspicious, for the administration of the guardianship is, in the meantime, considered to be forbidden them.

(2) If payment is made to a guardian who has been removed, the debtor pays one who has ceased to be a guardian, and for this reason he will not be released.

(3) But what if he has paid someone in whose place a curator should be appointed; for example, a man who has been perpetually, or temporarily banished ? I say that if he pays him before the curator has been substituted for him, he should be released from liability.

(4) Even if he has paid a guardian who is about to be absent on public business, the payment will be legal. And, indeed, he can pay him during his absence, provided another has not been appointed in his place.

(5) Payment may properly be made to a single guardian, whether the guardians are legal or testamentary, or have been appointed as the result of a judicial inquiry.

(6) Let us see whether payment can legally be made to a guardian appointed for the purpose of giving information, because he was appointed to advise his fellow-guardian. But, as he is a guardian, and payment to him has not been prohibited, I think that if it is .made, a release will take place.

(7) Payment may properly be made to the curator of an insane person, as well as to the curator of one who cannot take care of himself, either on account of his age, or for any other good reason. It is, however, settled that payment can legally be made to the curator of a ward.

(8) It is clear that a ward cannot pay without the authority of his guardian. If he should pay money, it does not become the property of him who received it, and can be recovered by an action. It is evident that if it has been expended the ward will be released from liability.

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

Payment cannot be made to a ward without the authority of his guardian. He cannot delegate a debtor, because he cannot alienate anything. If, however, the debtor has paid him, and the money is safe, upon the demand of the ward for payment a second time, the debtor can bar him by an exception on the ground of fraud.

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

If a release is granted to a debtor conditionally, and the condition is afterwards complied with, he will be understood to have been released some time before. Aristo says that this takes place even should payment actually be made, for he holds that if anyone promises money under a condition, and pays it with the understanding that if the condition should be complied with payment shall be considered to have been made, and the condition is fulfilled, he will be released; and no objection can be raised because the money previously became the property of the creditor.

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

Cassius says that if I have given money to anyone to enable him to pay my creditor, and he pays it in his own name, neither of the parties will be released. I will not be, because it was not paid in my name, and he will not be, because he paid what was belonging to another, but he will be liable under the mandate. If, however, the creditor should spend the money without being guilty of fraud, he who paid it in his own name will be released, for fear that, if it were decided otherwise, the creditor might profit by the transaction.

18. *Ulpianus, On Sabinus, Book XLI.*

Where anyone pays a slave who has been appointed to collect the money, after his manumission, if this is in accordance with the contract of his master,, it will be sufficient that he was not aware that the slave had been manumitted. If, however, the money was paid for some reason connected with the *peculium,* even though the master knew that the slave had been manumitted, still, if *he did not know that he had been deprived of his *peculium,* he will be released from liability. In both cases, however, if the manumitted slave did this for the purpose of taking the money from his master, he will be guilty of theft. For if I direct my debtor to pay a sum of money to Titius, and I then forbid Titius to accept it, and the debtor is not aware of this, and pays Titius, who pretends to be the agent, the debtor will be released, and Titius will be liable in an action of theft.

19. *Pomponius, On Sabinus, Book XXI.*

-My fugitive slave, pretending to be a freeman, lent you money which he had stolen from me. Labeo says that you are liable to me, and if you, believing him to be free, should pay him, you will be released, so far as I am concerned. If, however, you pay another by his order, or you ratify such a payment, you will not be released; because, in the first instance, the money becomes mine, and is understood to be paid, as it were, to myself. Hence, my slave, by collecting what he lent as part of his *peculium,* will release the debtor, but if he delegates him or makes a novation, this will not be the case.

20. *The Same, On Sabinus, Book XXII.*

If I pay you by giving you an article of mine which was due to you, but which was pledged to

another, I will not be released; because the property can be recovered from you by the person who received it in pledge.

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

If, having stipulated with Titius for ten *aurei,* you then stipulate with Seius to pay you whatever you cannot collect from Titius; even if you bring an action for ten *aurei* against Titius, Seius will still not be released. But what if Titius, having had a judgment rendered against him, should not be able to pay anything? Even if you first bring suit against Seius, Titius will not, in any respect, be discharged from liability, for it is uncertain whether Seius will owe anything at all. Finally, if Titius discharged the entire debt, Seius will not be considered to have been a debtor, for the reason that the condition upon which his indebtedness depended has failed to be fulfilled.

22. *Ulpianus, On Sabinus, Book XLV.*

*A* son under paternal control cannot release a debtor of his father against the latter's consent, as he can acquire an obligation for him, but he cannot diminish one.

23. *Pomponius, On Sabinus, Book XXIV.*

We can be released from liability by payment, or by appearance in court in our behalf, even against our consent, and without being aware of it.

24.. *Ulpianus, On Sabinus, Book XLVII.*

When a surety has become responsible for ten *aurei* for two persons, he will be liable for twenty; and whether he pays twenty for them together, or ten for each one, he will release both debtors from liability. If, however, he pays five, let us see which of the two debtors he will release to that extent. The one mentioned in the release will be discharged from liability for that amount, or if this does not appear, the sum should be credited upon the oldest debt.

The same rule will apply where fifteen *aurei* are paid, if it is apparent what the intention was with reference to ten of them, and the remaining five will be credited on the other obligation. But where the intention cannot be ascertained, ten *aurei* will be credited on the oldest note, and five on the other.

25. *Pomponius, On Sabinus, Book XXXV.*

Where anyone who has been appointed heir to a portion of an estate pays the entire sum of ten *aurei* which the deceased had promised, he will be released from liability for the share to which he is

entitled as heir; and he can recover the remainder by a personal action. If, however, before he brings this action, the residue of the estate should accrue to him, he will also be liable for the balance; and therefore, if he brings a personal action to recover property which was not due, I think that he can be barred by an exception on the ground of fraud.

26. *The Same, On Sabinus, Book XXXV.*

If a creditor sells a tract of land which has been hypothecated to him, and collects all that was due, the debtor will be released. When the creditor gives a release of the price to the purchaser, or stipulates with him for it, the debtor will still be released. If, however, a slave, who has been pledged, is sold by the creditor, the debtor will not be released, as long as the slave can be recovered under the terms of a conditional sale; as is the case where any pledge is sold subject to rescission of contract.

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

The right of action arising from a stipulation and from a will continues to exist even if the property which was due has been delivered; and although the title to it may be defective, an action can still be brought to recover it; as, for instance, I can bring suit for a tract of land,

even though it has been conveyed to me, provided some right guaranteed by the bond has not been transferred.

28. *Paulus, On the Edict, Book XXXVIII.*

Debtors are released by payment to anyone who transacts the business of the ward instead of his guardian; if the money becomes a part of the property of the ward.

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

When Stichus and Pamphilus are promised to two persons, Stichus cannot be delivered to one and Pamphilus to the other, but the half of each one of them is due to each individual creditor. The same rule applies where anyone promises to give two Stichuses or two Pamphiluses, or ten slaves to another slave who belongs to two masters. For the expression "ten slaves," like "ten *denarii,"* is ambiguous, and the half of the ten can be understood in two different ways. But with reference to money, oil, wheat, and other things of this kind, which are included in a common species, the intention appears to have been that the obligation should be divided by a number, when this is more convenient for the promisor and the stipulator.

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

If a debtor tenders money which he owes, and his creditor declines to accept it, the Praetor will refuse him an action.

31. *The Same, Disputations, Book VII.*

A great difference exists between artisans with respect to their-talents, character, knowledge, and education. Therefore, if anyone promises to build a ship, or a house, or to excavate a ditch, and it is specially agreed that he shall do this with his own worktnen, and the surety himself constructs the building, or makes the \excavation, without the consent of the stipulator, the debtor will not be released from liability.

Hence, even if the surety should add the following clause to the stipulation, "Nothing shall be done by you to interfere with my right of way," and the surety prevents me from passing, he does not render the stipulation operative; and if he permits the servitude to be enjoyed, he does not hinder the stipulation from taking effect.

32. *Julianus, Digest, Book XIII.*

If a slave lends money out of his *peculium,* and his debtor, not knowing that his master was dead, pays the slave before the estate has been entered upon, he will be released.

The same rule of law will apply even if the debtor pays the money after the slave has been manumitted, provided he is ignorant of the fact that his *peculium* was not bequeathed to him; nor does it make any difference whether the money was delivered to him during the lifetime or after the death of his master, since, even in the latter instance, the debtor will be released, just as if the debtor had been ordered by his creditor to pay a sum of money to Titius; for although the creditor may be dead, still he does not pay it any the less properly to Titius, provided he was not aware that he was dead.

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

Where anyone stipulates that a tract of land shall be conveyed to him, or to Titius, even though the land should be given to Titius he will still be entitled to an action, if he is subsequently evicted; just as if he had stipulated for a slave, and the promisor had given Titius one who was to be free under a condition, and the slave should afterwards obtain his liberty.

(1) Where a man, who promised to give Stichus or Pamphilus, wounds Stichus, he is not released by delivering him, any more than if he had only promised Stichus, and delivered him after he had been wounded by him.

Likewise, where anyone promises to give a slave, and tenders him wounded, he will not be

freed from liability. And where the case is pending in court, and the defendant tenders a slave who has been wounded by him, he should have judgment rendered against him; and even if he tenders a slave who has been wounded by someone else, he will have judgment rendered against him, if he can give another slave.

34. *The Same, Digest, Book LIV.*

Where anyone who has promised to give a slave, or pay ten *aurei* to you, or to Titius, delivers to Titius a part of the slave, and afterwards pays you ten *aurei,* he can bring an action to recover the part of the slave, not against Titius, but against you, just as if he had given to Titius with your consent, something that he did not owe him.

The same rule will apply if he should pay ten *aurei* after the death of Titius; as he can recover the share of the slave rather from you than from the heir of Titius.

(1) If two joint-stipulators contract that a slave shall be delivered to them, and the promisor delivers to each of them different shares of different slaves, there is no doubt that he will not be released. If, however, he gives to both of them the shares of the same slave, a release takes place, because the common obligation has such an effect that what is paid to two persons is held to have been paid to one.

On the other hand, when two sureties promise a slave shall be delivered, and they give shares of different slaves, they will not be released, but if they give shares of the same slave, they will be freed from liability.

(2) I stipulated for ten *aurei* to be paid to me, or a slave to be delivered to Titius. If the slave is delivered to Titius, the promisor will be released, so far as I am concerned; and before he is delivered I' can demand the ten *aurei.*

(3) If I give Titius charge of all my business, and afterwards, without the knowledge of my debtors, I forbid him to transact it, the latter, by paying him, will be released; for he who gives anyone charge of his business is understood to direct his debtors to pay him as his agent.

(4) If my debtor, without any authority from me, should erroneously believe that he has my consent to pay money to another person, he will not be released; and therefore no one will be freed from liability by payment of an agent, who voluntarily offers himself to transact the affairs of another.

(5) If a fugitive slave who asserts that he is free sells any property, it has been decided that the purchasers are not released from liability to his master by paying the fugitive slave.

(6) If a son-in-law pays a dowry to his father-in-law, without the knowledge of the daughter of the latter, he will not be released, but he can bring a personal action for recovery against his father-in-law, unless the daughter ratines what he has done. The son-in-law, to a certain extent, resembles one who pays the agent of a person who is absent, because, in the case of a dowry, the daughter participates in the dowry, and is, as it were, a partner in the obligation.

(7) If I, desiring to make a donation to Titius, order my debtor to pay a sum of money to him, even though Titius may accept the money with the intention of rendering it mine, the debtor will, nevertheless, be released from liability. If, however, Titius afterwards gives me the same money, it will become mine.

(8) A testator appointed, as his heir, a son under paternal control from whom he had received a surety. If he should enter upon the estate by the order of his father, the question arises whether the latter can bring an action against the surety. I stated that whenever the principal debtor became the heir of him who received security, the sureties would be released, because they could not be indebted to the same person, on account of the same person.

(9) If a thief restores to someone claiming an estate property which he has collected from debtors of the estate, the latter will be released.

(10) If I stipulate that ten *aurei* shall be paid, or a slave be delivered, and I receive two sureties, Titius and Masvius, and Titius pays five *aurei,* he will not be released until Msevius also pays five. If, however, Msevius delivers a share of a slave, both of them will remain liable.

(11) Anyone who can protect himself by means of a perpetual exception can recover what he has paid, and therefore will not be released. Hence, when one of two promisors makes an agreement that nothing shall be demanded of him, even though he should make payment, the other will, nevertheless, remain liable.

35. *Alfenus Varus, Epitomes of the Digest of Paulus, Book II.*

Whatever a slave has lent, or deposited, out of his *peculium,* although he may be sold or manumitted afterwards, can legally be paid to him; unless something should take place from which if may be inferred that payment has been made against the consent of the person to whom the slave belonged at the time. Where, however, anyone borrows, at interest, money from him which belonged to his master, while the slave was conducting the business of his master with his permission, the same rule will apply. For he who made the contract with the slave is considered to have received the money from him, and paid it to him, with the consent of his master.

36. *Julianus, On Urseius Ferox, Book I.*

If my father should die, leaving his wife pregnant, and I, as heir, should demand payment of all the debts due to him; some authorities hold that I will still retain my rights of action, and if no child is afterwards born, that I can legally bring suit, because it is true that I am the only heir in existence.

Julianus says that the better opinion is that the entire estate to which I was heir was claimed by me before it was certain that a child would not be born; or the fourth part because three children could be born; or the sixth, because five could be born. For Aristotle has stated that five children can be born, because the womb of a woman has that many receptacles, and that there was a woman at Rome who came from Alexandria in Egypt, who had five children at one birth, all of whom survived. I have obtained confirmation of this in Egypt.

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

Whenever one of several sureties has paid his share as having transacted the affairs of the principal debtor, this is considered the same as if the debtor himself had paid the share of the indebtedness for which one of the sureties was liable; but this does not diminish the amount of the principal, and only the surety, in whose name payment was made, is released.

38. *Africanus, Questions, Book VII.*

When anyone stipulates that payment shall be made to him, or to Titius, the better opinion is that it will only be properly made to Titius, when he remains in the same condition in which he was when the stipulation was entered into. If, however, he has been adopted, or sent into exile, or forbidden the use of fire and water, or has become a slave, it cannot be said that legal payment has been made, for this agreement, namely, "If he remains in the same condition," is understood to have been tacitly included in the stipulation.

(1) If I order my debtor to pay Titius, and, afterwards I forbid Titius to receive the money, and my debtor not being aware of the fact, pays him, it was held that the debtor was released, if Titius did not receive the money with the intention of profiting by it; otherwise, it would remain the property of the debtor, just as if he was about to steal it, and hence he cannot be released by operation of law; still, it is but just that relief should be granted him by means of an exception, if he is ready to assign to me the right of personal action, on account of theft, to which he is entitled against Titius; as is done where a husband, being desirous of making a donation to his wife, directs his debtor to pay her.

For, in this case also, because the money does not become the property of the woman, the debtor will not be released, but he can be protected against the husband by an exception, if he assigns to him the right of action which he has against his wife. In the case stated an action for theft will be in my favor, after a divorce has been granted, when it is to my interest that the money should not be appropriated.

(2) The action *De peculia* was brought against a master, and judgment having been rendered against him, he paid it. The opinion was given that the sureties received for the slave were released, for the same money can be used to satisfy several claims, because when security is given for the payment of a judgment, and judgment is rendered against the defendant, and he pays it himself, the sureties are released, not only on account of the satisfaction of the judgment but also under the stipulation.

This case is quite similar to the one where the possessor of an estate, believing himself to be the heir, makes payment, and the heir is not released; for this happens because the possessor, by paying money which was not due in his own name, can recover it.

(3) Where he who has promised a slave delivers one who is to be free under a condition, I think that the better opinion is that we should not wait for the fulfillment of the condition, but that the creditor can bring a personal action for recovery. If, however, in the meantime, the condition should fail to be fulfilled, the promisor will be released, just as if anyone had made payment through mistake, while a condition was pending, and it should be fulfilled before he brought the personal action. But it certainly can not be said, that if Stichus should die, and the condition should fail to be fulfilled, the debtor would be released, although if it was not fulfilled during his lifetime he would be freed from liability, since, in this case, you have, at no time, absolutely made the slave mine.

Otherwise, it might also be held that if you deliver me a slave in whom some other person enjoys the usufruct, and the slave should die during the continuance of the usufruct, you will be considered released by this delivery; which opinion can, by no means, be adopted, any more than if you had delivered a slave owned in common, and he should die.

(4) Where anyone becomes surety for a person who has returned after having been absent on public business, and he incurs no risk of being sued on this account, will the surety also be released after the expiration of a year? This opinion was not adopted by Julianus, even where no power to proceed against the surety existed. In this instance, however, in accordance with the terms of the Edict, restitution should be granted by means of an action against the surety himself, just as is done against a surety who kills the slave that had been promised.

(5) Where anyone who has become surety for you to Titius gives a pledge for the further security of his obligation, and you afterwards appoint him your heir, although you will not be liable by virtue of the suretyship, still, the pledge will still remain encumbered. If the same person gives another surety, and appoints you his heir, he says that it is better to hold that the obligation of the debtor for whom security was taken having been extinguished, he also who had become his surety will be released.

39. *The Same, Questions, Book Vill.*

If, being desirous of paying the money, I deposit it by your direction with an assayer to be tested, Mela, in the Tenth Book, says that you do this at your own risk. This is true, in case it was your fault that the coins were not immediately tested, for then it will be the same as if I was ready to pay, and you, for some reason or other, refused to accept the money. In this instance, the money is not always at your risk, for what if I should tender it at an inopportune time or place? I think that the result would be that, even if the purchaser and vendor, having little confidence in one another, should deposit the money and the merchandise, the money will be at the risk of the purchaser, if he himself selected the person with whom it was deposited, and the same rule will apply to the merchandise, because the sale was perfected.

40. *Marcianus, Institutes, Book HI.*

If anyone should pay my creditor for me, even though I am not aware of it, I will acquire a right to bring suit to recover my pledge. Likewise, if anyone pays legacies, the legatees must relinquish possession of the estate; otherwise, the heir will be entitled to an interdict to compel them to surrender it.

41. *Papinianus, On Adultery, Book I.*

Where a creditor is accused of a crime, there is nothing to prevent the payment of money by his debtors; otherwise, many innocent persons would be deprived of the necessary means of defence.

42. *Paulus, On Adultery, Book HI.*

Nor is it held to be forbidden for payment to be made by the accused party to his creditor.

43. *Ulpianus, Rules, Book II.*

In all cases where persons are released from liability, the accessories are also released, for instance sureties, and property hypothecated or pledged; except where merger having taken place between the creditor and the sureties, the principal debtor is not released.

44. *Marcianus, Rules, Book II.*

In the payment of money, it sometimes happens that two obligations are discharged by one payment, at the same time; as, for instance, where anyone sells to his creditor the property which has been pledged to secure his debt; for it happens that, by the sale, the obligation of the debt is also extinguished.

Again, where a bequest is made by a creditor to a ward who has borrowed money without the authority of his guardian, under the condition that he will pay this money, the ward is held to have paid it for two reasons: first, to discharge his debt, as it will be credited on the Falcidian portion of the heir; and second, in order to comply with the condition to enable him to obtain the legacy.

Likewise, if the usufruct of a sum of money has been bequeathed, it happens, that by one payment the heir will be released from the obligation imposed by the will, and will render the legatee liable to himself. The same thing occurs where anyone has been ordered by the court to sell or lease property to another; for, either by selling or leasing, the heir will be freed from liability under the will, and will render the legatee liable to himself.

45. *Ulpianus, Opinions, Book I.*

It was held by Callippus that although a husband had promised his wife, who was the stipulator, that in case the marriage should be dissolved, the land which was hypothecated for the dowry should be given in payment, still it would be sufficient to tender the amount of the dowry.

(1) The same authority stated to Fronto, that if a guardian continued to administer the affairs of the guardianship, although he had been accused of a capital crime, payment could be made to him of what was actually due to his ward.

46. *Marcianus, Rules, Book III.*

If anyone should give to his creditor with his consent, by way of payment, one kind of property instead of another, and it should be evicted, the former obligation will continue to exist. If the property should only partly be evicted, the obligation for the entire amount will still remain unimpaired, as the creditor would not have accepted it if there had been any doubt as to the title.

(1) But even if, for example, he had given two tracts of land instead of paying his debt, and

one of them was evicted, the obligation would remain unimpaired. Therefore, when one article is given in payment for another, a release from liability is effected, and it absolutely belongs to the person who receives it.

(2) But where anyone, through fraud, gives in payment a tract of land which is estimated at more than it is worth, he will not be released unless he makes up the deficiency.

47. *The Same, Rules, Book IV.*

Where payment is made to a ward without the authority of his guardian, and an inquiry is instituted to ascertain the time when he profited by it, the date on which he brought his action is taken into account; and this is done in order to determine whether he can be barred by an exception on the ground of fraud.

(1) It is evident (as Scsevola says) that if the property was lost before issue had been joined, the ward is sometimes considered as having profited pecuniarily; that is to say, if he bought something which was necessary, and which should have been purchased with his own money. For he is considered to have profited by the transaction by the mere fact that he did not become any poorer. Hence the opinion was advanced that the Macedonian decree of the Senate does not apply to the case of a son under paternal control, if he borrowed money for necessaries and lost it.

48. *Marcellus, Opinions.*

Titia, in order to secure her dowry, obtained possession of the property of her husband, and acted in every respect as if she owned it, for she collected the income, and sold the chattels. I ask whether what she collected out of the property of her husband should be credited on her dowry? Marcellus answers that, in the case stated, it did not seem unjust for such a credit to be made, for what the woman collected under such circumstances should rather be considered a payment. But if the arbiter appointed to decide as to the recovery of the dowry should also require an account of the interest to be rendered, this must be computed in such a way that whatever came into the hands of the woman will not be deducted from the entire amount, but will first be credited on the interest to which she was entitled. This is not inequitable.

49. *Marcianus, On the Hypothecary Formula.*

We understand a sum of money to be paid naturally, where it is counted out to the creditor. If, however, it is paid to another by his order, or to his creditor, or to someone who is about to become his debtor, or even to a person to whom he intends to donate it, he should be released from liability.

The same rule will apply if the creditor ratifies a payment which has been made. Also, where the money is paid to a guardian, a curator, an agent, or any successor whomsoever, or to a slave who is a steward, this will be valid. If a release, for the purpose of extinguishing an hypothecation, is given by means of a stipulation or without it, the term "payment" cannot be adopted, but that of "satisfaction" may be.

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

If, having promised you gold, I should, without your knowledge, give you copper instead, I will not be released, but I cannot recover it as having been paid without being due, because I gave it knowingly; nevertheless, if you bring suit for gold, I can bar you by means of an exception, if you do not return the copper which you received.

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

Payment can properly be made to a steward if he has been dismissed without the knowledge of the debtor; for he is paid with the consent of his master, and if he who pays him is not aware that his master has withdrawn it, he will be released.

52. *Ulpianus, On the Edict, Book XIV.* Satisfaction is equivalent to payment.

53. *Gaius, on the Provincial Edict, Book V.*

Anyone can make payment in behalf of a debtor who is ignorant of the fact, even against his consent; for it is established by the Civil Law that the condition of a person can be improved who is not aware of it, and who is also unwilling.

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

The term "payment" is applicable to every release from liability made in any way whatsoever, and relates to the substance of the obligation, rather than to the delivery of the money.

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

Where anyone pays with the intention of again receiving the money, he will not be released, just as money which is paid in order to be returned is not alienated.

56. *Paulus, On the Edict, Book LXII.*

Anyone who directs payment to be made is himself considered to pay.

57. *Ulpianus, On the Edict, Book LXXVII.*

When anyone stipulates for ten *aurei* to be paid in honey, honey can be delivered to him before proceedings are instituted under the stipulation. If, however, an action has once been begun, and the ten *aurei* demanded, the debt can no longer be paid in honey.

(1) Again, if I should stipulate for payment to be made to me or to Titius, and I afterwards bring suit, payment can no longer be made to Titius, although it could have been done before issue had been joined.

58. *The Same, On the Edict, Book LXXV.*

If anyone should, in good faith, pay a person who had voluntarily taken charge of the business of another, when will he be released? Julianus says that he will be released when the principal ratines the transaction. He also asks whether a personal action can be brought against him for recovery, on this ground, before the principal ratifies the transaction. In answer to this, he says that it makes a difference with what intention the payment was made, whether this was done in order that the debtor might be discharged immediately, or only after the principal had ratified. the act. In the first instance, the agent can be sued at once, and then, when the principal has ratified what has taken place, the right of action will be extinguished; but, in the second instance, no cause of action will arise unless the principal refuses to ratify what the agent has done.

(1) If a creditor, to whose agent payment has been made without his knowledge, gives himself to be arrogated, the acceptance of the money will be valid if the father ratifies it, but if he does not do so, the debtor can recover what he has paid.

(2) Where there are two joint-stipulators, and payment is made to the agent of one of them, who is absent, and before he ratifies it, payment is made to the other, the last payment as well as the first remains in abeyance; since it is uncertain whether the last stipulator has collected something which was due, or which was not due.

59. *Paulus, On Plautius, Book II.*

If I stipulate as follows, "Do you promise to pay me or Titius?" and the debtor agrees to pay me, although an action to collect money on an informal agreement will lie in my favor, the promisor can still pay him who has been added. And if I stipulate for myself or for Titius with a son under paternal control, the father can pay Titius out of the *peculium,* that is, if he wishes to pay in his own name, and not in that of his son; for when payment is made to the person who was added, it is considered to be made to me. Therefore, if payment of something which is not due is made to the person who has been added, Julianus says that suit can be brought against the stipulator to recover it, so that it makes no difference whether I direct you to pay

Titius, or whether the stipulation was framed in this way in the beginning.

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

He who has given a slave that did not belong to him in payment, will be released, if the slave is acquired by usucaption.

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

Whenever what I owe you becomes yours in perpetuity, and the title is perfect, and what has been paid cannot be recovered, the release will be complete.

62. *The Same, On Plautius, Book Vill.*

I directed my steward to be free by my will, and I bequeathed him his *peculium.* After my death, he collected money from my debtors. The question arises whether my heir can withhold what he collected from his *peculium.* If he collected the money after the estate had been entered upon, there can be no duobt that he cannot deduct it from his *peculium* on this account; because, having been made free, he will become liable himself if the debtors of the estate are released by payment.

But if the steward received the money before the estate was entered upon, and the debtors were released by the payment of the same, the amount unquestionably can be deducted from the *peculium,* because the steward begins to be indebted to the heir by having transacted his business, or complied with his mandate. If, however, the debtors are not released, and, in transacting my business, you were paid by them, and I did not afterwards ratify your act, and then, if I wish to bring an action on the ground of voluntary agency, the question arises whether I can do so properly if I give security to indemnify you against loss. I do not think that this is the case, for suit on the ground of voluntary agency cannot be brought, for the reason that I have not ratified the transaction, and hence the debtors remain liable, to me.

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

Where a debtor is the usufructuary of a slave, the slave can be liberated by means of a release, for he will be held to have acquired from the property of the usufructuary. We say the same thing in the case of an agreement.

64. *The Same, On Plautius, Book XIV.*

When, by my order, you pay what you owe me to my creditor, you are released so far as I am concerned, and I am freed from liability to my creditor.

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

If the daughter of an insane person should be divorced from her husband, it has been decided that the dowry can be paid to the agnate curator, with the consent of the daughter, or to the daughter with the consent of the agnate.

66. *The Same, On Plautius, Book VI.*

If the debtor of a ward, by his direction and without the authority of his guardian, pays money to the creditor of the former, he releases the ward from liability to the creditor, but he himself remains bound. He, however, can protect himself by means of an exception. But if he was not indebted to the ward, he cannot bring a personal action for recovery against the latter, who is not responsible as he acted without the authority of the guardian; nor can he bring one against the creditor, with whom he contracted by the order of another. The ward, however, having been released from liability for his indebtedness, can be sued in a praetorian action for the amount by which he has been pecuniarily benefited.

67. *Marcellus, Digest, Book XIII.*

If anyone should promise two slaves, and deliver Stichus, and he afterwards becomes the

owner of the said Stichus, he will be released from liability by delivering him. With reference to the payment of money, there is less doubt, and, indeed, almost none at all. For in Alfenus, Servius says that a creditor who is willing to accept less than is due from his debtor, and release him, can do so by frequently receiving a sum of money from him, returning it, and afterwards receiving it again; for instance, if a creditor, to whom a debtor owes a hundred *aurei,* is willing to release him on the payment of ten, and after haying received the ten, gives the same coins back to him, and afterwards receives them and returns them up to the full amount, and finally retains them, although this has not been accepted by certain authorities as being sufficient payment, because he who takes the money in order to refund it, seems rather to have paid it himself than to have received it.

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

A slave, having been ordered to pay ten *aurei* to a ward and become free, if the ward is an heir, or the condition is merely personal, can the slave, by making payment to the ward in the absence of his guardian, obtain his freedom? Some difficulty will arise in comparing this condition with that which consists of an act; for instance, if he should give his services to a ward, which can be done without the intervention of his guardian. And, it is asked, what if he is ordered to make payment to an insane person, who has a curator; will he, by paying the curator, be released? Suppose that a tract of land was left to someone on condition that payment should be made to a minor, or a person who is insane. It must be remembered that, in all these cases, payment can legally be made to the guardian or curator, but is not valid if made to the insane person or ward, for fear that what is paid may be lost by their weakness. For it was not the intention of the testator that the condition should be considered to have been complied with no matter in what way payment was made.

69. *Celsus, Digest, Book XXIV.*

If you surrender a slave by way of reparation for damage committed, and someone else has the usufruct in said slave, or he has been pledged for a debt to Titius, he in whose favor a judgment has been rendered against you can cause the judgment to be executed, and it will not be necessary to wait until the creditor evicts him. If, however, the usufruct should be extinguished, or the obligation of the pledge be discharged, I think that a release will take place.

70. *The Same, Digest, Book XXVI.*

Anything which has been promised on a certain date can be given or paid immediately, for all the intermediate time is understood to be left free to the promisor for the purpose of making payment.

71. *The Same, Digest, Book XXVII.*

When, having stipulated for ten *aurei* to be paid to myself or to Titius, I accept five; the promisor can properly pay the remaining five to Titius.

(1) If a surety pays the agent of the creditor, and the latter ratifies the payment after the time when the surety could have been released has elapsed, still, for the reason that the surety paid while he still was liable on account of his suretyship, he cannot recover what he paid, and he is just as much entitled to the action on mandate against the principal debtor as if he had paid the creditor when present.

(2) Again, if the creditor, not being aware that payment has been made to his agent, gives a release to the slave or the son of the debtor, and he afterwards learns of the payment, and ratines it, it is confirmed ; and the release which he gave becomes of no force or effect. And on the other hand, if he does not ratify the payment, the release remains valid.

(3) If, however, not being aware of the payment, he institutes legal proceedings, and ratifies the payment while the suit is pending, the party against whom the action is brought will be

discharged; but if he does not ratify it, judgment shall be rendered against the defendant.

72. *Marcellus, Digest, Book XX.*

Where anyone who owes ten *aurei* tenders them to his creditor, and the latter, without any good reason, refuses to accept them, and afterwards the debtor loses them, without any fault of his own, he can protect himself by an exception on the ground of fraud, even though, after having been notified, he does not make payment; for, indeed, it is not just for him to be liable for the money which was lost, because he would not be liable if the creditor had been willing to take it. Wherefore, what the creditor was in default in receiving should be considered as having been paid. And certainly, if a slave formed part of a dowry, and the husband tendered him, and the slave died, or if he rendered money, and should lose it, after the woman has refused to accept the slave or the money, he ceases to be liable by operation of law.

(1) If you owe me Stichus, and are in default in delivering him, having promised him under a condition, and while the condition is pending Stichus dies, as the first obligation cannot be renewed, let us see whether suit can be brought to recover the slave, if there was no stipulation. It may, however, be said in reply that when the debtor promised the stipulating creditor under a condition, he does not appear to have been in default in the delivery of the slave. For it is true that he who was notified and refused to deliver him will be released from liability, if he tenders him subsequently.

(2) But what if the creditor should stipulate with another, without the knowledge of the debtor? In this instance, also, the debtor should be considered as having been released from liability; just as if anyone should tender a slave in the name of the debtor, and the stipulator should refuse to accept him.

(3) The same opinion was given in the case where a man, after a slave had been stolen from him, stipulated under a condition for all that the thief was able to pay, or do; for the thief will be released from liability to an action for recovery, if the owner of the slave should refuse to accept him when he is tendered.

If, however, the stipulation was entered into while the slave was in a province, and suppose that, before the thief or the promisor was able to obtain possession of him, the slave should die, there would be no ground for the application of the rule which we mentioned above; for, on account of the absence of the slave, he could not be considered to have been tendered.

(4) I stipulated for Stichus and Pamphilus, when Pamphilus belonged to me. If he should cease to be mine, the promisor will not be released by giving Pamphilus; for no contract is considered to have been made with reference to the slave, Pamphilus, either by way of obligation or payment. But where anyone stipulates for the delivery of a slave, the promisor, by giving one of the slaves who belonged to him at the time the stipulation was made, will be released. And, indeed, the stipulator, by the terms of the agreement, seems to have contracted for a slave to be delivered who did not belong to the promisor at the time. Let us suppose the stipulation was as follows: "Do you promise to give one of the slaves that Sempronius left?" If Sempronius left three, one of them would belong to the stipulator; and let us see if the other two slaves that belonged to someone else should die, whether the obligation would continue to exist. The better opinion is, that the stipulation will be extinguished, unless the remaining slave belonging to the stipulator should cease to be his before the death of the other two.

(5) Where someone who owes a slave gives Stichus, who is entitled to his freedom under the terms of a trust, he is not considered to have been released. For his delivery of the slave amounts to less than if he had given him while still liable to be surrendered by way of reparation for damage committed. Hence, will the same rule apply if he delivers a grave-digger, or some other degraded slave? In this instance, we cannot deny that he has given a slave, but it differs from the former ones, as he has a slave who cannot be taken away from him.

(6) The promisor of a slave must deliver such a one as the stipulator can manumit, if he desires to do so.

73. *The Same, Digest, Book XXXI.*

I gave a surety for twenty *sesterces,* and a pledge for ten, in order to secure thirty *sesterces* which I had borrowed. The creditor collected ten by the sale of the pledge. Does this sum of ten *sesterces* decrease the entire debt (as certain authorities hold), if, when paying the ten, the debtor said nothing about it; or (which is my opinion) is the surety entitled to be released from liability for the *sesterces* on all that is due, for the reason that, by mentioning this, the debtor could have brought it about; and as he did not say anything, he would be held rather to have intended to make payment of that which was secured? I am rather inclined to think that the owner of the obligation should be permitted to credit what was paid upon that part of the claim for which the debtor was severally liable.

74. *Modestinus, Rules, Book HI.*

Whatever is collected from the debtor as a penalty should enure to the benefit of the creditor.

75. *The Same, Rules, Book Vill.*

Just as a release annuls all preceding actions up to that time, so merger produces the same effect; for if a debtor becomes the heir of

his creditor, the merger of the estate annuls the action to recover the debt.

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

Modestinus holds that payment having been made of everything that was due on a tutelary account without any agreement, if, after a certain interval, the rights of action are assigned, the assignment is void, because no such right remains. If, however, this was done before payment, or if it was agreed between the parties that the rights of action should be assigned, and payment is made, and the assignment afterwards takes place, the rights of action will remain unimpaired; as, even in the last instance, the price of those which were assigned seems rather to have been paid than that the right which existed at the time has been extinguished.

77. *The Same, Pandects, Book VII.*

A contract for his services cannot be made by a master with his freedman for any time previous to obtaining his liberty.

78. *Javolenus, On Cassius, Book XI.*

When money belonging to another is paid without the knowledge or consent of the owner, it still continues to be his property. If it is mixed with other money, so that it cannot be separated, it is stated in the Books of Gaius that it will belong to the person who receives it; so that an action of theft will lie in favor of the owner against him who paid the money.

79. *The Same, Epistles, Book X.*

The money which you owe me, or any other property which I direct you to produce in my presence, when this is done, causes you immediately to be released, and the property to belong to me. For as the possession of the said property is not actually held by anyone, it is acquired by me, and is, as it were, considered to be delivered to me *manu longa.*

80. *Pomponius, On Quintus Mucius, Book IV.*

An obligation can be discharged in the same way in which it was contracted. Hence, when we have made an agreement with reference to any property, it should be discharged by the transfer of the thing itself, as, for instance, when we lend some article to be consumed, and its value in money is to be given in return; and where we have contracted for anything orally, the obligation should be discharged by the delivery of the article, or by words. By words, when

the promisor is given a release; by the delivery of the article, when what was promised is given. Likewise, where a purchase, sale, or lease, is effected, if this is done by mere consent, the contract can be dissolved by a contrary agreement.

81. *The Same, On Quintus Mucius, Book VI.*

If I stipulate for payment to myself or to Titius, and Titius should die, you cannot pay his heir.

(1) If Titius should deposit a dish in my hands, and die leaving several heirs, and some of them notify me to deliver it, the best thing will be for the Praetor, after having been applied to, to order me to deliver the dish to some of the heirs, under which circumstances I will not be liable for the deposit to the remaining ones; but if I deliver it, in good faith and without having been ordered to do so by the Praetor, I will be released; or, what is more' true, I will not be liable to the obligation resulting from the deposit. The best course to pursue, however, is to do this by the order of the magistrate.

82. *Proculus, Epistles, Book V.*

If Cornelius should give a tract of land which belongs to him, in the name of Seia, to her husband by way of dowry, and make no provision with reference to its return; and he does this in such a way that an agreement is entered into between Seia and her husband that, if a divorce should take place, the land shall be returned to Cornelius; I do not think that, if a divorce does take place, the husband can safely return the land to Cornelius, if Seia should forbid him to do so; just as, where no informal agreement was made, the woman, after the divorce, should direct the land to be returned to Cornelius, and then, before this was done, forbid it, it could not safely be returned to him.

If, however, before Seia forbade this to be done, her husband should return the land to Cornelius, and he had no reason to think that, if he did so, she would not consent, I do not think that it would be better or more equitable to deliver the land to Seia.

83. *Pomponius, Various Passages, Book XIV.* If I lend money to your slave, and then purchase him, and, after having been manumitted, he pays me, he cannot recover the money.

84. *Proculus, Epistles, Book VII.*

You brought an action *De peculia* against a master for a debt of his slave, and it was held that the sureties were not released. If the same slave who had been entrusted with the management of his *peculium* should pay the money, you have read correctly that the securities will be released.

85. *Callistratus, The Monitory Edict, Book I.*

Less than the entire amount is paid either by quantity or by time.

86. *Paulus, On the Edict, Book Vill.*

It is our practice that payment cannot properly be made to the attorney in a suit; for it is absurd that it should be made before the case' has been decided to one to whom the right to enforce judgment is not granted. If, however, it is given to him for the purpose of payment, he will be released after payment has been made.

87. *Celsus, Digest, Book XX.*

Where a debt is paid by my agent, I cannot recover it, as where anyone appoints an agent for the transaction of all his business he is

considered to have directed him to pay his creditors the money to which they are entitled, and it is not necessary to wait until the principal ratifies the transaction.

88. *Scsevola, Digest, Book V.*

A father died intestate and left his daughter his heir. Her mother transacted her business, and

caused her property to be sold by bankers, and all this was entered upon their accounts. The bankers paid over all the proceeds of the sale, and, after this, for about nine years, her mother attended to whatever was to be done in the name of her minor daughter, and finally, gave her in marriage, and delivered her property to her.

The question arose whether the girl was entitled to any action against the bankers, when not she, but her mother, stipulated for the price of the property given to them to be sold. The answer was that if any doubt existed whether the bankers were released by law, after having paid over the money, it should be held that they were freed from liability.

Claudius: For the following question with reference to authority to act remains, that is, whether the price of the property which the bankers knew to belong to the minor appeared to have been paid in good faith to the mother, who did not have the right of administration. Hence, if they were aware of this, they would not be released from liability, that is to say, provided the mother should prove to be insolvent.

89. *The Same, Digest, Book XXIX.*

*A* creditor provided as follows with reference to several of his claims and notes: "I, Titius Maavius, acknowledge to have received and to have in my hands (for which I have given a release to Gaius Titius) all the balance on account, after a calculation has been made of the money for which Stichus, the slave of Gaius Titius, gave me a note." The question arose whether suit could be brought to collect other notes which were not signed by Stichus, but only by the debtor himself. The answer was that only that obligation had been extinguished on which it was stated payment had been made.

(1) Lucius Titius wrote to Seius, who owed him four hundred *sesterces* on two notes, one of which was for a hundred, and the other for three hundred, to send him the amount of the note for a hundred by Msevius and Septicius. I ask whether Seius would be released, if he alleged that he also paid to Msevius and Septicius the amount of the note for three hundred *sesterces?* The answer was that if the creditor did not direct him to pay the note for three hundred *sesterces,* or did not ratify the payment after it had been made, that he would not be released.

(2) Lucius Titius, in two different stipulations, one calling for fifteen *aurei* at a high rate of interest, the other for twenty at a lower rate, bound Seius on the same date, in such a way that the note for twenty *aurei* should be paid first, that is to say, on the *Ides of*

September. The debtor, after the time for payment of both stipulations had elapsed, paid twenty-six *aurei,* and it was not stated by the creditor under which stipulation payment was made. I ask whether what had been paid discharged the obligation which was first due; that is to say, whether the principal of twenty *aurei* should be considered to be paid, and the remaining six paid by way of interest. I answered that it is customary to understand it in 'this way.

90. *The Same, Digest, Book XXVII.*

A son in the capacity of heir administered.the estate of his father, lent money forming part of it to Sempronius, which he received in instalments, and afterwards, being a minor, rejected the estate. The question arose whether the curator of the father's estate would be entitled to an equitable action against Sempronius. The answer was that there was nothing in the case stated to indicate that he who had paid what he had borrowed should not be released.

91. *Labeo, Epitomes of Probabilities by Paulus, Book VI.*

If your debtor refuses to be released by you, and he is present, he cannot be discharged by you against his will.

Paulus: Further, you can release your debtor, if he is present, even without his consent, by substituting for him someone with whom you stipulate for payment of the debt with the

intention of making a novation; and even if you do not give him a release, still, so far as you are concerned, the indebtedness is immediately extinguished, since, if you attempt to collect it, you will be barred by an exception on the ground of fraud.

92. *Pomponius, Epistles, Book IX.*

If you promise to deliver me a slave belonging to another, or if you have been ordered to do so by will, and the slave should be manumitted by his master before you are obliged to deliver him to me, this manumission will have the same effect as death, for if the slave should die you will not be liable.

(1) If, however, anyone who has promised to give a slave, and, having been appointed an heir by the master, he delivers him to be free under a condition, he will be released.

93. *Scasvola, Questions Publicly Discussed.*

Where there are two joint-stipulators, and one of them appoints the other his heir, let us see whether the obligation will not be merged. It has been decided that it will not be merged. What was the advantage of this decision? If the heir brings suit to compel the property to be delivered to him, it must be given to him either because he is the heir, or because he is entitled to it in his own name. A great difference, however, exists in this case, for if one of the stipulators can be barred by a temporary exception arising from the contract, it is important to know whether the heir brings the action in his own name, or as the heir, so that in this way you can ascertain whether there will be ground for an exception, or not.

(1) Again, where there are two joint-promisors, and one of them appoints the other his heir, the obligation will not be merged.

(2) If, however, a principal debtor should make the heir his surety, the obligation will be merged. And it may be considered a general rule that, where a principal obligation is joined to one which is accessory, the two are merged, but where there are two principal obligations, one of them is added to the other rather for the purpose of strengthening the action rather than to produce a merger.

(3) What is the rule where a surety appoints the principal debtor his heir? The obligation will be merged, according to the opinion of Sabinus, although Proculus dissents from it.

94. *Papinianus, Questions, Book Vill.*

Where anyone to whom a debtor has paid money belonging to another continues to demand payment of what is due him while the said money is in his hands, and does not offer to return what he has received, he will be barred by an exception on the ground of fraud.

(1) If, however, I lend money which is owned in common, or I pay it, a right of action and a release will immediately arise with reference to my share, whether the undivided joint interest in the money be taken into account, or whether this money is considered, not as to its corporeal existence, but as to its amount.

(2) But when a surety pays money belonging to someone else, for the purpose of being. released from liability, and it is expended, he can bring an action on mandate. Therefore, if he pays the money which he purloined, he can bring an action on mandate after he has paid the amount of the judgment obtained in an action of theft, or in one for the recovery of property.

(3) Favius Januarius to Papinianus, Greeting: Titius owed Gaius Seius a certain sum of money under the terms of a trust, and also as much more for another reason, that he was unable to collect, but which, after it had been paid, could not be recovered. A slave, who was the agent of Titius, paid the sum of money during the absence of his master, it being equal to the amount of one of the claims, and stated that it should be credited on the entire indebtedness.

I ask upon which claim the amount which was paid should be considered to have been credited. The answer was that if Seius stated to Titius that the payment should be credited on

the entire indebtedness, the term "indebtedness" would seem to indicate only the sum due under the trust, and not that for which he could not bring suit, and after the payment of which the money could not be recovered. But as the slave, who was the agent of Titius, paid the money during the absence of his master, the ownership of the said money would not pass to the creditor under the kind of obligation in which recourse could be had to an exception, even if payment was alleged to be made on this debt; because it is not probable that the master would have appointed his slave' to pay the money on the debt which should not be paid; any more than to make payment out of the *peculium* in order to release

the slave from liability as surety, which the slave had assumed without reference to the benefit of his *peculium.*

95. *The Same, Questions, Book XXVIII.*

"Do you promise to deliver Stichus or Pamphilus, whichever one I may desire?" One of the slaves being dead, the .survivor alone can be claimed, unless there was delay in delivering the one who died, and whom the plaintiff had chosen; for then he alone who died should have been delivered, as if he had been the only one included in the obligation.

(1) When the promisor was entitled to make the choice, and one of the slaves should die, the survivor alone can be demanded. If, however, one of them should die by the act of the debtor, as he had the right of selection, although, in the meantime, he only can be demanded who can be delivered, the debtor cannot tender the estimated value of the one who is dead, if he should happen to be much less valuable than the other; for the reason that this rule has been established for the benefit of the claimant, and to punish the promisor. Still, if the other slave should afterwards die without the fault of the debtor, an action can, under no circumstances, be brought by virtue of the stipulation ; as the latter, at the time of his death, had not caused the stipulation to become operative. But, as fraud certainly should not remain unpunished, an action on this ground can, not unreasonably, be employed.

The rule is otherwise, so far as the person of a surety is concerned, if he kills the slave who was promised; because he will be liable in an action under the stipulation, just as he would be if the debtor should die without leaving an heir.

(2) The acceptance of an estate sometimes merges an obligation by operation of law; for instance, where a creditor enters upon the estate of the debtor, as his heir, or, on the other hand, the debtor enters upon that of the creditor. It sometimes takes the place of payment if a creditor, who had lent money to a ward without the authority of his guardian, should become his heir; for he does not reserve from the estate merely the sum by which the ward profited, but the entire amount of the debt.

It occasionally happens that an obligation which is void is confirmed by the acceptance of an estate; for if an heir who delivered the estate in accordance with the Trebellian Decree of the Senate becomes the heir of the beneficiary of the trust, or a woman who is surety for Titius becomes his heir, the civil obligation will begin to lose the benefit of the exception on account of the inheritance of the person who was liable by law, for it is not proper to come to the relief of a woman who assumes responsibility in her own name.

(3) The common statement that a surety who becomes the heir of a principal debtor is released from liability as surety is true when the obligation of the principal promisor is ascertained to be greater. For if the principal debtor was only liable, the surety will be released.

On the other hand, it cannot be said that the obligation of the surety is not extinguished, if the debtor has a personal defence of his own; for if he lent money in good faith to a minor of twenty-five years of age, and he lost it, and the latter died within the time when he could have demanded complete restitution, leaving his surety his heir, it is difficult to hold that the right under the praetorian law by which the minor could obtain relief protects the obligation of the surety, which was the principal right, and to which the obligation of the surety was accessory,

without taking into consideration the praetorian law. Therefore, the relief of restitution will be granted within the prescribed time to the surety who becomes the heir of the minor.

(4) A natural obligation is extinguished by operation of law, for instance, by the payment of money, as well as by a just agreement, or by an oath; because the bond of equity by which it is alone sustained is dissolved by the justice of the agreement, and therefore a surety given by a minor is said to be released for these reasons.

(5) The question arose whether anyone could stipulate as follows, "Do you promise to pay ten *aurei* to me, or to my son?" or as follows, "To me, or to my father?" A distinction can very properly be made in such cases, for when the son stipulates, the father is added only when the stipulation cannot be acquired for him; and, on the other hand, there is nothing to prevent the son from being added whenever the father stipulates, as where a father stipulates for his son, he is understood to stipulate for himself, when he does not do so expressly. In the case stated, it is clear that the son is added, not with reference to the obligation, but for the purpose of payment.

(6) I stipulate for an usufruct to be given to me, or to Titius. If Titius loses his civil rights, the power to pay him is not lost, because we can stipulate as follows: "Do you promise to pay me or Titius if his status changed?"

(7) When a lunatic or a ward is added, the money can properly be paid to his guardian or curator, if payment can legally be made to them also for the purpose of complying with a condition. This rule Labeo and Pegasus think should be adopted on account of its general convenience. It may be adopted, if the money was employed for the benefit of either the ward or the lunatic.

This is also the case, where anyone is ordered to pay a master, and pays his slave in order that he may pay his master. But where he is ordered to pay a slave, and he pays his master, he is not understood to have complied with the condition, unless he pays him with the consent of the slave.

The same opinion must be given with reference to payment, if Sempronius, having stipulated that ten *aurei* should be paid to him or to Stichus, the slave of Masvius, the debtor should pay the money to Msevius, the master of the slave.

(8) Where a creditor is in possession of the estate of his debtor which does not belong to him, and he obtains as much from it as would release the heir, if any other possessor of the estate were to

pay him, it cannot be said that the sureties are released, for it must not be assumed that he from whom the estate has been evicted has paid the money.

(9) You have been guilty of fraud, in order to avoid being in possession of what you have taken from an estate belonging to another. If the possessor surrenders the property itself, or pays its appraised value in court, the transaction will be for your benefit, because the plaintiff has no further interest in the matter. If, however, you-, having previously been sued, make payment on account of the fraud which you have committed, this will not, in any way, benefit the possessor of the property.

(10) If, by my order, you lend money to Titius, a contract of this kind resembles one made between a guardian and the debtor of his ward; and therefore, if the mandator is sued and has judgment rendered against him, reason suggests that the debtor will not be released, even though the money may have been paid, but the creditor must assign his rights of action against the debtor to the mandator, in order that the former may pay him. This has reference to the comparison which we have made with reference to the guardian and the debtor of his ward; for, as the guardian is liable to his ward for not having brought suit against his debtor, where suit is brought against one, the other will not be released; and if the guardian has judgment

rendered against him, this fact will not benefit the debtor.

Moreover, it is usually stated that a contrary action on guardianship should be brought against the ward, to compel the latter to assign his rights of action against the debtors.

(11) If the creditor should lose his case against the debtor, through his own fault, it is probable that he can obtain nothing from the mandator by the action on mandate, as he himself was to blame for not being able to assign his rights of action to the mandator.

(12) If it is agreed between the purchaser and the vendor before anything has been delivered by either of them, that the sale should be annulled, the surety who has been received will be released upon the dissolution of the contract.

96. *The Same, Opinions, Book XI.*

The debtor of a ward, having been delegated by his guardian, paid the money to the creditor of the latter. Release will take place, if it is proved that this was done without any fraudulent arrangement with the guardian. When fraud is committed, however, the creditor of the guardian will be liable to the ward under the interdict based on fraud, if it should be established that he participated in it.

(1) Where a female ward became the heir of a magistrate who had fraudulently appointed a guardian for another minor, her guardians compromised with the latter. The female ward refused to ratify the compromise. She will, nevertheless, be released by the money of her guardian, and the guardians cannot bring a prsetorian action against the minor, who received that to which he was entitled. It is evident that, if the minor should prefer to refund the money to the guardian of the female ward, after having annulled the transaction, he will be entitled to a praetorian action against the said ward who was the heir of the magistrate.

(2) A sister to whom a legacy was due from her brother, who was the heir, after an action to collect the legacy had been brought, made a compromise; and, being content with the note of the debtor, took no further steps to obtain her legacy.

It was decided that, although no delegation was made, and no release took place, the risk of the note was still hers. Therefore, if she should claim the legacy, after having made the agreement, she could be legally barred by an exception based upon the agreement.

(3) Where pledges are given for two contracts at the same time, the creditor should credit any sum which he receives on the two contracts, in proportion to the amount of each debt, and the choice does not depend upon his will, as the debtor submitted the value of the property pledged to the said contracts in common. It was decided that, if the dates were separated, and the excess value of the pledges was liable, the first obligation would be legally paid by the price received for the pledge, and the second by the excess of the same.

(4) When anyone who has been appointed heir deliberates as to whether he will accept the estate, and money has been paid to a substitute by mistake to discharge a debt, and the estate afterwards falls to him, the reason for the condition disappears. On this account the obligation of the indebtedness is extinguished.

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

When a debtor pays money on account of several claims, and does not indicate which one of them he wishes to discharge, that which involves infamy is considered to be entitled to the preference; next, the one to which a penalty is attached; third, one which is secured by the hypothecation or pledge of property; and after this an individual obligation shall have priority, rather than one for which another is liable, as, for instance, that of a surety. The ancient authorities established this rule because it seemed to them probable that a diligent debtor, if properly advised, would transact his business in this manner.

Where none of these conditions exist, payment should first be made upon the oldest claim. If

the amount paid is larger than that required by any single debt, the first obligation which has the preference having been discharged, the surplus will be considered to have been credited on the second one, either in full satisfaction, or for the purpose of diminishing it to that extent.

98. *Paulus, Questions, Book XV.*

A certain man encumbered his property, and afterwards placed an additional lien on one of the tracts of land by promising it as a dowry for his-daughter, and transferred it. If the latter should be evicted by the creditor, it must be held that the husband can proceed under the promise of the dowry, just as if the father had given, by way of dowry to his daughter, a slave who was to be free under a condition, or a legacy which had been conditionally bequeathed; for the delivery of these things cannot afford a release from liability, that is to say, except where they are certain to remain intact.

(1) A different opinion must be given with reference to the money or property which a patron, under the Favian Law, takes for himself after the death of his freedman; for this action, as'it is recent, cannot revoke a release from liability when it has once been obtained.

(2) A minor of twenty-five years of age, who has been deceived by his creditor, is entitled to the benefit of this rule, and can obtain restitution of whatever he has paid on account of his debt.

(3) Where a father pays money belonging to a *castrense peculium,* we must understand this to be just as if he had made payment with what belonged to another; although it can remain in the possession of him to whom it was paid, if the son should die first, and intestate. But it is considered to be acquired only when the son dies, and the event has declared to whom it belongs. This is one of the cases in which matters, which subsequently occur, show what has previously happened.

(4) I can make a valid stipulation for ten *aurei* to be paid to me or to Titius absolutely on the *Kalends;* or conditionally to me on the *Kalends* of January, or to Titius on the *Kalends* of February. A doubt may arise as to its validity if it is to be paid to me on the *Kalends* of February, and to Titius on the *Kalends* of January. It is better, however, to say that the stipulation is valid, for as this stipulation has reference to a fixed time, payment cannot be made to me before the *Kalends* of February; and therefore payment can also be made to him.

(5) Where anyone stipulates for himself or for Titius, and says that if you do not pay Titius, you must pay him, he is held to have stipulated conditionally. Therefore, even if the stipulation was made as follows, "Do you stipulate to pay me ten *aurei,* or Titius five?" and five are paid to Titius, the principal debtor will be released, so far as the stipulator is concerned. This can be admitted if it was expressly understood a penalty should, so to speak, be imposed upon the promisor, if payment was not made to Titius. But where anyone stipulates simply for himself, or for Titius, Titius is only added for the sake of payment; and therefore where five *aurei* have been paid to him, the other five still remain in the obligation. And, on the other hand, if I stipulate for five *aurei* to be paid to me, and ten to be paid to him, and five are paid to Titius, the terms of the stipulation do not permit me to be released. Moreover, if he pays ten, and does not demand that five be refunded, ten will be due to me in an action on mandate.

(6) I stipulate for payment to me at Rome, or to Titius at Ephesus. Let us see whether, by payment to Titius at Ephesus, the debtor will be released from liability to me. If these are different acts, as Julianus thinks, the question is not the same. For, as the debtor is released on account of payment, which is the principal thing, he will be released, even if I should stipulate that Stichus be given to me,

and Pamphilus to Titius, and he delivers Pamphilus to Titius; but when I stipulate merely for an act, for instance, for the construction of a house on my ground, or on that of Titius, if he builds on the ground of Titius, will not a release take place? for no one has said that, where

one act is given for another, a release takes place. The better opinion is that, in this instance, it does take place, because one act is not considered to be performed for another, but the choice of the promisor is carried out.

(7) When a slave, subject to an usufruct, stipulates with reference to the property of the usufructuary, or for the benefit of the owner of the property, or for that of the usufructuary himself, the stipulation is void. But if he stipulates with reference to the property of the owner, for the benefit of the latter, or for that of the usufructuary, the stipulation will be valid; for, in this instance, the usufructuary can only receive payment, but cannot acquire any obligation.

(8) I promised land belonging to another, and the owner built a house on this land. The question arises whether the stipulation is extinguished. I answered that if I promised the slave of another, and he should be manumitted by his master, I will be released. The statement of Celsus is not accepted; that is to say, if the same slave should again be reduced to servitude by any law whatever, he will be considered as another slave. And he does not make use of a similar argument when he says that if, after you have promised a ship, the owner of the same ship should take it apart, and afterwards rebuild it with the same materials, you will be liable for it. For, in this instance, the ship is the same which you have promised to furnish, so that the obligation seems rather to have been suspended than extinguished. This case would be similar to that of the manumitted slave, if you suppose the ship to have been taken apart with the intention of converting the materials of which it was composed to other uses, and then the owner having changed his mind, they have been put together again. For this last ship seems to be a different one, just as the slave appears to be another man. The ground, however, on which the house was built causes a distinction to arise, for it does not cease to exist; and further, it can be claimed and its appraised value be paid, for the land is a part of the house, and, indeed, the greater part of it, since even the surface belongs to it. A different opinion, however, must be given if the slave who was promised should be captured by the enemy, for under these circumstances he cannot be claimed, just as if the time for doing so had not yet arrived; but if he should return under the law of *postliminium,* he can then lawfully be claimed, for this obligation remains in suspense, but the land continues to exist, just as all the other materials of which the building is composed.

Finally, the Law of the Twelve Tables provides that a person can recover timbers fastened to his house, but, in the meantime, it prohibits them from being removed, and directs that their appraised value should be paid.

99. *Paulus, Opinions, Book IV.*

Holds that a debtor should not be compelled to receive his money in other property, if he will sustain any loss by doing so.

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

Where curators or guardians are appointed in,a province, I ask whether money which was lent by them, at interest, in the province, under the condition that it should be paid at Rome, can be paid to them there, when the said curators or guardians did not have the administration of the property in Italy; and if payment is made to them, whether the debtor will be released. Paulus gave it as his opinion that the money which was due to a ward could properly be paid to his guardians or curators who transacted his business, and that those appointed guardians or curators in a province do not usually administer the affairs of their trust in Italy, unless the guardians in the province expressly provide that payment should be made to them at Rome.

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

Paulus gave it as his opinion that those who are obliged to contribute equal shares under the terms of a trust do not appear to be released, because certain of their colleagues, through mistake, have contributed more than was due.

(1) Paulus also held that the obligation of the debtor who pays is one thing, and the claim of a creditor who sells a pledge is another; for when a debtor pays a sum of money, it is in his power to determine on what obligation he pays it. When, however, a creditor sells a pledge, he can credit the price of the same even upon something which is only due by nature, and therefore, after deducting this natural debt, he can demand the remainder as due.

102. *Scsevola, Opinions, Book V.*

A creditor postponed the acceptance of money tendered by his debtor in order to receive it at another time. This money, which the government was then using, was soon afterwards withdrawn from circulation by order of the Governor, as containing too much copper. Certain money belonging to a minor, which had been kept in order to be invested in good notes, was also rendered worthless.

The question arose, who would be compelled to bear the loss? I answered that, according to the facts stated, neither the creditor nor the guardian would be compelled to bear it.

(1) The parties to a loan having agreed as to the principal of the debt but being involved in litigation with reference to the interest, it was finally decided on appeal that the interest which had been paid could not be recovered, and would not afterwards be due. I ask whether the money which had been paid should be credited on the interest, as was claimed by the plaintiff, or whether it should be employed to reduce the principal. I answered that if he who paid it said that he did so in order that it might be credited on the principal, it should not be credited as interest.

(2) Valerius, the slave of Lucius Titius, drew up the following receipt: "I have received from Marius Marinus such-and-such a sum of *aurei* to be credited on a larger amount." I ask whether this amount should be credited for the coming year, as it constituted the balance for the past year. I answered that the payment should be considered a credit upon any sum which was previously due.

(3) Titius borrowed a sum of money, promised to pay interest at the rate of five per cent, and did so pay for a few years, and afterwards, without any agreement to that effect, but through mistake and ignorance, paid interest at six per cent. If the mistake should be discovered, I ask whether the amount which he had paid over and above the interest agreed upon in the stipulation would diminish the principal. The answer was, if he had paid more interest by mistake than he owed, any excess should be credited upon the principal.

103. *Msecianus, Trusts, Book II.*

When a debtor owing several debts pays money, Julianus very properly holds that it ought to be considered as credited on the obligation which, at the very time he paid it, he could have been compelled to satisfy in full.

104. *The Same, Trusts, Book Vill.*

Payments and releases made by the heir before the estate is transferred should be ratified.

105. *Paulus, On the Falcidian Law.*

When we say with regard to an heir that he should repay immediately to the surety of the testator what the surety had paid before the acceptance of the estate, must be understood to admit of some slight delay, for he need not come immediately with his bag of money.

106. *Gaius, On Oral Obligations, Book II.*

It is one thing to be able to pay Titius in accordance with the terms of a stipulation, and another for this to take place by my permission. For if payment is properly made by virtue of the stipulation, the creditor can legally be paid even if I forbid it to be done; but if I permit payment to be made, this will not be legal, if,,before it takes place, I notify the promisor not to pay.

107. *Pomponius, Enchiridion, Book II.*

An oral obligation is discharged either naturally or civilly. It is discharged naturally, for instance, by payment, or where the property mentioned in the stipulation has ceased to exist without the fault of the promisor. It is discharged civilly, for example, by a release, as where the rights of the stipulator and the promisor become united in the same person.

108. *Paulus, Manuals, Book II.*

Where anyone, in obedience to my mandate, makes a stipulation to be executed after my death, payment will legally be made to him, because such is the law of obligations. Therefore he can legally be paid, even against my consent. But when I have ordered my debtor to pay someone after my death, payment will not be legally made, because the mandate is annulled by death.

## TITLE IV.

## CONCERNING RELEASE.

1. *Modestinus, Rules, Book II.*

A release is a discharge from liability through mutual interrogation, by means of which both parties are freed from compliance with the same contract. . 2. *Ulpianus, On Sabinus, Book XXIV.*

It is established that a ward can be discharged from liability by means of a release, without the authority of his guardian.

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

No one can be freed from liability through an agent, nor can anyone be discharged by a release without a mandate.

4. *Pomponius, On Sabinus, Book IX.*

A release cannot be granted under a condition.

5. *Ulpianus, On Sabinus, Book XXXIV.*

A release to date from a certain time is of no force or effect, for a release discharges a person from liability in the same way as a payment.

6. *The Same, On Sabinus, Book XLVII.*

Where several stipulations have been entered into, and the promisor demands a release, as follows, "Do you acknowledge the receipt of what I have promised you?" and it is clear to what reference is made, it alone will be disposed of by the release. If this is not clear, all of the stipulations will be extinguished, provided we bear in mind that if I had intended to grant the release of one debt, and you had asked for the release of another, the transaction will be void.

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

It is certain that a release can be made as follows, "Do you acknowledge the receipt of ten *aurei?"* and the other party answers "I do."

8. *The Same, On Sabinus, Book XLVIII.*

The question arises whether a release which is of no effect can include a valid agreement. It includes an agreement, unless the intention is otherwise. Someone may say, "Can it not then be a consent?" Why can it not be? Suppose that he who makes the release, being well aware that it will be of no effect, grants it; who would entertain any doubt that there was no agreement, since he did not have the consent required to render one valid?

(1) As a slave owned in common can stipulate for one of his masters, he can also receive a

release for him, and by so doing, he entirely discharged him from liability. Octavenus is of the same opinion.

(2) A slave owned in common can receive a release from one of his masters for the discharge of the other; and this opinion is held by Labeo. Finally, in the Book of Probabilities, he says that if the slave has stipulated with his first master for the benefit of his second, who is his partner, he can demand a release from the second, and by means of it, release his first master, whom he himself had bound by an obligation. Hence it happens that an obligation is contracted and annulled by one and the same slave.

(3) Only a verbal contract can be dissolved by a release, for it destroys the oral obligation, as it, itself, is verbally made; for what has not been contracted by words cannot be annulled by them.

(4) A son under paternal control does not bind his father civilly by promising, but he binds himself. Hence a son under paternal control can ask for a release in order to be discharged from liability, because he himself is bound; but the father, by making the interrogatories with reference to the release, does not produce any legal effect, for the reason that not he himself, but his son, is bound.

The same rule applies to the case of slaves; for a slave can be discharged by a release, and even praetorian obligations are extinguished if they are against the master, because this is our practice, and a release is part of the Law of Nations. Therefore, I think that the release can be expressed in the Greek language, provided the same formula is used as in Latin, that is, "Do you acknowledge the receipt of so many *denarii?"* "I do."

9. *Paulus, On Sabinus, Book XII.*

A part of a stipulation can be annulled by a release, as where anyone says, "Do you acknowledge the receipt of five of the ten *sesterces* which I have promised to pay you?" And also if anyone should ask, "Do you acknowledge the receipt of half of what I have promised you?"

10. *Pomponius, On Sabinus, Book XXVI.*

If, however, it is not money, but some other property, as, for instance, a slave, which is the object of the stipulation, a release can be granted for a portion of the same, as it can be granted for the benefit of one of several heirs.

11. *Paulus, On Sabinus, Book XII.*

One method of acquisition is the liberation of an owner from an obligation; and therefore a slave in whom someone has the usufruct

can, by obtaining a release, discharge the usufructuary, because he will be considered to acquire the property of the latter. Even when we have only the use of property, the same rule applies. We say the same thing with reference to a person who is serving us in good faith as a slave, as well as to others subject to our authority.

(1) If, however, I release the slave who has himself promised to pay me, I cannot avail myself of any praetorian action against his master, which is granted with reference to *peculium,* or on account of the benefit accruing to property.

(2) Where a slave belonging to an estate, before it is entered upon, asks for a release which the deceased promised to give, I think that the better opinion is that he will be freed from liability, so that, in this manner, the estate itself will be released.

(3) But even if the master is in the hands of the enemy, it must be said that a release is confirmed by the right of *postliminium;* for a slave can stipulate for his master who is in the hands of the enemy.

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

Anything which is due from a certain date, or under a condition, can be disposed of by means of a release. This, however, will appear to be done only where the condition is complied with, or the time has arrived.

13. *Ulpianus, On Sabinus, Book L.*

It is better to say that the obligation for services promised by the oath of a freedman can be extinguished by a release.

(1) If what is the object of a stipulation is not susceptible of division, the release of a portion of it will be of no force or effect; as, for instance, where it is a servitude attaching to a rustic or an urban estate. It is clear that if an usufruct, for instance, of the Titian Estate, is the object of the stipulation, a release can be made for a part of it, and the usufruct of the remaining portion of the land will continue to exist. If, however, anyone should stipulate for a right of way, and a stipulation is granted for a right of passage, or a driveway, it will be of no effect. This opinion should also be adopted if a release is made for a driveway. But where a release is granted for both a passage and a driveway, the result will be that he who promised the right of way will be released.

(2) It is certain that anyone who stipulates for a tract of land, and consents to the release of the usufruct, or of a right of way through said land, commits an act which renders the release void; for he who grants a release must do so for the entire right, or that part of it which is included in the stipulation. These things, however, are not parts of the land, any more than if someone, having stipulated for a house, should give a release for the stones or windows, or for a wall, or a room.

(3) Where anyone having stipulated for an usufruct gives a release for the use, and does so believing that only the use was due, there will be no release. If, however, he did this in order to deduct it from the usufruct, when the use can be established without the usufruct, it must be held that the release is valid.

(4) Where anyone who stipulated for a slave gives a receipt for Stichus, Julianus, in the Fifty-fourth Book of the Digest, says that the release has an effect, and that is to extinguish the entire obligation; for what the promisor can pay to the stipulator, even against his consent, being the object of the release, discharges the former from liability.

(5) Where anyone stipulates for a tract of land, it is decided that the clause having reference to fraud cannot be included in the release, for this does not constitute a part of the debt, as what is due is one thing, and what is released is another.

(6) If anyone stipulates for Stichus, or ten *aurei,* under a condition, and receipts for Stichus, or ten *aurei,* and while the condition is pending, Stichus dies, the ten *aurei* will remain in the obligation, just as if a release had not been given.

(7) If a release is granted to a surety, where the principal debtor was liable on account of the property, but not by words, will he also be released ? It is our practice that, although the principal debtor may not be bound by words, still he will be discharged from liability on account of the release granted to his surety.

(8) When a surety is given for a legacy payable under a condition, and a release is given him, the legacy will be due as soon as the condition upon which its payment is dependent is complied with.

(9) Where anyone stipulates with a surety as follows, "Do you promise to be responsible for what I shall lend to Titius?" and then, before he lends him the money, he gives a release to the surety, the principal debtor will not be discharged, but when the money is lent to him he will be liable. For, although we think that the surety is not released before the money is lent to the

principal debtor, still the latter cannot be discharged by a release which precedes his obligation.

(10) The guardian or curator of an insane person cannot consent to a release, nor can an agent do so, but all these persons must make novations; for, in this way, they can grant releases. Nor can a release be made for their benefit, but if a novation is made first, they can be discharged by means of a release.

We are accustomed to apply this remedy with reference to an absent person, when we stipulate with someone for the purpose of making a novation of what the former owes us, and 'in this way we release him with whom we have stipulated. The result is that the absent person is released by the novation, and the one who is present is freed from liability by a release.

(11) An heir, as well as Praetorian successors, can release others, and be released in this manner.

(12) Where one of several joint-stipulators grants a release, it will apply to the entire amount which is due.

14. *Paulus, On Sabinus, Book XII.*

Unless the release agrees with the stipulation, and what is stated in the release is true, it is imperfect; because words cannot be annulled by words, unless they agree with one another.

15. *Pomponius, On Sabinus, Book XXVII.*

If anyone, who has promised Stichus, makes the following interrogation, "As I have promised Stichus, do you acknowledge the receipt of Stichus and Pamphilus?" I think that the receipt is valid, and that the mention of Pamphilus is merely superfluous; just as where a man who has promised ten *aurei* makes the following interrogation, "As I have promised you ten *aurei,* do you acknowledge the receipt of twenty ?" he will be released from liability for ten.

16. *Ulpianus, Disputations, Book VII.*

Where a release is granted to one of several persons, who are liable, he alone will not be released, but also all of those who are liable with him; for whenever a release is granted to one of two or more persons who are liable under the same obligation, the others are also discharged, not because the release was granted to them, but because he who was freed from liability by the release was considered to have paid the debt.

(1) If a surety is granted for the payment of a judgment, and a release is given him, the person against whom the judgment was rendered will also be discharged from liability.

17. *Julianus, Digest, Book LIV.*

Where anyone stipulates for a slave or ten *aurei,* and receives a receipt for five, he extinguishes a part of the stipulation, and he can demand five, or the half of a slave.

18. *Florentinus, Institutes, Book Vill.*

A release and a discharge from liability can be granted either in one, or in several contracts, whether they are certain or uncertain; or with reference to some, reserving the others; or for all of them, for any reason whatsoever.

(1) The following is the formula of a stipulation and a release, drawn up by Gallus Aquilius: "All that you owe, or shall owe me for any reason whatsoever, either now or after a certain date, for which I can now, or shall be able to bring suit against you, on a claim, or a right to collect; or any property of mine which you have, hold, or possess, and all the value of any of the things aforesaid, Aulus Agerius has stipulated for, and Numerius Nigidius has promised to pay. And Numerius Nigidius has asked Aulus Agerius if he acknowledges the receipt of what he promised him, and Aulus Agerius has granted a release for the same to Numerius Nigidius."

19. *Ulpianus, Rules, Book II.*

If a release should be granted to someone who is not bound by words, but by the property, he will not, indeed, be freed from liability, but he can defend himself by an exception on the ground of bad faith, or on that of an informal agreement.

(1) The following difference exists between a release and a receipt: by a release, absolute discharge from liability takes place, even if the money has not been paid; but a receipt does not have this effect, unless the money has actually been paid.

20. *The Same, On the Edict, Book LXXVII.*

Where a release has been granted with reference to the clause providing for the payment of a judgment, Marcellus says that the remaining parts of the stipulation are extinguished, because they cannot be interposed except to enable the case to be decided.

21. *Venuleius, Stipulations, Book XI.*

If I stipulate for the purpose of making a novation on account of a legacy which was bequeathed to me under a condition, and I release my right to it before the condition is fulfilled, Nerva, the son, says that even if the condition should be fulfilled, I will not be entitled to an action under the will, because a novation took place, nor can I bring one under the stipulation, as the right to do so has been extinguished by the release.

22. *Gaius, On Oral Obligations, Book III.*

*A* slave cannot give a release by the order of his master.

23. *Labeo, Epitomes of Probabilities, by Paulus, Book V.*

If I should make a release to you, I will not, for that reason, be freed from liability, so far as you are concerned.

Paulus: But when a hiring, a lease, a purchase, or a sale has been made under an agreement, and the property has not yet been delivered, even though only one of the contracting parties may have consented to a release, all of them, however, will be discharged.

## TITLE V.

## CONCERNING PRAETORIAN STIPULATIONS.

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

There are three kinds of praetorian stipulations; namely, judicial,

cautional, and common.

(1) We call those stipulations judicial which are interposed on account of a judgment, in order to procure its ratification, so that it may be paid, or notice served with reference to the construction of a new work.

(2) Cautional stipulations are those which take the place of a lawsuit, and are introduced to permit a new action to be brought; such are stipulations with reference to legacies and guardianships, to enable ratification to be made, and for the prevention of threatened injury.

(3) Common stipulations are those which are entered into for the purpose of causing a party to appear in court.

(4) It should be remembered that all stipulations are in their nature cautional, for in agreements of this kind the intention is that, by means of them, a person may be rendered more secure and safe.

(5) Some of these praetorian stipulations require security, others merely a promise; but there are very few of them which require a mere promise, and, when they are enumerated, it will be

evident that those which are mentioned are not promises, but obligations with security.

(6) A stipulation made with reference to notice of a new work sometimes includes security, and sometimes a promise. Hence, after what kind of a notice to discontinue a new work should security be given? How should it be given? Security must be given for a work which is constructed on private property, but where it is constructed on public lands, a mere promise will be sufficient. Those, however, who contract in 'their own names promise; those who contract in the name of another furnish security.

(7) Likewise, in a case of threatened injury, sometimes a promise is made, and at others security is given; for when anything is built in a public stream, security is furnished, but a mere promise is made with reference to houses.

(8) Stipulation for double damages is a promise, unless an agreement was made that security should be furnished.

(9) Where, however, there is some controversy, as, for instance, if, for the purpose of annoying an adversary, it is stated that a stipulation should be interposed, the Praetor himself should decide the case summarily, and either order security to be furnished, or refuse it.

(10) But where anything is to be added, taken from, or changed in the stipulation, this belongs to the jurisdiction of the Praetor.

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

Prsetorian stipulations either involve the restitution of the property, or an indeterminate amount.

(1) As, for instance, the stipulation with reference to notice of a new work, whereby it is provided that everything shall be restored to its former condition. Therefore, whether the plaintiff or the defendant dies, leaving several heirs; and whether either of them gains, or loses the case, everything must be restored to its former condition; for as long as anything remains it cannot appear that complete restitution has been made.

(2) A stipulation involves an indeterminate amount, when an agreement is made that the judgment shall be paid; that the principal will ratify what has been done; that injury will not be caused; and other things of this kind. With reference to these, it can be said that they are divided among the heirs, although it may be maintained that a stipulation made by the deceased, and which descends from him, cannot, in the persons of his heirs, render their condition different.

But, on the other hand, it is perfectly reasonable that if one of the heirs of the stipulator gains his case, the stipulation will become operative, so far as his share is concerned; since this is caused by the words of the stipulation: "As much as the property is worth."

(3) If, however, one of the heirs of the promisor is in possession of the entire property, Julianus says that judgment must be rendered against him in full. It may be doubted whether he himself, as well as his sureties, are liable under the stipulation, or even liable at all; and it is a question whether the stipulation becomes operative. If the possessor should die after issue has been joined, one of the heirs ought not to have judgment rendered against him for a larger share than he is entitled to from the estate, even though he may be in possession of all the land.

3. *Ulpianus, On the Edict, Book LXX1X.*

Generally speaking, in all praetorian stipulations security is furnished, even to agents.

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

Praetorian stipulations are often interposed when, without the fault of the stipulator, the security ceases to exist.

5. *The Same, Qn the Edict, Book XLVIII.*

In all praetorian stipulations, it should be noted that if my agent stipulates for my benefit, an action will lie in my favor by virtue of the stipulation, if proper cause is shown.

The same thing happens where a factor is in such a position that, through his personal interposition, the principal will lose his. merchandise; for example, where his property is to be sold, for the Praetor should come to the relief of the principal.

6. *The Same, On Plautius, Book XIV.*

In all praetorian stipulations in which something is to be previously done, and if it is not done, we impose a penalty, the stipulation takes effect on account of the penalty.

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

Praetorian security requires persons to appear for themselves, and no one can replace this kind of security by pledges, or by depositing money or articles of gold or silver.

8. *Papinianus, Questions, Book V.*

Paulus says that when anyone is appointed under a condition, and is recognized as capable of holding possession of the estate, he will be compelled to give security to the substitute, but for a more remote date. For the Praetor does not wish the benefit which he confers to become a source of deceit, and a man can seem to demand security for the purpose of annoyance, when another precedes him.

(1) When a legacy has been bequeathed to Maevius and to Titius, under opposite conditions, security is furnished to both of them, because both expect a legacy under the will of the deceased.

9. *Venuleius, Stipulations, Book I.*

In praetorian stipulations, if the language is ambiguous, it is the duty of the Praetor to interpret it, for its intention should be determined.

10. *Ulpianus, Opinions, Book I.*

Answers Valerianus. If the Praetor, who previously had ordered security furnished for three years afterwards, should direct it to be given for a longer time, because he desired that the first stipulation should be abandoned, he is considered to have granted an exception to those who were bound by the first stipulation.

11. *Venuleius, Actions, Book Vill.*

In stipulations which include a promise of as much as the property is worth, it is more convenient to mention a definite sum, for the reason that it is frequently difficult to prove the amount of the interest of each of the persons in question and this is reduced to a very small sum.

## TITLE VI.

## CONCERNING SECURITY FOR THE PROPERTY OF A WARD OR MINOR.

1. *Paulus, On the Edict, Book XXIV.*

Where security is given that the property of a ward shall be safe, proceedings can be instituted under this stipulation whenever the action on guardianship can be brought.

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

If a minor is absent, or cannot speak for himself, his slave can stipulate for him. If he has no slave, one should be bought for him. When, however, there is nothing with which to buy one, or it is not I expedient to do so, we hold that a public slave can certainly stipulate in the

presence of the Praetor.

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

Or the Praetor can appoint someone to whom security can be given.

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

Such a slave does not acquire for the minor by operation of law, for he does not acquire; but a praetorian action based on the stipulation may be granted to the minor.

(1) A guarantee, however, is given to the minor under this stipulation, by means of the security.

(2) It should be remembered that not only the guardian is bound by this stipulation, but also he who transacts the business in the place of the guardian, as well as their sureties.

(3) He, however, who has not transacted the business will not be liable, for an action on guardianship cannot be brought against one who has not administered it; but he should be sued in a praetorian action, because he withdrew at his own risk, and still, neither he himself nor his sureties, will be liable in a suit based on the stipulation. Therefore, he should be compelled to undertake the management of the trust, in order that he may be rendered liable under the stipulation.

(4) It is decided that this stipulation becomes operative when the guardianship terminates, and that then the sureties begin to be liable.

The rule is different with reference to a curator. It is also different where someone has transacted the business in the place of a guardian. Therefore, stipulations of this kind, where there is a guardian, become operative when the guardianship comes to an end, but where anyone acting as a guardian has administered the trust, it is proper to hold that as soon as the estate begins to be insecure the stipulation will become operative.

(5) When a guardian is captured by the enemy, let us see whether the stipulation will become operative. A difficulty arises in this case, because the guardianship is terminated, although there is a prospect that it may be renewed. I think that the action can be brought.

(6) Generally speaking, it should be remembered that, for whatever reasons we have stated that an action on guardianship cannot be brought, it can be said for the same reasons that one can be brought under the terms of the stipulation, in order to preserve the property of the ward.

(7) If anyone, who has been appointed curator, should not administer the curatorship, the result will be that it must be said that the stipulation does not take effect; but, in this instance, what we stated with reference to a guardian should be repeated, with this 'difference, however, that the stipulation will take effect as soon as any of the property ceases to be secure, and the sureties will become liable, and the right of action will be revived.

(8) This stipulation has reference to all curators, whether they are appointed for children arrived at puberty, or for such as have not reached that age, or whether they have been appointed for spendthrifts, insane persons, or any others for whom this is ordinarily done.

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

If a son, who is under the control of an insane person, stipulates for the preservation of his property, he acquires an obligation for his father.

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

The slave of a minor must stipulate, if the minor is absent, or cannot speak for himself. For if he is present, and can speak for himself, although he may be of such an age that he is incapable of understanding what he is doing; still, on account of the advantage resulting, it has

been decided that he can legally stipulate, and act.

7. *Modestinus, Rules, Book VI.*

A testamentary guardian or curator does not demand security from his colleague, but he can give him the choice of either receiving or giving security.

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

Although a curator is appointed for certain specific purposes, a stipulation for the preservation of the property may be interposed.

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

Where a ward stipulates with his guardian that his property shall remain secure, not only his patrimony, but also any credits, are considered to be included in the stipulation; for whatever can become the subject of an action on guardianship is embraced in this agreement.

10. *Africanus, Questions, Book HI.*

If, after a ward has arrived at the age of puberty, his guardian should be in default for some time in rendering an account of his administration, it is certain that, so far as the profits and interest of the intermediate time are concerned, he, as well as his sureties, will be liable.

11. *Neratius, Parchments, Book IV.*

When security is furnished to a ward for the preservation of his property, the stipulation will become operative if anything which should be given or done on account of the guardianship is not executed. For although the property itself may be secure, it is not so where something which should be paid or done on account of the guardianship is not carried into effect.

12. *Papinianus, Questions, Book XII.*

Where several sureties have been given by a guardian to his ward, no distinction should be made, but an action can be granted against any one of them, so that the rights of action can be assigned to the one against whom suit is brought. Nor should it be thought that this is a violation of the rule of law which says that guardians shall have judgment rendered against them in proportion to the share of the estate which each has administered; and that they can only be sued for the entire amount where the property has not been cared for by the others; and where they are proved to have failed to accuse one of their number of being liable to suspicion. For the equity of the judge, as well as the duty of a good citizen, appear to have required this provision of the law.

Moreover, those sureties who are civilly liable in full, when the others proceed against them, can ask that the action be divided; but when the ward brings suit, if he himself did not make the contract, and he is in the hands of his guardian, and is ignorant of everything, the benefit of dividing the action would appear to be productive of injury; as, under a single guardianship, many dissimilar questions may be presented to different judges for their decision.

## TITLE VII.

## CONCERNING SECURITY FOR THE PAYMENT OF A JUDGMENT.

1. *Paulus, On the Edict, Book XXIV.*

The stipulation for the payment of a judgment becomes operative immediately after the decision is rendered; but the execution is postponed for the time granted to the principal debtor.

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

When the suit is ended the obligation is disposed of, and therefore it is held that under the stipulation the sureties are not liable for the payment of the judgment.

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

If anyone, being about to appear before a certain judge, should stipulate for the payment of a judgment, and bring suit in another court, the stipulation will not take effect, because the sureties did not subject themselves to the decision of this judge.

(1) An agent, a guardian, and a curator, can stipulate for the payment of a judgment.

(2) We should understand an agent to be one upon whom authority has been conferred, either specially for this purpose, or generally for the administration of all the property. And he is even considered to be an agent if his acts subsequently should be ratified.

(3) The question arises, if a child or a relative should happen to interfere in the transaction of business, or a husband should do so in behalf of his wife, persons from whom no mandate is required, whether the stipulation will take effect. The better opinion is that it should not, unless authority was granted, or what has been done is ratified; for while they are permitted by the Edict of the Prsetor to act, this does not render them agents; and therefore, if anyone of this kind should offer his services voluntarily, he must again furnish security.

(4) What we have said with reference to a guardian, however, must be understood to mean that if he is a person who administered a guardianship, when he was not actually a guardian, he should not be designated by that appellation.

(5) But even if he is a guardian, and does not transact business as one, or if he is not aware that he is a guardian, or any other cause exists, it must be said that the stipulation will not take effect. For, by the Edict of the Praetor, the power of acting as guardian is granted to him to whom the guardianship was entrusted, either by the father, by the majority of the guardians, or by those invested with competent jurisdiction.

(6) By the term curator, we understand the curator of an insane person of either sex, or of a male or female ward, or of any other person, for example, a minor, and, under these circumstances, I think that the stipulation will take effect.

(7) If we suppose that a guardian appointed for any region or province, or for the administration of property in Italy, is intended, the result will be that we can say that the stipulation will only take effect if he acted with reference to matters which pertained to his administration.

(8) If the defendant, after having promised to pay the judgment, should lose his mind, the question arises whether the stipulation will become operative, for the reason that his case has not been defended. The better opinion is that it will become operative, if no one appears for his defence.

(9) A stipulation does not take effect merely because a case is not defended, as long as anyone can appear to undertake the defence.

(10) Where there are several sureties, after issue has been joined with one of them with reference to the clause, "Because the case is not defended," the principal debtor can undertake the defence.

4. *Julianus, Digest, Book LV.*

He, also, against whom the action was brought should be discharged.

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

If, however, the surety, who is a party to the action, should have judgment rendered against him, the principal debtor will in vain undertake the defence. For even when payment of the debt has been made after the case had been decided, suit can be brought to recover what has been paid.

(1) If no one else appears for that purpose, one of several sureties or heirs can undertake the

defence.

(2) For the reason that there are several claims included in a single sum, in this stipulation, if, in one of them, the stipulation should immediately take effect, this cannot occur, so far as any other is concerned.

(3) Now let us see what defence is required, and by whom, in order to prevent the stipulation from taking effect. And, if any one of the persons enumerated as having a right to undertake the defence should do so, it is clear that the case is properly defended, and that the stipulation will not take effect. Where, however, someone, outside of those above mentioned, comes forward to defend it, the stipulation will not, in this instance, become operative; provided he is prepared to undertake the defence in accordance with the judgment of a good citizen, that is to say, by furnishing security, as he is considered to undertake it if he gives security. If, however, he is merely ready to appear, and is not accepted, the stipulation will take effect, because the action was not defended. But where anyone accepts him, either with or without security, the result will be that it must be said that no part of the stipulation becomes operative, because he who accepts such a defender has no one to blame but himself.

(4) Where one of the sureties who has given bond for the payment of the judgment appears to defend the case, it has been decided that the stipulation for the payment of the judgment does not take effect, and that all other matters are in the same condition as if a stranger had undertaken the defence.

(5) The question arose, with reference to this stipulation, whether the sureties would be liable in an action on mandate, if they abandoned the defence. The better opinion is that they would not be liable; as they only became sureties for a definite amount, and their mandate related to this, and not to the defence of the case.

(6) But what if they had taken it upon themselves to defend the case, could they bring an action on mandate? Where, indeed, they were defeated, they could recover what they had paid out in satisfaction of the judgment, but they could, by no means, recover the cost of the litigation. If, however, they gained the case, they could recover the expenses of litigation, just as under a mandate, although they did not act in compliance with the mandate.

(7) Where, however, several sureties are ready to undertake the defence, let us see whether they should appoint a single defender, or whether it will be sufficient for each of them to undertake the defence of his own share, or substitute a defender.

The better opinion is that, unless they appoint a representative, that is to say, if the plaintiff desires it, the stipulation will take effect on the ground that the case is not defended. For several heirs of a debtor are obliged to appoint an attorney for fear that, if the defence should be divided among several parties, it will subject the plaintiff to inconvenience.

The case is otherwise with respect to the heirs of the plaintiff, or whom the necessity of appearing in court by a single representative is not imposed.

(8) It must be remembered that, for a case to be defended properly, this must be done before a court having jurisdiction.

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

The stipulation for the payment of a judgment contains three clauses: one relating to the settlement of the claim; another to the defence of the case; and still another providing against the commission of fraud.

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

If, before issue is joined, the attorney for the defendant should be forbidden by his client from appearing, and the plaintiff, not knowing that this had been done, should proceed with the case, will the stipulation take effect? Nothing else can be said than that it will take effect.

When, however, anyone knowing of the prohibition imposed upon the attorney proceeds to trial, Julianus does not think that the stipulation will become operative. For, in order that it may do so, he says that it is not sufficient for issue to be joined with the person included in the stipulation, but it is necessary that the claim of that person should be the same as it was at the time when the stipulation was entered into. Hence, if he who was appointed attorney appears as the heir of his client, and as such conducts the case, or if he should do this even after he has been forbidden, the stipulation will not become operative. For otherwise, it has been decided that if anyone who is defending an absent person should give security, and afterwards should either be appointed his attorney, or become-his heir, and conduct the case, the sureties will not be liable.

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

If the plaintiff, after security has been furnished, but before issue has been joined, becomes the heir of the possessor, the stipulation will be extinguished.

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

The stipulation for the payment of a judgment has reference to an indeterminate sum, for it becomes operative for the amount that the judge may decide to be due.

10. *Modestinus, Pandects, Book IV.*

If an attorney is appointed for the purpose of making a defence, he is ordered to give security for the payment of the judgment, by means of a stipulation which is not interposed by the attorney himself, but by the principal party in the case. If, however, the attorney defends someone, he himself is compelled to furnish security by the stipulation for the payment of the judgment.

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

If a slave, who is sought to be recovered by a real action, dies, after issue has been joined, and the possessor then abandons the suit, some authorities hold that the sureties given for the payment of the judgment will not be liable, because the slave having died, the property is no longer in existence. This is false, as it is expedient that a decision should be rendered not only for the purpose of preserving the right of action in case of eviction, but also on account of the profits.

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

Where a defendant, after having given security for payment of the judgment, becomes a magistrate, he cannot be brought into court without his consent; still, if the suit is not defended, as in the judgment of a good citizen it should be, the sureties will be liable.

13. *Ulpianus, Disputations, Book VII.*

When a stipulation is made for the payment of a judgment, and the party does not defend the case, and afterwards he suffers judgment to be taken by default, the question arises, does the clause having reference to the judgment become operative? I said that the clause in the stipulation contained two things: one relating to the defence of the case, and the other to the judgment. Therefore, as the stipulation with reference to the payment of the judgment includes everything in one clause, if a decision is rendered, or the case is not decided, the question is very properly asked whether, for one of these reasons, the stipulation will become operative with reference to the other clause. For example, if anyone should stipulate, "If a ship should arrive from Asia," or, "If Titius should become Consul," it is established that no matter whether the ship arrives first, or Titius first becomes Consul, the stipulation will become operative.

Where, however, it takes effect on account of the first clause, it cannot do so on account of the second, even though the condition may be complied with; for it is one of the clauses, and not

both of them, which renders the stipulation operative. Hence it should be considered whether the stipulation having reference to the failure to defend the case will take effect, if this is not done; or whether one must believe that it does not become operative before issue is joined. The latter opinion is the better one; hence the sureties do not appear to be liable the very moment that the action is not defended. Therefore, if a case in which a defence is necessary should be terminated either by payment, by compromise, by a release, or in any other way, it has been decided that, in consequence, the clause that has reference to the failure to defend the case ceases to have any effect.

(1) If I, being about to bring an action *in rem,* should stipulate with the surety of an attorney to pay a judgment, and I afterwards intend to bring one *in personam,* but before doing so, I resolve to bring another, the stipulation will not take effect; because it appears that what has been done has reference to one thing, and the stipulation entered into has reference to another.

14. *Julianus, Digest, Book LV.*

When one of two sureties who have promised to pay a judgment pays his share because the case was not defended, the defence can, nevertheless, be undertaken; but he who made payment cannot recover anything, as the stipulation is extinguished, so far as his share is concerned, just as if he had received a release.

(1) Whenever proceedings are instituted against sureties under a stipulation to pay a judgment, on account of the case not having been defended, it is not inequitable to provide that the principal shall be released from liability for the first'judgment; because, if this provision were omitted, the sureties could not have recourse to the action on mandate, or they would certainly be compelled to defend the principal against the first judgment.

15. *Africanus, Questions, Book VI.*

The following stipulation, "As long as the case is not defended," is annulled whenever the defence begins, or as soon as the obligation to defend it is at an end.

16. *Neratius, Parchments, Book III.*

When I desire to institute proceedings against one of several sureties, under a stipulation to pay the judgment because the case has not been defended, and the surety is ready to pay his share, judgment should not be rendered in my favor against him. For it is not just for him. to be annoyed by an action, or be compelled to interpose a denial, where he is ready to pay what he owes without a judgment by which his adversary could not compel him to pay a larger sum.

17. *Venuleius, Stipulations, Book VI.*

When, through fraud, a case has not been completely defended,' the stipulation will become operative under the clause relating to the payment of the judgment; for a suit is not considered to be properly defended in accordance with the opinion of a good citizen where a defence is not made for the entire amount of the property involved.

18. *The Same, Disputations, Book VII.*

A good citizen does not consider a case to be undefended in which the Praetor does not compel this to be done.

19. *The Same, Stipulations, Book IX.*

The last clause of the stipulation for the payment of a judgment, "That there is no fraud, and will be none," indicates a permanent fact for the future. Therefore, if he who was guilty of fraud should die, his heir will remain liable; for the words, "will be none," have great latitude, and refer to all coming time, and if fraud should be committed at any time, for the reason that it is true that there was fraud, this clause will become operative.

(1) And where the following is added, "If any fraud should be committed in this matter, do

you promise to pay the entire value of the property?" the promisor will be liable to the penalty, even on account of fraud committed by a stranger.

(2) The clause relating to fraud, however, as is the case with other stipulations in which the time is not expressly mentioned, refers to the beginning of the stipulation.

20. *Scsevola, Digest, Book XX.*

While a party to a suit was making a defence before Sempronius, the judge, it was provided by a stipulation that the amount decided to be due by Sempronius, the judge, should be paid. The plaintiff appealed from his decision, and the case having been taken before a competent court on appeal, and a decision rendered against the defendant, the question arose whether the stipulation would become operative. The answer was that, according to the facts stated, it would not become operative by law.

Claudius: For this reason the following is added in a stipulation, "Or whoever may be substituted in his place."

21. *The Same, Questions Publicly Discussed.*

Where one of several sureties is sued for not having defended a case, and it is afterwards defended, the other surety can be proceeded against to compel the execution of the judgment. If the principal promisor should die, leaving two heirs, and one does not defend the case and the other does, the former can be sued for not having done so, and the latter can be proceeded against to compel the execution of the judgment; as it is held that these two clauses cannot become operative against one and the same person. We say that the clause relating to the judgment would always take precedence over the others, and that it alone takes effect.

## TITLE VIII.

## CONCERNING SECURITY FOR RATIFICATION.

1. *Papinianus, Questions, Book XXVIII.*

When anyone stipulates that an act will be ratified, although not the same but another person, against whom no action can be brought if ratification should take place, is sued, it has been decided that the stipulation will take effect; for instance, where a surety or another of the joint-possessors, who is a partner, is made defendant.

2. *The Same, Opinions, Book XI.*

In the agreement for ratification, the property of the party promising or stipulating should not be considered, but merely the interest of the stipulator in having the transaction ratified.

3. *The Same, Opinions, Book XII.*

A minor of twenty-five years of age, who was a creditor, desiring to collect his'money, a man whom he had appointed his agent gave security to the debtor that payment of the obligation would be ratified. If complete restitution should be granted, it was decided that a suit for the collection of money which was not due could not be brought, and that the stipulation had not become operative.

The same rule will apply, if the minor should ratify the act of a false agent. Therefore, where a mandate had been given, it should be provided, "That if he, or his heir should obtain complete restitution, or anyone to whom the property in question belongs should do so, a sum of money equal to the value of the property shall be paid." If, however, there was no mandate, the ordinary clause referring to ratification ought to be inserted, and it would be more prudent to do this with the consent of the contracting parties. Otherwise, if there is no agreement to this effect, and the minor creditor does not give his consent, an action must be granted.

(1) A false agent gave security for ratification, and having lost the case, his principal appealed from the decision of the judge, and it appeared that the condition of the stipulation had failed

to be fulfilled, as the unsuccessful party could have had recourse to a common remedy. If, however, the principal, not having ratified the act of his agent, should collect the money, the stipulation for ratification would take effect, so far as the money which the master had received is concerned, although the agent himself might have received nothing.

*4. Scsevola, Questions, Book XIII.*

An agent brought suit for fifty *aurei.* If his principal should bring suit for a hundred, the sureties who bound themselves for ratification would be liable for fifty, and for the interest which the debtor had in having the action for the fifty dismissed.

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

Ratification takes place not only by words but also by acts: hence if. the principal, approving the act of his attorney, proceeds with the case which the latter began, the stipulation will not become operative.

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

Where a guardian has been accused, or is liable to suspicion, his defender can be compelled to furnish security that his principal will ratify his act, if the guardian desires to defend the case.

7. *Paulus, Opinions, Book III.*

If a person who is not aware of the fact that suit has been brought for possession of his property should die, his heir, while the proceeding is pending, cannot ratify it.

8. *Venuleius, Stipulations, Book XV.*

An attorney instituted proceedings for the production of property, and his adversary was discharged because he did not have possession of it. Then, he having subsequently obtained possession of the same property, the principal brought an action against him to compel him to produce it.

Sabinus says that the sureties will not be liable, as this is a different matter; for even if the principal should bring the action in the first place, and, after his adversary had been discharged because he did not have possession of the property, he should bring another, he would not be barred by an exception on the ground of *res judicata.*

(1) If an agent has collected money from a debtor, and given him security that his principal will ratify his act, and the latter afterwards brings suit for the same sum of money, and loses the case, the stipulation will become operative; and if the agent pays the same money to his principal without an order of court, it can be recovered by a personal action.

Where, however, the debtor brings suit under the stipulation, it may be said that if the principal undertakes the defence of his agent he cannot improperly make use of an exception on the ground of bad faith against the debtor, because the obligation remains a natural one.

(2) If anyone should permit his status to be disputed by an agent, he should take security from him that he will not continually be molested on this account, and if the principal, or his representatives, does not ratify his act, namely, that the agent attempted to reduce the party in question to slavery; or if the latter obtained a judgment against the agent in favor of his freedom, the entire value of the property must be paid to him when his right to liberty has been established, that is to say, to the extent of his interest in not having his status placed in jeopardy, as well as for the expenses incurred by the litigation.

Labeo, however, thinks that a definite sum should be included, because the estimation of freedom is capable of indefinite extent; the stipulation, however, is held to become operative from the very moment when the principal refused to ratify the act of the agent.

Still, an action cannot be brought under the stipulation before a judgment has been rendered with reference to the freedom of the alleged slave, because if it should be decided that he was

a slave, the stipulation becomes void, and if any action can be brought he is understood to have acquired it for his master.

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

An agent who is appointed by a guardian must, by all means, give security; but the agent of a municipality, the head of a university or the curator of property appointed with the consent of creditors, is not personally required to give security.

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

Sometimes, by agreement, a stipulation for the ratification of an act is interposed; for instance, where an agent either sells, leases, or hires, or payment is made to him:

11. *Hermogenianus, Epitomes of Law, Book VI.*

Or he enters into a contract, or transacts any business whatsoever, in the name of a person who is absent.

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

For anyone who makes a contract usually stipulates for ratification in order to be in a more secure position.

(1) To ratify an act is to approve and recognize what has been done by a false agent.

(2) Julianus says that it is important to know when the principal should ratify the payment made to his agent. Should this be done as soon as he is informed of it? The time should be understood with a certain latitude, and should not be too long or too short an interval, which can be better understood than expressed by words. What then would be the rule, if he did not ratify it immediately, but did so afterwards? This does not have the effect of interfering with the exercise of his right of action, and, because he did not ratify it in the first place, he says that he will still be entitled to his action. Therefore, if he should demand what had already been paid to his agent, he can bring suit under the stipulation, just as if he had not stated afterwards that he would ratify the payment. I think, however, that the debtor will be entitled to an action on the ground of fraud.

(3) Whether anyone sues, or takes advantage of a set-off, the stipulation that the principal will ratify the act immediately becomes operative. For no matter in what way the latter may show his disapproval of what has been done by the agent, the stipulation will take effect.

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

If the stipulation that the principal will ratify the act should become operative, I can bring an action for all my interest in the matter; that is to say, for all that I have lost, and all that I could have gained.

(1) Where a legacy is paid to an agent without judicial authority, Pomponius says that he must give security for ratification.

14. *The Same, On Plautius, Book III.*

If anyone should promise one of the joint-debtors that the principal will ratify the payment, and that it will not again be demanded, it must be said that the stipulation will take effect if the money is demanded by a party to the same obligation.

15. *The Same, On Plautius, Book XIV.*

The words, "will not again be demanded," Labeo understands to mean, demanded in court. If, however, the debtor is summoned to court, and security is furnished that he will appear, and suit has not yet been begun, I do not think that the stipulation relating to the further demand of the money will take effect, for the claimant does not actually demand it, but merely intends to do so. But where the money was paid without a judgment, the stipulation becomes operative;

for if anyone makes use of a set-off, or a deduction against the claimant, it is properly said that he can be held to have made a demand, and that the stipulation that the money will not be demanded a second time becomes operative. For even if an heir, against whom judgment has been rendered, should not make the demand, if he does either of these things, he will be liable under the will.

16. *Pomponius, On Plautius, Book III.*

If payment of a sum of money which was not due should be made to an agent, proceedings can immediately be instituted under this stipulation against the agent, to compel ratification by the principal, so that it may be determined whether what has been improperly paid should be recovered from the principal, if he has ratified it; or whether a personal action should be brought against the agent, if the principal does not confirm the transaction.

(1) When an agent demands a tract of land, and gives security (as is customary) that his principal will ratify his act, and afterwards the principal sells the land, and the purchaser claims it, Julianus says that the stipulation that the transaction will be ratified becomes operative.

17. *Marcellus, Digest, Book XXI.*

Titius brought suit for ten *aurei* in the name of a creditor against the debtor of the latter, and the principal ratified a part of the claim. It must be said that a portion of the obligation is extinguished, just as if he had stipulated for, or collected ten *aurei,* and the creditor had approved not all, but a part of the transaction. Therefore, if I have stipulated for ten *aurei,* or Stichus, whichever I wish, and, during my absence, Titius demands five, and I ratify his act, what has been done is considered valid.

18. *Pomponius, On Sabinus, Book XXVI.*

Where an agent has furnished security that his principal or the heir of the latter will ratify his act, and one of the heirs of the principal ratifies it, but the other does not, there is no doubt that the stipulation will take effect, so far as that part of the act which was ratified is concerned, because it becomes effective for something in which the stipulator is interested. For even if the principal himself should ratify the transaction in part, the stipulation will not become operative, except in part, as it does so only with reference to that in which the plaintiff has an interest. Hence, proceedings can be instituted several times under this stipulation, according to the interest of the plaintiff: because he brings the action; because of his expense; because of the persons he represents; and because, when judgment is rendered against him, he must pay. For it may happen under a stipulation for the prevention of threatened injury that the stipulator may bring several actions; as it is provided in the bond that, "If anything falls, is divided, is excavated, or is constructed, liability will result."

Suppose, then, that damage is repeatedly caused. There is no doubt that proceedings can be instituted, for if an action can only be brought when all possible injury has been sustained, it almost inevitably follows that this cannot be done before the time prescribed by the stipulation has passed, within which security was furnished for any immediate damage which might be caused. This is not correct.

19. *Paulus, On Sabinus, Book XIII.*

Whatever may be the interest of the stipulator is included in the agreement by which an agent provides that his principal will ratify his act.

The same rule applies to all the clauses having reference to fraud.

20. *Ulpianus, Disputations, Book II.*

Where rights of action are derived from the suits which an attorney brings, as well as from the stipulations that he desires to introduce, he must give security for ratification. Therefore, when

an attorney introduces a stipulation for double damages, he is obliged to furnish security that it will be ratified. If, however, a stipulation against threatened injury is inserted by an agent, he must give security that his principal will ratify it.

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

It is proper that security for ratification by the principal should not be required in cases where someone sets forth in a petition presented to the Emperor that he has appointed an agent to act for him in this matter. If, however, security for the payment of the judgment is demanded of the agent, it will be necessary for him to obey the manifest rule of law.

22. *Julianus, Digest, Book LVI.*

When an agent, without a judgment, collects money which is not due, and his principal does not ratify the payment, but institutes proceedings to collect the same money, the sureties will be liable; and the right to the personal action under which the agent would have been responsible if the stipulation had not been interposed will be extinguished. For whenever money is paid to an agent, and his principal does not ratify the payment, I think that the effect is that the right of personal action for recovery will be extinguished, and that the sole proceeding to which he who paid the money which was not due will be entitled, against the agent, will be the one based on the stipulation.

In addition to this, the sureties must pay the expenses incurred in the suit. If, however, the principal should ratify the payment, the sureties will be released; but the same money can be recovered from the principal by means of a personal action.

(1) Where an agent collects money due to his principal without bringing suit, the same rule applies, with the difference that if the principal has ratified the transaction he cannot afterwards make another demand for the money.

(2) If an agent should collect a sum of money which was not due, by having an execution issued on the judgment, it can be said that whether the principal ratifies his act or not, the sureties will not be liable, either for the reason that there was nothing that the principal could ratify, or because the stipulator had no interest in having the ratification made; hence he who pays the agent suffers an injury.

It is, however, better to hold that if the principal does not ratify the transaction the sureties will be liable.

(3) Where, however, an agent who had not been directed to do so institutes judicial proceedings to collect money which is due, the better opinion is that the sureties will be liable for the entire amount, if the principal does not ratify the transaction.

(4) But when the agent makes a proper demand, he should not be compelled to guarantee that the principal will not profit by the injustice of the judge; for sureties are never liable on account of any damage caused by the wrongful act of a court. In this case it is better to hold that the sureties are only liable for the costs of the suit.

(5) Marcellus: If the principal does not ratify the transaction, but loses the case after it has been brought, nothing but the costs should be included in the agreement for ratification.

(6) Julianus: If, without an order of court, legacies should be paid to the agent of a person who is already dead, the stipulation will become operative unless the heir ratifies the transaction, that is, if the legacies were due; for then there is no doubt that it is to the interest of the stipulator to have the payment ratified by the heir, so that he may not be compelled to pay the same legacies twice.

(7) If, in a stipulation for ratification, it was expressly stated that Lucius Titius would ratify the transaction, as it was clearly the intention that the ratification of the heir and the other parties in interest should be omitted, it is difficult to hold that the clause having reference to

fraud becomes operative. When the above-mentioned persons are omitted through inadvertence, an action under the clause having reference to fraud will undoubtedly lie.

(8) Where an attorney brings suit with reference to an estate, and afterwards his constituent demands a tract of land forming part of said estate, the stipulation for ratification becomes operative, because, if he was a genuine attorney, an exception on the ground of *res judicata* would act as a bar to his constituent.

The stipulation for ratification, however, generally becomes effective in cases in which, if the genuine attorney should proceed, the action, if brought by the constituent, will become of no avail, either by operation of law or through pleading an exception.

(9) When anyone, in the name of a father, brings an action for injury sustained, because his son was struck or beaten, he will be compelled also to include the son in the stipulation; and especially as the father may happen to die before being informed that his attorney had instituted proceedings; and thus the right of action for injury will return to the son.

(10) If an injury is inflicted upon a grandson, and the attorney for the grandfather, on this account, brings suit for injury sustained, not only the son, but also the grandson, must be included in the stipulation. For what will prevent both the father and the son from dying before they knew that the attorney has brought the action? In this case it would be just for the sureties not to be held liable, if the grandson should bring suit for injury sustained.

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

An agent, when bringing an action to collect a sum of money, gave security that no more would be demanded. If, after judgment has been rendered, another person should appear, who claimed the same money in the capacity of agent, as he who made the second demand was not really an agent, and for this reason could be excluded by an exception on the ground that he had no authority, the question arises whether the sureties of the first agent are liable. Julianus is of the opinion that they are not liable. For it was provided in the stipulation that he who has the right to bring an action to demand or to collect the debt will not do so; and that all those having an interest in the matter will ratify the transaction. He, however, who is not an agent, is not understood to have any right of action, or to be entitled to make any claim whatever.

24. *Africanus, Questions, Book V.*

It is necessary for the possession of property, if acknowledged by anyone but the heir, to be ratified within the specified time, in order that it may be demanded. Therefore, it cannot be ratified after the one hundredth day has passed.

(1) If, however, he who made the demand should die, or become insane, let us see whether it can be ratified or not, for, generally

speaking, it should be ratified; just as where, in this instance, ratification takes place at a time when the person claiming possession cannot be benefited by it. The result of this is that, even if the agent should repent of having made the demand, ratification could not occur; which is absurd. Therefore, it is better to say that neither of these causes interferes with ratification.

25. *The Same, Questions, Book VI.*

A father, in the absence of his daughter, demanded a dowry which had been given by him, and furnished security that she would ratify the transaction, but she died before doing so. It was denied that the stipulation took effect; because although it was true that she had not ratified his act, her husband, nevertheless, had no interest in having the dowry transferred to him, for the entire dowry should be returned to the father after the death of his daughter.

(1) An agent, having collected money from a debtor who could have been released by lapse of time, gave security that his principal would ratify his act; and then, after the debtor had been released by prescription, the principal ratified it. It was held that the debtor, after having once

been released, could bring an action against the agent; and the proof of this is, that if no stipulation was interposed, a personal action for recovery could be brought against the agent; but the stipulation had been introduced instead of such an action.

# THE DIGEST OR PANDECTS.

## BOOK XVLII.

## TITLE I.

## CONCERNING PRIVATE OFFENCES.

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

The Civil Law prescribes that heirs shall not be liable to penal actions any more than other successors, and therefore they cannot be sued for theft. But although they are not liable in an action of theft, still they will be in one to compel them to produce the property in question, if they have possession of it, or if they have committed fraud to avoid being in possession; since when it is once produced, they will be liable to be sued for its recovery. A personal action will also lie against them.

(1) It is also established that an heir can bring an action of theft, as the prosecution of certain crimes is conceded to heirs. In like manner, an heir is entitled to the action granted by the Aquilian Law; but a suit for injury sustained will not lie in his favor.

(2) Not only in the action of theft, but also in other actions arising from criminal offences, whether they are civil or praetorian, it is decided that the crime follows the person.

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

Where several criminal offences take place at the same time, this does not cause impunity to be granted for any of them, for one crime does not diminish the penalty for another.

(1) Therefore, where anyone robs a man and kills him, he is liable to an action of theft, for the reason that he robbed him, and to the Aquilian action, because he killed him; and neither one of these actions destroys the other.

(2) The same thing must be said if he robbed him by violence, and then killed him, for he will be liable to an action for robbery with violence, as well as under the Aquilian Law.

(3) Where a personal suit is brought for a slave who has committed theft, the question arose, whether one could also be brought under the Aquilian Law. Pomponius says that this can be done, because the action under the Aquilian Law calls for a different valuation than the one to recover property which has been stolen; as the Aquilian Law includes the greatest value of the stolen article during the year preceding the offence; but the personal action for recovery on account of theft does not go further back than the time of the joinder of issue. If, however, a slave has committed these offences, no matter under what noxal proceeding he may be surrendered, the other right of action will be extinguished.

(4) Likewise, if anyone beats a stolen slave with a scourge, he will be liable to two actions; that of theft and that of injury sustained ; and if he should kill him, he will be liable to three actions.

(5) Again, if anyone has stolen a female slave belonging to another, and debauched her, he will be liable to two actions; for he can be sued for having corrupted the slave, as well as for having stolen her.

(6) Moreover, if anyone should wound a slave whom he has stolen, there will be ground for two actions against him; that authorized by the Aquilian Law, and the action of theft.

3. *The Same, On the Duties of Proconsul, Book II.*

Where anyone desires to bring an action based on a criminal offence, and intends to do so for his own pecuniary benefit, he must have recourse to the ordinary proceeding, and cannot be compelled to prosecute the culprit for the crime. If, however, he wishes to sue for the penalty under the extraordinary proceeding, he must then sign the accusation of the crime.

## TITLE II.

## CONCERNING THEFTS.

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

Labeo says that the word "theft" is derived from the term meaning black, because the offence is committed secretly, and in obscurity, and generally at night; or from the word "fraud," as Sabinus held; or from the verbs to take, and to carry away; or from the Greek term which designates thieves as ^*wpas.* And, indeed, the Greeks themselves derived the word from the verb to carry away.

(1) Hence the sole intention of committing a theft does not make a thief.

(2) Thus, anyone who denies that a deposit has been made with him does not immediately become liable to an action for theft, but only when he has hidden the property with the intention of appropriating it.

(3) A theft is the fraudulent handling of anything with the intention of profiting by it; which applies either to the article itself or to its use or possession, when this is prohibited by natural law.

2. *Gaius, On the Edict, Book XIII.*

There are two kinds of theft: manifest and non-manifest.

3. *Ulpianus, On Sabinus, Book XLI.*

*A* manifest thief is one whom the Greeks call orav™<£crpa; that is to say, one who is caught with the stolen goods.

(1) It makes little difference by whom he is caught, whether by one to whom the property belongs, or by another.

(2) But is he a manifest thief only when he is caught in the act, or when he is caught somewhere else? The better opinion is, as Julianus also says, that even if he is not caught where he committed the crime, he is, nevertheless, a manifest thief if he is seized with the stolen property before he has conveyed it to the place where he intended to take it.

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

The place where anyone intends to take stolen property should be understood to mean where he expected to remain that day with the proceeds of the theft.

5. *Ulpianus, On Sabinus, Book XLI.*

Therefore, if he is arrested in a public or a private place, before he has transported the stolen property to the destination which he had in view, he is considered a manifest thief; provided he is taken with the stolen article in his possession. This was also stated by Cassius.

(1) If, however, he has carried the stolen property to the place where he intended to take it, even if he is seized with it in his possession, he is not a manifest thief.

6. *Paulus, On Sabinus, Book IX.*

For although theft is often committed by merely handling an .object, still, in the beginning, that is to say, when the theft was committed, is the time which has been established to determine whether or not the culprit is a manifest thief.

7. *Ulpianus, On Sabinus, Book XLI.*

If anyone in servitude commits a theft, and is caught after having been manumitted, let us see whether he is a manifest thief. Pomponius, in the Nineteenth Book on Sabinus, says that he cannot be prosecuted as a manifest thief, because the origin of a theft committed while in

slavery was not that of manifest theft.

(1) Pomponius very properly says, in the same place, that the thief does not become a manifest one unless he is caught. Moreover, if I commit a theft by taking something from your house, and you have concealed yourself to prevent me from killing you, even if you saw me commit the theft, still, it is not a manifest one.

(2) Celsus, however, adds to the result of detection, that if you have seen the thief in the act of stealing, and you run forward to arrest him, and he takes to flight, he is a manifest thief.

(3) He thinks it makes very little difference whether the owner of the property, a neighbor, or any passer-by, catches a thief.

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

What a non-manifest theft is readily becomes apparent; for what is not manifest for this very reason is non-manifest.

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

A person who can bring an action of theft is not entitled to any further proceeding based on the constant handling of the articles taken by the thief, even to recover any accession which may accrue to the property after it has been stolen.

(1) If I should bring suit to recover the property from the thief, I will still be entitled to a personal action.

It may, however, be said that it is the duty of the judge who has jurisdiction of the case, not to order the restitution of the property, unless the plaintiff dismisses the personal action.

If, however, the defendant, after having had judgment rendered against him in the personal action, pays the damages assessed, so that he is absolutely discharged from liability; or (which is the better opinion) if the plaintiff is ready to return the damages, and the slave is not given up to him, the possessor should have judgment rendered against him for the amount sworn to by the other party in court.

10. *Ulpianus, On Sabinus, Book XXIX.*

He who was interested in not having the property stolen is entitled to an action for theft.

11. *Paulus, On Sabinus, Book IX.*

The party in interest is entitled to the action for theft if the case is an honorable one.

12. *Ulpianus, On Sabinus, Book XXIX.*

Therefore, a fuller who has received clothing for the purpose of mending and cleaning it has always a right of action, as he is responsible for its safe-keeping. If, however, he is not solvent, the owner of the property can bring suit, for he who has nothing to lose sustains no risk.

(1) The action of theft is not granted to a possessor in bad faith —although he is interested in not having the property stolen—for the reason that it is at his risk. No one can acquire a right of action based upon dishonesty, and therefore the action of theft is only granted to a *bona fide* possessor, and not to one who holds the property in bad faith.

(2) If the stolen article has been given in pledge, we also grant an action for theft to the creditor, although it does not constitute part of his property. Further, not only do we grant the action of theft against a stranger, but also against the owner of the property himself; as Julianus stated. It is established that it also is granted to the owner, and, consequently, he is not liable to the action for theft, but he can bring it. It is granted to both parties, because both are interested; but is the creditor always interested, or is this only the case when the debtor is

insolvent? Pomponius thinks that it is always to his interest to have the pledge, which opinion Papinianus adopts in the Twelfth Book of Questions. It is better to say that this appears at all times to be the interest of the creditor; and this was frequently stated by Julianus.

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

*A* person to whom property is due under the terms of a stipulation is not entitled to an action for theft if it should be stolen, even though the debtor may be to blame for not having delivered it to him.

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

Where property which has been bought is not delivered to the person who purchased it, Celsus says that he will not be entitled to an action for theft, but that the vendor can bring this action. It will certainly be necessary for him to direct the purchaser to bring the action for theft, as well as the personal action, and the one to recover the property, and if anything is obtained by means of these proceedings, he must deliver it to the purchaser; which opinion is correct, and is accepted by Julianus. It is clear that the risk of the property must be assumed by the purchaser, provided the vendor had charge of it before he delivered it.

(1) Moreover, the purchaser is not entitled to an action for theft before delivery, and the question has been asked whether the purchaser himself, if he should steal the property, is liable to an action for theft? Julianus, in the Twenty-third Book of the Digest, says that if a purchaser, after having paid the price of the property, steals it, and the vendor has guaranteed its safe-keeping, he will not be liable to an action for theft. It is clear, however, that if he should steal the property before paying the money, he will be liable to an action for theft, just as if he had stolen a pledge.

(2) Again, tenants on land, although they are not the owners of the property, but because they have an interest in it, can bring an action of theft.

(3) Let us next examine whether the person with whom the property was deposited is entitled to an action for theft. As he gives a guarantee against fraud, it is held with reason that he is not entitled to an action for theft; for what interest has he if he has not been guilty of fraud? If he has acted fraudulently, the property is at his risk, but he ought not to ask for an action for theft on the ground that he has been guilty of fraud.

(4) Julianus, in the Twenty-second Book of the Digest, also says that, because it has been settled with reference to all thieves, that they cannot bring an action for theft on account of the property which they themselves have stolen; neither can he, with whom property has been deposited, bring an action for theft, although he has begun to be responsible for the property, if he has handled it with the intention of stealing it.

(5) Papinianus discusses the point that if I should receive two slaves in pledge for ten *aurei,* and one of them should be stolen, and the other that was left was not worth less than ten *aurei,* whether I will only be entitled to an action for theft to the amount of five *aurei,*

for the reason that I am sure of the other five in the person of the remaining slave; or, indeed, because the latter may die, it should be held that I am entitled to an action for ten, even if the remaining slave is of great value. I incline to the latter opinion, for we should not consider the pledge which was not taken, but the one which was stolen.

(6) He also said that if ten *aurei* are due me, and a slave given in pledge for them has been stolen, and I have recovered ten *aurei* by an action for theft, I will not be entitled to another action for theft if the slave should be stolen a second time, because I have ceased to have an interest when I have once obtained that which was due me. This is the case where the theft was committed without any fault of mine, for if I was to blame, as I had an interest because I would be liable in an action on pledge, I can bring the action for theft.

If, however, I was not to blame, it appears that there is no doubt that an action will lie in favor of the owner of the property, which will not be granted to the creditor.

This opinion Pomponius approves in the Tenth Book on Sabinus.

(7) The same authorities assert that if two slaves are stolen at the same time, the creditor will be entitled to an action for theft on account of both of them; not for the entire sum, but to the extent of his interest estimated by dividing the amount which is due to him with reference to each of the slaves.

If, however, the two slaves should be stolen separately, and the creditor has collected the entire amount on account of one of them, he can recover nothing on account of the other.

(8) Pomponius, in the Tenth Book on Sabinus, also says that if he to whom I have lent something for use, commits fraud with reference to the property loaned, he cannot bring the action for theft.

(9) Pomponius holds the same opinion with reference to a person who, by the direction of someone, has received the property for transportation.

(10) The question arises whether a father is entitled to an action for theft when property has been lent for use to his son. Julianus says that a father cannot bring the action under these circumstances, because he should not be responsible for the safe-keeping of the property; just as he says that anyone who becomes surety for someone to whom property is loaned for use is not entitled to an action for theft. For he holds that not everyone, without distinction, to whose interest it is that the property should not be lost, is entitled to an action for theft; but only he who is liable because it was his fault that the same property has been destroyed. Celsus, also, approves this opinion in the Twelfth Book of the Digest.

(11) Is a man who has acquired a slave by a precarious tenure entitled to an action for theft if the slave is stolen, is a question which may be asked. And, as a civil suit cannot be brought against him, because property held by a precarious tenure resembles a donation, and therefore an interdict appears to be necessary, he will have no right to an action for theft. I think, after an interdict has been granted, it is clear that he ought to offer a guarantee against negligence, and hence he can bring an action for theft.

(12) Where anyone has leased property, he will be entitled to an action for theft, provided it was stolen through his negligence.

(13) Where a son under paternal control is stolen, it is evident that his father can bring an action for theft.

(14) If property should be loaned for use, and he to whom it was loaned should die, although theft cannot be committed against an estate, and therefore the heir of the person to whom the article was lent cannot institute proceedings, still, the lender can bring the action for theft.

The same rule applies to property which has been pledged or hired, for although the action for theft is not acquired by an estate, still it is acquired by the parties interested in the same.

(15) The action for theft not only lies in favor of him to whom the property was lent, on account of said property, but also on account of anything connected with it, because he was responsible for its safe-keeping. For if I lend you a slave for use, you can bring an action for stealing his clothing, although I did not lend you the garments which he wore. Likewise, if I lend you beasts of burden, and a colt is following one of them, I think that an action for theft will lie for stealing the colt, although it was not included in the loan.

(16) The question arose, what then is the nature of the action for theft which is granted to the person to whom property was lent for use? I think that actions for theft will lie in favor of all those who are responsible for the property of others, whether it is lent for use, leased, or pledged, provided it is stolen; but a personal action will only lie in favor of him who is the

owner.

(17) If a letter which I have sent to you should be intercepted, who will have a right to bring the action for theft? And, in the first place, it must be ascertained to whom the letter belonged, whether to the person who sent it, or to him to whom it was despatched. If I gave it to a slave of him to whom it was sent, it was immediately acquired by the latter. If I gave it to his agent, this is also the case, because, as possession can be acquired by means of a free person, the letter immediately became his property; and this is especially true if he was interested in having it. If, however, I sent a letter which was to be returned to me, it will remain mine, because I was unwilling to relinquish or transfer the ownership of it.

Who then can bring the action for theft? He can do so who is interested in not having the letter stolen, that is to say, the individual who was benefited by what it contained. Therefore, it may be asked whether he, also, can bring the action for theft to whom the letter was given in order to be conveyed to its destination. He can do so if he was responsible for the safe-keeping of the letter, and if it was to his interest to deliver it he will be entitled to an action for theft. Suppose that the letter stated that something should be delivered to him, or done for him; he can then bring an action for theft, if he assumed responsibility for its delivery, or received a reward for carrying it. In this instance, he resembles an inn-keeper, or the master of a ship; for we grant them an action for theft, if they are solvent, as they are responsible for property.

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

A creditor, whose pledge has been stolen, has an interest not merely to the extent of his claim, but he can bring an action of theft for the entire value of the property stolen, but he must return to the debtor all in excess of his debt which can be recovered in an action on pledge.

(1) The owner of the property who has stolen something of which another enjoys the usufruct is liable to the usufructuary in an action for theft.

(2) If anyone who has lent you an article for use should steal it; Pomponius says that he will not be liable in an action for theft, as you have no interest in the matter, for an action based on the loan of the property cannot be brought against you; hence, if you have retained the article on account of some expense which you have incurred with reference to it, you will be entitled to an action for theft, even against the owner himself, if he should steal it, because, in this instance, the property takes the place of a pledge.

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

It is not a rule of law that a father cannot bring an action for theft against his son, who is under his control, but it presents an obstacle from the nature of the case; because we cannot bring suit against those who are under your control, any more than they can bring suit against us.

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

Our slaves and our children can, indeed, steal from us, but they will not be liable to an action for theft; as he who can decide the case of a thief has no need to bring suit against him. Therefore, no action was granted to him by the ancient legislators.

(1) Hence the question arose, if a slave was either alienated or manumitted, whether he would be liable to an action for theft. It was decided that he is not liable, for a cause of action which does not exist in the beginning cannot afterwards arise against a thief of this kind. It is, however, clear that if, after having been manumitted, he should appropriate any property, he can be said to be liable to such an action, because he then commits a veritable theft.

(2) When, however, a slave whom I purchased, and who was delivered to me, is returned to me under a conditional clause of the sale, he should not be considered as ever having belonged to me, but he has been mine, and has ceased to be such. Therefore Sabinus says that,

if he commits a theft, his position is such that the person who returned him will not be entitled to an action for theft. But although he cannot bring such an action, still, when he is sent back, the value of the property stolen should be estimated and included in the action for his return.

(3) If a fugitive slave should steal from his master, the question was asked whether the latter could also bring an action against the person who had *bona fide* possession of him before he was restored to the power of his master. This point gives rise to some difficulty; for although I may be considered to have had possession of the slave during the time in which he was a fugitive, still I will not be liable to an action for theft, as he was not under my control. For Julianus says that when I seemed to possess him, this was of no advantage except to enable me to acquire him by usucaption. Therefore Pomponius, in the Seventeenth Book on Sabinus, says that the action for theft will lie in favor of the owner whose slave was in flight.

18. *Paulus, On Sabinus, Book IX.*

When it is said that the injury follows the person, this is true to the extent that the right of action follows him who commits the damage, where it arises against anyone in the beginning. Hence, if your slave steals something from me, and, having become his owner, I sell him, the Cassians hold that I cannot bring an action against the debtor.

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

In an action for theft, it is sufficient for the property to be described in such a way that it can be understood what it is.

(1) It is not necessary to mention the weight of vessels, therefore it will be sufficient to say a dish, a plate, or a bowl. The material of which the article is composed must, however, be stated; that is, whether it is of silver, or gold, or anything else.

(2) Where anyone brings suit for unmanufactured silver, he should say an ingot of silver, and give its weight.

(3) The number of coins which have been stolen from the owner must be included, for instance, so many *aurei,* or more.

(4) The question arises whether the color of a garment should be mentioned. It is true that this should be done, for, just as where a theft of plate is involved, a golden bowl is mentioned, so, where a garment is concerned, the color should be stated. It is clear that if anyone should swear that he cannot positively designate the color, the necessity of the case should excuse him.

(5) Where anyone gives property in pledge, and then steals it, he will be liable in an action for theft.

(6) The owner is not only considered as guilty of the theft of property which has been pledged, when he takes it from the creditor who possesses or holds it, but also if he should remove it at a time when he did not possess it; for instance, if he should sell the article which had been pledged; for it is settled that, under such circumstances, he commits theft. Julianus, also, is of this opinion.

20. *Paulus, On Sabinus, Book IX.*

Where brass is given in pledge, and it is stated to be gold, a dishonorable act, but not a theft, is committed. If gold is pledged, and afterwards, under the pretext of weighing, or sealing it, brass is substituted for the gold, the person who does so commits a theft, for he has appropriated property given in pledge.

(1) If you purchase my property in good faith, and I steal it from you, or even if you are entitled to the usufruct thereof, and I put it aside with the intention of appropriating it, I will be liable to you in an action for theft, notwithstanding I am the owner of the property. In these

cases, however, usucaption will not be prevented, as where it is stolen; for, if another had stolen it, and the property should again come under my control, usucaption will continue to run.

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

The following question frequently arises, namely: where anyone removes a measure of grain from a heap, whether he steals the whole of it or only the amount which he appropriates. Ofilius thinks that he steals the entire heap, for Trebatius says that a person who touches the ear of anyone is considered to have touched him all over; hence, if anyone opens a cask, and takes out a little wine, he is understood to have stolen not merely what he removed, but all of it. It is, however, true that, under these circumstances, he is only liable in an action for theft for the amount which he carried away. For if anyone opens a closet, which he cannot remove, puts aside everything it contains, and then departs; and afterwards, having returned, removes one of the articles, and is caught before he reaches his destination, he will be guilty of both manifest and a non-manifest theft of the same property. For he who, in the daytime, cuts down growing grain, and puts it aside with the intention of removing it, is both a manifest and a non-manifest thief, so far as what he has cut is concerned.

(1) If anyone, who has deposited a bag of twenty *sesterces,* should receive another bag in which he knows there are thirty, through the mistake of the person who gave it to him, who thought that his twenty were contained therein, it is decided that he will be liable for the theft of ten *sesterces.*

(2) Where anyone steals brass, when he thinks he is stealing gold, or *vice versa,* or he thinks that the value of the article is less, when it is more, he commits a theft of what he removed, according to the Eighth Book of Pomponius on Sabinus. Ulpianus is of the same opinion.

(3) If, however, anyone steals two bags, one of ten, and the other of twenty *aurei,* one of which he thought belonged to him, and the other he knew to belong to someone else, we say that he only steals the bag which he believed belonged to another, just as if he should steal two cups, one of which he thought was his own, and the other he knew belonged to someone else, for he only steals one of them.

(4) But where he thinks that the handle of a cup belongs to him, and it actually is his, Pomponius says that he is guilty of stealing the entire cup.

(5) If, however, anyone should steal the sixth part of a measure of wheat from a loaded ship, does he commit a theft of the entire load, or only of the sixth part of the measure of wheat? This question is more applicable to a granary, which is full, and it is very severe to hold that a theft of all of it is committed. And what would be the rule in the case of a reservoir of wine, or a cistern of water, or what in that of a ship loaded with wine, as there are many of these in which wine is poured? And what shall we say of him who has drunk of the wine; is he to be considered to have stolen all of it ?

The better opinion is that we should say that he has not stolen it all.

(6) If you suppose two jars of wine to be placed in a warehouse, and that one of them is stolen, the theft has reference to that one, and not to the entire warehouse; just as where one of several portable articles in a granary is removed.

(7) A person who enters a room with the intention of committing a theft is not a thief, although he may have entered for that purpose. What, then, is the rule? To what action will he be liable? He can be accused of committing damage or violence, if he entered by force.

(8) Likewise, if he opened or broke anything of great weight, which he was not able to remove, an action for theft for the entire amount cannot be brought against him, but only for what he took away, because he was unable to take it all. Hence, if he removed a cover which he could not take away, in order to obtain access to certain articles, and then appropriated

some of them, although he may have been able to remove the objects therein contained separately, but could not take the entire contents together; he is only considered to have stolen the thing which he removed, and not the others.

If he was able to remove the entire receptacle, we say that he steals the whole of it, although he may have detached the cover in order to take some, or a certain number of the articles therein contained. This was also the opinion of Sabinus.

(9) If two or more persons should steal a beam, which any one of them alone is unable to lift, it must be said that all of them are guilty of stealing it, although none of them singly could have handled or removed it, and this is our practice. For it cannot be held that each one committed a theft proportionally, but that all of them stole the whole of it. Hence it results that each of them will be liable for theft.

(10) And although a person may be liable in an action of theft for property which he did not remove, still, a personal action cannot be brought against him, because such a proceeding will not lie to recover property which has been carried away. This was also the opinion of Pomponius.

22. *Paulus, On Sabinus, Book IX.*

Where a thief breaks or destroys anything, which he did not handle for the purpose of stealing it, an action of theft cannot be brought against him on this account.

(1) If, for instance, a chest should be broken into with the intention of stealing pearls, and they were handled with this dishonest purpose, it seems that the culprit had intended to steal them alone; which is correct. For the other articles which were displaced in order to reach the pearls were not handled for the purpose of stealing them.

(2) Anyone who scrapes a silver dish is a thief of all of it, and he is liable to an action for theft to the extent of the owner's interest.

23. *Ulpianus, On Sabinus, Book XLI.*

*A* child under the age of puberty can commit a theft if he is capable of crime, as Julianus states in the Twenty-second Book of the Digest. Likewise, an action for injury sustained can be brought against a child under the age of puberty, because the theft was committed by him; but this admits of a modification, for we do not think that the action under the Aquilian Law which can be brought against a child under the age of puberty, who is capable of guilt, is applicable to infants. What Labeo says is also true, that is, where theft has been committed with the aid of a child under the age of puberty, it will not be liable.

24. *Paulus, On Sabinus, Book IX.*

Julianus says that a personal action for recovery cannot be brought against him.

25. *Ulpianus, On Sabinus, Book XLI.*

The rule adopted by most authorities, that the theft of a tract of land cannot be committed, is true.

(1) Hence, the question arises, if anyone is ejected from land, can a personal action for its recovery be brought against him who ejected him? Labeo denies that it can. But Celsus thinks that a personal action can be brought to recover possession, just as when movable property is stolen.

(2) There is no doubt that an action of theft can be brought where anything is removed from land, for example, trees, stones, sand, or fruits, which someone has taken with the intention of stealing them.

26. *Paulus, On Sabinus, Book IX.*

If wild bees swarm upon a tree of your land, and anyone removes either the bees or their honey, he will not be liable for theft to you, because they were not yours, and it is established that they are included among those things which can be seized on land or sea, or in the air.

(1) It is also settled that a tenant who pays rent in money can bring an action for theft against anyone who steals his standing crops, because they would have begun to belong to him as soon as he had gathered them.

27. Ulpianus, On Sabinus, Book XLI.

Anyone who appropriates account-books, or written instruments, is liable for theft, not only for the value of the account-books, but also for the interest which the owner had in them, which has reference to the estimate of the sums included in the accounts, that is to say, if they amounted to that much money; for instance, if they contained an account of ten *aurei,* we say that this sum should be doubled.

If, however, no claims were entered in the accounts because they had been paid, should not the estimate of the value of the account-books themselves only be considered? For what other interest could the owner have in them? It may be held that, because sometimes debtors desire the accounts to be returned to them, as they say that they have paid sums which are not due, it is to the interest of the creditor to hold the accounts, in order that no controversy may arise respecting them. And, generally speaking, it should be said that double the value of the interest involved is asked in cases of this kind.

(1) Hence, where anyone who has other proofs and bank-registers has had a note stolen from him, it may be asked whether double the amount of the note should be estimated, or whether this should not be done on the ground that he has no interest in it. For what interest can he have when the debt can be proved in some other way; for instance, if it is included in two different accounts. For the creditor is not considered to have lost anything, if there happens to be another evidence of the debt which renders him secure.

(2) Likewise, when a receipt is stolen, it must also be said that there will be ground for an action of theft to the extent of the owner's interest. It seems to me, however, that he has no interest in it, if other evidence exists to show that the money has been paid.

(3) If, however, the offender did not remove documents of this kind, but erased portions of them, there will not only be ground for an action of theft, but also for procedure under the Aquilian Law, for anyone who has defaced property is held to have "broken *it."*

28. *Paulus, On Sabinus, Book IX.*

If, however, he should steal something, he will only be liable for the interest which the owner had in not having the article stolen, for, by defacing it, he adds nothing to the penalty.

29. *Ulpianus, On Sabinus, Book XLI.*

Moreover, an action for the production of the property can be brought, as well as an interdict for the possession of the same.

30. *The Same, On Sabinus, Book IX.* If the will has been mutilated.

31. *The Same, On Sabinus, Book XLI.*

Where, however, anyone defaces a picture or a book, he will be liable to an action for wrongful damage, just as if he had destroyed the article.

(1) If anyone steals, or makes erasures in the registers of the acts of the Republic, or of any municipality, Labeo asserts that he will be liable for an action of theft. He says the same thing with reference to other public property, or that belonging to associations.

32. *Paulus, On Sabinus, Book IX.*

Some authorities think that, in an action for theft, an estimate of the accounts should only be made, for the reason that if the amount of the debt can be proved before a judge having jurisdiction of an action of theft, it can also be proved before one having jurisdiction of a suit brought for the collection of the money.

If, however, it cannot be established before the judge having jurisdiction of the action for theft, the amount of the damage sustained cannot be shown. Still, it might happen that, after the theft has been committed, the plaintiff could recover the accounts, so that he can prove how much damage he would have sustained if he had not recovered them.

(1) The principal question with reference to the Aquilian Law is, how can the value of the party's interest be established? For if it can be proved in any other way, he does not sustain any damage. What then is the rule, if he should happen to lend money under a condition, and, in the meantime, the witnesses on whom he relies for proof die before the condition is fulfilled? Or, suppose I have demanded a sum of money, which I lent, and because I do not produce the witnesses who signed the agreement, I lose my case; if I bring an action for theft, I can make use of their memory and their presence to prove that I lent the money.

33. *Ulpianus, On Sabinus, Book XLI.*

A guardian, while entitled to the administration of the affairs of his ward, has no power to appropriate his property. Therefore, if he removes anything belonging to the latter with the intention of stealing it, he commits a theft, and the property cannot be acquired by usucaption; but he will be liable to an action for theft, although one on guardianship can also be brought against him. What has been said with reference to a guardian also applies to the curator of a minor, as well as to other curators.

34. *Paulus, On Sabinus, Book IX.*

Anyone who assists a thief is not always himself a manifest thief; hence it happens that he who furnished assistance is liable for non-manifest theft, and he who was caught in the act is guilty of manifest theft of the same property.

35. *Pomponius, On Sabinus, Book XIX.*

If anyone should receive an article for the purpose of transporting it, knowing it to have been stolen, it is established that if he is arrested with it in his possession, he alone is the manifest thief, but if he was not aware that it had been stolen, neither of the parties is a manifest thief; the latter because he is not a thief, and the thief himself, because he was not arrested with the goods in his possession.

(1) If one of your slaves has drunk and carried away wine, and another has been caught drinking the wine, you will hold the former liable for non-manifest theft, and the latter for manifest theft.

36. *Ulpianus, On Sabinus, Book XLI.*

Anyone who persuades a slave to take to flight is not a thief; for he who gives another bad advice does not commit theft, any more than if he persuaded him to throw himself down from some height, or to lay violent hands upon himself; for things of this kind do not admit of an action of theft. If, however, he should persuade him to run away in order that he may be stolen by someone else, he will be liable for theft, because the crime was committed with his assistance and advice.

Pomponius goes still further, and says that the person who persuades him, even though in the meantime he is not liable for theft, he, nevertheless, begins to be liable at the time that anyone steals the fugitive slave, as the theft is considered to have been committed with his assistance and advice.

(1) It has also been decided that anyone who assists his son, or a slave, or his wife, to commit a theft, is liable for theft; although they themselves cannot have an action of theft brought against them.

(2) Pomponius also says that when a fugitive slave takes property with him, he who has induced him to do so can have an action for theft brought against him, on account of the stolen property; because he contributed his assistance and advice to the thief. This also is stated by Sabinus.

(3) If two slaves take the advice of one another, and both run away at the same time, one is not the thief of the other. But what if they should conceal one another? It may happen that they are both thieves of one another. It can also be said that one is the thief of the other, for, where other persons steal each of them, they will be liable as having given mutual assistance; just as Sabinus has stated that they are also liable for stealing the property which they have carried away.

37. *Pomponius, On Sabinus, Book XIX.*

If you follow a tame peacock which has escaped from my house until he is lost, I can bring an action for theft against you, as soon as anyone seizes it.

38. *Paulus.*

If a son under paternal control is stolen, it is clear that his father will be entitled to an action for theft.

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

A mother whose son has been stolen is not entitled to an action for theft.

(1) Although an action for theft can be brought on account of free persons, a personal action for recovery will still never lie.

40. *Ulpianus, On Sabinus, Book XLI.*

It is true that if anyone has carried away a female slave, who is a harlot, and belongs to another, or has concealed her, this will not be a theft; for not the act, but the motive for committing it should be considered. The motive for committing this act was lust, ancl not theft. Therefore, even a person who has broken down the door of a harlot for the purpose of having intercourse with her will not be liable for theft, where thieves were not introduced by him; even though having entered, they may have carried away the woman's property.

But is anyone who has concealed a female slave for the purpose of enjoying her liable under the Favian Law? I do not think that he is, and an instance of this kind having been presented to me, I gave this opinion: for the person who stole the woman commits a more dishonorable act, and he pays for its disgrace, but he certainly is not a thief.

41. *Paulus, On Sabinus, Book IX.*

Anyone who takes beasts of burden to a greater distance than was agreed upon when they were lent to him, or who makes use of property belonging to another against the consent of the owner, commits a theft.

42. *Ulpianus, On Sabinus, Book XLI.*

When anyone, while in the hands of the enemy, has something stolen from him, and returns by the right of *postliminium,* it may be said that he is entitled to an action for theft.

(1) It is certain that an arrogator can bring an action for theft, even if the property has been stolen from the person whom he arrogated before this was done. If the theft was committed afterwards, there is no doubt that he can bring the action.

(2) The action for theft is not extinguished as long as the thief lives, whether he who perpetrates the offence is his own master when an action is brought against him, or whether he is under the control of another, and the action for theft is brought against the person to whose authority he is subjected; and this is the reason that it is said that the crime follows the person.

(3) If anyone, after having committed damage, should become the slave of the enemy, let us see whether the action will be extinguished. Pomponius says that it will be extinguished, and if the captive returns by the law of *postliminium,* or by any other right whatsoever, the action will be revived; and this is our practice.

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

If a slave should assume command of a ship without the consent of his master, the common rule should be applied against the latter for anything which is lost in the ship; so that what the slave is responsible for may be taken out of his *peculium,* and any negligence of the owner himself must in addition be atoned for by a noxal action. Therefore, if the slave should be manumitted, the right to bring the action *De peculio* will continue to exist against a master for a year, but the noxal action will follow him.

(1) Sometimes both the manumitted slave and the person who gave him his freedom are liable for theft, if the latter manumitted the slave in order to prevent an action for theft from being brought against -him. When, however, the master is sued, Sabinus says that the manumitted slave is released by operation of law, just as if it had been decided that this should be the case.

44. *Ulpianus, On Sabinus, Book XLI.*

Where a false creditor (that is to say, one who pretends to be a creditor) receives anything, he commits a theft, and the money paid does not become his property.

(1) A false agent is also considered to commit a theft. Neratius, however, says that it should be considered whether this opinion, which is susceptible of different constructions, is correct. For when a debtor pays an agent money with the intention that it shall be delivered to his creditor, and the agent appropriates it, the above-mentioned opinion is correct, as the money continues to belong to the debtor when the agent did not receive it in the name of him to whom the debtor desired it to be paid, and by retaining it without the consent of his principal, he undoubtedly commits a theft.

If, however, the debtor should pay the money in order that it may become the property of the agent, Neratius says that the latter by no means commits a theft, as he receives the money with the consent of his principal.

(2) Where anyone receives something which is not due, and delegates another to whom payment should be made, an action for theft will not lie; provided payment is made during the absence of the person above mentioned. If, however, he is present, the case is different, and he commits a theft.

(3) If someone has not made a false statement with reference to himself personally, but is guilty of fraud in his assertions, he is rather deceitful than guilty of theft; for example, if he says he is rich, and will invest what he has received in merchandise; that he will give solvent sureties; or that he will immediately make payment; for in all these instances, he is rather guilty of deception than of theft, and therefore he will not be liable for theft; but because he has committed fraud, if no other action can be brought against him, one for fraud will lie.

(4) Where anyone, with the intention of stealing it, removes the property of another, which he had left lying exposed, he will be liable

for theft, whether he knew or did not know to whom the property belonged; for it does not diminish the guilt of theft for a person to be ignorant who was the owner of the property.

(5) If the owner has abandoned the property, I do not steal it, even if I have the intention of

doing so; for a theft is not perpetrated unless there is someone from whom the article may be stolen. However, in the case where it is not stolen from anyone, the opinion of Sabinus and Cassius, who held that property immediately ceases to be ours as soon as we abandon it, has been adopted.

(6) If the property has, in fact, not been abandoned, but he who takes it thinks that it has, he will not be liable for theft.

(7) If the property has not been abandoned, and he does not think so, but takes it lying as it were exposed, not to profit by it, but to return it to the person to whom it belongs, he will not be liable for theft.

(8) Therefore, if he did not know to whom it belonged, and, nevertheless, took it in order to return it to anyone who claimed it, or could prove that the property was his, let us see whether he will be liable for theft. I do not think that he will, for most persons do this with the intention of putting up a notice announcing that they have found the property, and will return it to him who claims it. Such persons show that they have not the intention of stealing.

(9) What should be done if he demands a reward for finding the property? This is not considered to constitute a theft, although it is not very honorable for him to demand anything.

(10) Where anyone voluntarily throws something away, or has thrown it away, but not with the intention of considering it abandoned, and you remove it, Celsus, in the Twelfth Book of the Digest, asks whether you are guilty of theft. And he says that if you thought that the article was abandoned, you will not be liable, but if you did not think so, a doubt may exist on this point; still he maintains that you will not be liable, because he says the property has not been taken from him who voluntarily threw it away.

(11) When anyone carries away property which has been thrown overboard from a ship, is he guilty of theft? In this case, the question is whether the property was considered to be abandoned. If he who threw it overboard did so with the intention of abandoning it, which, in general, should be believed, as he knew that it would be lost, he who finds it makes it his own, and is not guilty of theft. When, however, he did not have this intention, but threw it overboard for the purpose of keeping it, if it should be saved, he who finds it can be deprived of it. If the latter was aware of this, and holds the property with the intention of stealing it, he is guilty of theft; but where he retained it with the intention of preserving it for the owner, he will not be liable for theft. If, however, he thought that the property had simply been thrown overboard, he will still not be liable for theft.

(12) Even if I should acquire only half of the ownership of a slave who had previously stolen something from me, the better opinion is that the right of action will be extinguished, when I have only obtained the ownership of half of said slave; because, even in the beginning, a person who had a half ownership in a slave could not bring an action for theft.

It is clear that, if my usufruct in the said slave begins to exist, it must be said that the right of action for theft is not extinguished, because the usufructuary is not the owner.

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

If, by order of a debtor, a false agent should receive money from another, a debtor of the said debtor, he will be liable to the debtor for theft, and the money will belong to the latter.

(1) If I deliver my property to you as yours, and you know that it is mine, the better opinion is to hold that you are guilty of theft, if you did this with the intention of profiting by it.

(2) If a slave belonging to an estate which has not yet been accepted, steals something from the heir, and is manumitted by the will of his master, an action for theft will lie against him, because the heir was at no time his master.

46. *Ulpianus, On Sabinus, Book XLI.*

Where a partner steals property owned in common (for a theft of partnership property can be committed), it can be said without any doubt that an action for theft will lie.

47. *The Same, On Sabinus, Book XLII.*

It has been decided by all authorities that an action for theft can be brought against the thief, even if the stolen property has been destroyed. Hence, after the death of a slave whom someone has stolen, the right of action for theft remains unimpaired. Nor does manumission extinguish this right, for manumission is not unlike death as it appears to remove the slave from the power of his master. Therefore, no matter in what way the slave may be removed from the control of his master, the action for theft can still be brought against the thief; and this is our practice. This action lies, not because the slave is now separated from his master, but because he is separated from him for the benefit of the thief.

This rule has also been adopted with reference to a personal action for recovery of the property; for it can be brought against a thief, even if the property has been, for some reason or other, destroyed. This must also be said where the property has fallen into the hands of the enemy, for it is established that an action for theft can be brought on account of it. If, however, after having been considered abandoned, it should be recovered by the owner, he can still bring an action for theft.

(1) If a slave subject to an usufruct is stolen, both the usufruct-ua'ry and the owner are entitled to an action for theft. The action is, therefore, divided between the owner and the usufructuary, and the usufructuary brings suit for the profits, .or for the amount of the

interest which he had in not having a theft committed, that is to say, for double damages; and the owner brings an action for the interest he had in not being deprived of his property.

(2) When we say double damages, we must understand this to mean that an action for quadruple damages will lie, if the theft is manifest.

(3) This action may lie in favor of a person who is only entitled to the use of said slave.

(4) If anyone should suppose that this slave has also been given in pledge, the result will be that he, likewise, who received him by way of pledge, will be entitled to the action for theft. Moreover, if the slave is worth more than the amount due under the pledge, even the debtor can bring the action for theft.

(5) The actions which lie in favor of these persons are so different in their nature that if anyone of them has released the thief from responsibility for damages, it must be said that he has lost the right of action only for himself, but that it continues to exist so far as the others are concerned. For if you suppose that a slave owned in common has been stolen, and one of his masters releases the thief from liability for damages, the other, who did not do so, will be entitled to an action for theft.

(6) The owner can also bring the action for theft against the usufructuary, if he has done anything for the purpose of concealing the property, or appropriating it.

(7) It has been very properly held that he who thinks he has obtained possession of property with the consent of the owner is not a thief. For how can he be guilty of fraud who thinks that the owner will give his consent, whether his opinion is false or true? Therefore, he alone is a thief who takes something against the will of the owner and knows that he does so.

(8) On the other hand, if I think that I am doing something against the will of the owner, and the latter should actually be willing, the question is asked whether there will be ground for an action for theft. Pomponius says that I commit a theft. However, it is true that if I am willing for him to make use of the property, although he may not be aware of the fact, he will not be guilty of theft.

(9) If the stolen property should be restored to the owner, and is taken a second time, another action for theft will lie.

48. *Paulus, On Sabinus, Book IX.*

If the ownership of the stolen property is changed in any way whatsoever, the action for theft will lie in favor of the actual owner; as, for instance, in favor of the heir and the praetorian possessor of the estate, as well as of an adoptive father, and a legatee.

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

A certain man lost a silver vase, and brought an action for theft, and when a dispute arose as to the weight of the vase, and the plaintiff declared that it was greater than it really was, the thief produced

the vase. He to whom it belonged took it away from the thief, and the latter, nevertheless, had judgment rendered against him for double damages, which was an exceedingly proper decision. For in the penal action not merely the property itself which was stolen is included, whether the action for manifest theft, or that for non-manifest theft is brought.

(1) Anyone who knows a thief is not one himself, whether he points him out or does not do so, as a great difference exists between concealing a thief and not pointing him out. He who knows him is not liable for theft, but he who conceals him is responsible for doing so.

(2) He who takes a slave with the consent of his master is neither a thief nor a kidnapper, as is perfectly evident. For who that acts in accordance with the will of the owner of the property can be called a thief?

(3) If the master has forbidden it, and he takes the slave away, but not with the intention of concealing him, he is not a thief; if he conceals him, he then begins to be a thief. Therefore, anyone who takes a slave away, but does not conceal him, is not a thief, even if he does this against the will of the master. We understand, however, that the master forbids this being done, even when he is not aware of the fact, that is to say, when he does not consent.

(4) If I give you a garment to be cleaned for a compensation, and you, without my knowledge or consent, lend it to Titius, and Titius steals it, an action for theft will also lie in your favor, because you are responsible for the safe-keeping of the property; and I will be entitled to an action against you, because you ought not to have lent it, and by doing so, you have committed a theft. This is an instance in which a thief can bring an action for theft.

(5) Where a female slave, who is pregnant, is stolen or conceives while in the hands of the thief, her child will be stolen property; whether it is born while she is under the control of the thief, or while she is in the hands of a *bona fide* possessor. In the latter case, however, the action for theft will not lie. But if she conceives while in the hands of a *bona fide* possessor, and has a child while there, the result will be that the child will not be stolen property, but that it can even be obtained by usucaption.

The same rule should be observed with reference to cattle and their offspring, as in the case of a child of a female slave.

(6) Colts born to stolen mares immediately belong to a *bona fide* purchaser, and this is reasonable, because they are included in the profits, but the child of the female slave is not included therein.

(7) A thief sold stolen property, and the owner of the same extorted the money paid for it from the thief. The opinion was properly given that he had committed a theft of the money, and he will even be liable to the action for property taken by violence; for no one has any doubt that what has been acquired in exchange for stolen property is not itself stolen. Therefore, money obtained as the price of stolen property is not stolen.

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

It sometimes happens that he who has an interest in having the property preserved is not entitled to the action for theft. For instance, a creditor cannot bring suit for the theft of property belonging to his debtor, although the latter, otherwise, may not be able to pay what he has borrowed. We speak, however, of property which has not been given in pledge. Likewise, a wife cannot bring an action for theft with reference to dotal property, which is at her risk; but her husband can do so.

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

In the action for theft it is not the damages which are quadrupled or doubled, but the true price of the property itself. If, however, the property has ceased to exist at the time judgment is rendered, this, nevertheless, should be done.

The same rule applies if the property at present has become deteriorated, for the valuation will be referred to the time when the theft was committed. If the property has become more valuable, double the amount of the value will be estimated at the time when it was worth the most; because it is more true to say that the theft was committed at that time.

(1) Celsus asserts that a theft is committed with aid and advice, not only when this is done in order that the parties might steal together, but even if this intention did not exist, and where the theft was committed through motives of hostility.

(2) Pedius very properly says that, as no one commits a theft without fraud, assistance and advice to commit it cannot be given without fraud.

(3) He is considered to give advice who persuades, induces, and gives information for the commission of the theft. He gives assistance who furnishes his services and aid for the secret removal of the property.

(4) Anyone who shows a red cloth to cattle and puts them to flight, in order that they may fall into the hands of thieves, and does so with fraudulent intent, will be liable to an action for theft. Even if he does not do this for the purpose of perpetrating a theft, so dangerous a jest should not go unpunished. Therefore, Labeo says that an action *in factum* should be granted against him.

52. *Gaius, On the Provincial Edict, Book XIII.*

For if the cattle should precipitate themselves from some elevation, an equitable action for wrongful damage will be granted as under the Aquilian Law.

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

When anyone gives aid or advice to a wife who steals the property of her husband, he will be liable for theft.

(1) Even if he commits theft with her, he will be liable to the action for theft, while she will not be liable.

(2) If she, herself, gives assistance to the thief, she will not be liable for theft, but for the fraudulent removal of property.

(3) There is no doubt whatever that she will be liable for a theft committed by her slave.

(4) The same must be said with reference to a son under paternal control who is serving in the army; for he will not be liable for a theft perpetrated on his father; but he will be responsible for the act of his castrensian slave, if the latter steals from his father.

(5) If my son, who has a *castrense peculium,* steals something from you, let us see whether I can bring an equitable action against him, as he has property with which to satisfy the judgment. It may be maintained that the suit may be brought.

(6) Will the father, however, be liable to his son if he has removed something from his *castrense peculium?* is a question which we should consider. I think that he will be liable, for he not only steals something from his son, but he can also be sued in an action for theft.

(7) Mela says that a creditor who does not return a pledge after his money has been paid to him is liable for theft, if he retains the pledge for the purpose of concealing it, which I believe to be true.

(8) Where there are sulphur mines in a field, and anyone removes the sulphur from them, the owner will be entitled to an action for theft and afterwards the tenant can, by proceeding under his lease, compel the former action to be assigned to him.

(9) If your slave, or your son, receives clothing for the purpose of cleaning it, and it is stolen; the question arises whether you will be entitled to an action for theft. If the *peculium* of the slave is stolen, you can bring an action for theft, but if it is not stolen, it must be said that an action of this kind will not lie.

(10) If, however, anyone purchases stolen property, not knowing that this is the case, and he is dishonestly deprived of it, he will be entitled to an action for theft.

(11) It is stated by Labeo, that if a man should direct a flour-merchant to furnish anyone with flour who asks for it in his name, and a passer-by having heard this should ask for the flour in his name, and receive it, an action for theft will lie in favor of the flour-merchant against the person who made the demand, and not in my favor, for the flour-merchant was transacting business for himself, and not for me.

(12) Where anyone receives my fugitive slave as his own from a duumvir, or from any other magistrate who has authority to release persons from prison, or from custody, will he be liable to an action for theft? It is established that if he gave sureties, an action should be granted to the owner against them, and they should assign their rights of action to me. If, however, he did not take sureties but surrendered the slave to the claimant, as to one who was receiving what belonged to him, the owner will be entitled to an action for theft against the kidnapper.

(13) If anyone strikes gold or silver coins, or any other property, out of the hand of another, he will be liable for theft, if he did so with the intention that a third party should take them, and he should carry them away.

(14) Where anyone steals a silver ingot belonging to me, and makes cups out of it, I can either bring suit for the theft of the ingot, or a personal one for the recovery of the property.

The same rule applies to grapes, and their unfermented juice, and seeds; for the action for the theft of grapes, their unfermented juice, and their seeds, can be brought, as well as a personal action.

(15) A slave who alleges that he is free in order that money may be lent to him does not commit theft, for he only asserts that he is a solvent debtor.

The same rule applies to one who pretends to be the head of a household in order that money may the more readily be loaned to him when, in fact, he is a son under paternal control.

(16) Julianus, in the Twenty-second Book of the Digest, says that if anyone should receive money from me to pay my creditor, and, as he himself owes the same sum to the same creditor, he pays it in his own name, he commits theft.

(17) If Titius sells property belonging to another, and receives the price of it from the purchaser, he is not considered to have stolen this money.

(18) When one of two general partners receives property in pledge, and it is stolen, Mela says that he alone who received the pledge will be entitled to an action for theft, and that his partner will have no right to it.

(19) No one can commit a theft by words, or by writing; for it is an accepted principle that a theft cannot be committed without handling the article in question. Wherefore, giving assistance or advice only becomes criminal when the property is afterwards handled.

(20) If anyone excites my ass to induce him to cover his own mares, for the purpose of breeding colts, he will not be liable for theft, unless he had also the intention of stealing. I gave this opinion to my friend Herennius Modestinus, who consulted me from Dalmatia, with reference to stallions to which mares had been brought for this purpose by a man who was afterwards held liable for theft; if he had the intention of stealing, but if he had not, an action *in factum* would lie.

(21) As I was willing to lend money to Titius, who was an honorable man and solvent, you substituted for him another Titius who was poor, representing to me that he was the wealthy Titius, and, having received the money, you divided it with him. You are liable for theft, as it was committed with your assistance and advice, and Titius will also be liable for theft.

(22) If, when you make a purchase, anyone should lend you heavier than legal weights, Mela says that he will be liable to the vendor for theft, and that you also will be, if you were aware of the

facts; for you did not receive the article by the consent of the vendor, as he was deceived in the weight.

(23) If anyone should persuade my slave to erase his name from an instrument, for instance, from a bill of sale, Mela says, and I think, that an action for theft can be brought.

(24) Where my slave has been persuaded to copy my registers, I think that an action for the corruption of a slave can be brought against the person who persuaded him; and if he himself copies them, an action for fraud should be granted.

(25) When a string of pearls has been stolen, the number of them must be stated. Where an action is brought for the theft of wine, the number of jars which were taken must be mentioned. If vases are appropriated, the number must be given.

(26) If my slave, who has the free administration of his *peculium,* should make an agreement (but not for the purpose of donation), with someone who has stolen his *peculium,* he is considered to have engaged in a legitimate transaction; for although an action for theft may be acquired for his master, still it forms part of the *peculium* of the slave. If the entire penalty of double the value of the theft is paid to the slave, there is no doubt that the thief will be released. The result of this is, that if the slave should have received from the thief what seems to him to be satisfaction for the property stolen, the transaction will also be considered legitimate.

(27) Where anyone swears that he has not committed a theft, and he afterwards handles the stolen property, the right of action for theft is extinguished, but that to pursue the property is still preserved for the owner.

(28) When a stolen slave has been appointed an heir, the plaintiff can also obtain the value of the estate in an action of theft, provided the slave died before he entered upon the estate by the order of his master. The same result can be obtained by bringing a personal action for the recovery of the dead slave.

(29) If a slave who is to be free under a condition is stolen, or any property conditionally bequeathed is appropriated and the condition afterwards should be fulfilled, before the estate has been entered upon, the action for theft cannot be brought, because the interest of the heir has ceased to exist. While the condition is pending, however, the value of the slave should be estimated as the price for which he could be sold.

54. *The Same, On the Edict, Book XXXVIII.*

When a man, by employing violence, steals anything from a house where no one was at the time, he can be sued in an action to recover fourfold the amount of the value of the stolen property, as well as in one for non-manifest theft, if he should not be arrested while carrying away the property.

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

He who breaks a door for the purpose of causing injury (although property may be taken away by others as the result of this), will not

be guilty of theft, for the wish and intention of the culprit make a distinction in the case of crime.

(1) If a slave of the lender of an article for use steals it, and he from whom it was taken is solvent, Sabinus says that an action on loan can be brought against him, as well as one against the master on account of the theft committed by the slave. Where, however, the master has the money which he collected, the right of action for theft will be extinguished.

The same rule applies where the action on loan is dismissed.

(2) If your slave steals property which has been lent to you for use, an action for theft will not lie against you, but only one on loan, because the property was at your risk.

(3) Anyone who volunteers to transact the business of others is not entitled to the action for theft, although the property may have been lost by his fault; but judgment can be rendered against him in a suit based on voluntary agency, if the owner transfers to him his right of action.

The same rule applies to one who administers affairs in the place of a guardian, as well as to a guardian who is bound to observe diligence; as, for example, where several testamentary guardians have been appointed, and one of them alone, after having given security, undertakes the administration of the trust.

(4) If you hold my property through the donation of another, and I steal it, Julianus says that you can only bring the action for theft against me, if it was to your interest to retain possession; for instance, if you have defended a slave who was given in a noxal action, or if you have taken care of him when he was ill, you will have a just cause to retain him against the person demanding him.

56. *Gaius, On the Provincial Edict, Book XIII.*

If a creditor makes use of a pledge he is liable for theft.

(1) The opinion has been given that a person who has received something for his own use, and lends it to another, is guilty of theft. Hence, it is sufficiently apparent that a theft is committed, even if anyone uses the property of another for his own advantage, and it makes no difference for it to be said that he does not act with this end in view. For it is one kind of pecuniary profit to give away someone else's property; and another to acquire for ourselves an obligation on account of the resulting benefit. Hence he is guilty of theft who secretly removes an article for the purpose of giving it to another.

(2) The Law of the Twelve Tables does not permit a thief, who is caught stealing by day, to be killed, unless he defends himself with a weapon. By the term "weapon" is meant a sword, a club, a stone, and finally everything which can be used for the purpose of inflicting injury.

(3) As the action for theft has reference to the pursuit of the penalty, while the personal action and that for the recovery of the property are employed for the latter purpose, it is evident that if the property is recovered, the right of action for theft will remain unimpaired, but that those of the other two actions will be extinguished; as, on the other hand, after the penalty of double

or quadruple damages have been paid, the right to bring suit for the recovery of the property, and that of the personal action, will remain unimpaired.

(4) Anyone who knowingly lends tools to break open a door or a closet, or knowingly lends a ladder for the purpose of climbing, even though, in the beginning, he gave no advice for the commission of a theft, will still be liable to an action for theft.

(5) If a guardian who administers the affairs of his trust, or a curator, makes a compromise with a thief, the right of action for theft is extinguished.

57. *Ulpianus, Disputations, Book III.*

When a creditor carries away property which has been pledged to him, he is not considered to handle it for the purpose of stealing it, but to take charge of his own pledge.

58. *Julianus, Digest, Book XXII.*

Under certain circumstances, a thief, even while the obligation of his penalty remains, again becomes liable, and can be sued several times for the theft of the same property. The first instance which occurs is when the right to possession is changed; for example, where the property again comes .into the hands of the owner, and the same person steals it either from the same owner, or from him to whom he lent, or sold it. If, however, the owner is changed, he will be liable to a second penalty.

(1) Anyone who brings a thief before the Prefect of the Night Watch or the Governor of a Province is understood to have chosen a way by which to recover his property. If the matter is terminated there, and, by the conviction of the thief, the stolen money is recovered, the question of theft appears to be reduced to simple damages; especially if the thief was directed not only to return the stolen property, but the judge ordered something else to be done, in addition. Where, however, he was ordered to do nothing more than return the stolen property, and the judge did not render a decision for anything else against him, for the reason that the thief incurred the danger of a greater penalty, it should be understood that the question of theft has been disposed of.

(2) If property forming part of a *peculium,* after having been stolen, again comes into the possession of the slave, the defect at-

taching to the theft is removed, and the property in this case begins to belong to the *peculium,* and to be possessed by the slave.

(3) When, however, a slave secretly removes property belonging to his *peculium,* with the intention of stealing it, so long as he retains it his condition is not changed, for his master is not deprived of anything. If, however, he delivers it to another, he commits a theft.

(4) A person who administers a guardianship has a right to compromise with a thief, and if he remains in control of the stolen property, it ceases to be such, because the guardian occupies the place of the owner.

The same thing must be said with reference to the curator of an insane person; as he occupies the place of the owner to such an extent that, even by delivering property belonging to the insane person, he is considered to alienate it. The guardian and the curator of an insane person, however, can, in their own names, bring suit for the recovery of the stolen property.

(5) If two of your slaves steal clothing and silver plate, and, on account of one of the slaves, an action is brought against you to recover the stolen clothing, and then, on account of the other, suit is brought against you for the recovery of the silver plate, an exception should not be granted against you, because an action has already been brought to recover the stolen clothing.

59. *Alfenus, Epitomes of the Digest of Paulus, Book IV.*

If anyone makes an excavation for the purpose of taking out chalk, and removes it, he is a thief, not because he dug out the chalk, but because he took it away.

60. *Julianus, On Urseius Ferox, Book IV.*

If property should be stolen from a son under paternal control, he can properly bring an action for this cause after he becomes the head of a household. Where property which has been leased to him has been stolen, he can also bring an action on this account, after he becomes independent.

61. *The Same, On Minicius, Book III.*

When anyone who has lent an article for use steals it, an action for theft cannot be brought against him, because he only took what was his, and the other party to the transaction will be released from any liability growing out of the loan. This, however, should only pe considered to refer to cases where he to whom the article was lent had no reason for retaining it. For if he had incurred any necessary expense on account of the article lent, it is rather to his interest to retain it than to bring an action based on the loan, and therefore he will be entitled to an action for theft.

62. *Africanus, Questions, Book VII.*

A female fugitive slave is understood, to a certain extent, to steal herself, and also by taking her child with her she commits a theft.

63. *The Same, Questions, Book Vill.*

When a slave owned in common steals something from one of his masters, it is established that an action in partition should be brought; and it is in the discretion of the judge to order that the other master make good the damage, or assign his share of the slave. The result of this appears to be that, even if he has alienated his share, an action can also be brought against the purchaser, as, in some respects, a noxal action follows the person. This rule, however, should not be pushed to the extent of holding that even if the slave should become free he can bring suit against him; just as an action could not be brought if he belonged entirely to the other master. Therefore, it is evident from this, that if the slave should die, there is nothing which the plaintiff can recover on this ground, unless the other joint-owner has obtained some benefit from the stolen property.

(1) He says that another result of this is, that if a slave, whom you have given to me in pledge, steals something from me, by bringing the contrary action of pledge I can compel you to make good the damage, or to surrender the slave to me by way of reparation.

(2) The same must be said with respect to a slave who it was agreed might be returned under certain circumstances, so that even the purchaser will be required to restore all accessions and profits; and, on the other hand, the vendor will be obliged to either make good the damage, or to surrender the slave by way of reparation for the injury sustained, unless an action for a larger amount can be brought.

(3) Where a man knowingly gives a thief in pledge to one who is ignorant of the fact, he can be compelled to make good all damages; for this is in conformity with good faith.

(4) In the action on purchase, however, what kind of a slave the vendor represented him to be must, by all means, be taken into consideration.

(5) But, with reference to what concerns the action on mandate, he says that he doubts whether it should also be held that all damages should be made good. And, indeed, this principle should be observed even more than in the preceding cases; so that if he who gave the order for the purchase of a certain slave did not know that he was a thief, he will,

nevertheless, be compelled to make good all damages sustained; for it will be perfectly just for the agent to allege that he would not have suffered the damage if he had not received the order.

This is still more evident in the case of a deposit, for although otherwise it would appear equitable that no more damage should be sustained by anyone than the slave himself is worth, it is much more equitable that the duty performed by one person to another for his benefit, and not for that of him who undertook it, should not injure the latter. And, as in the previously mentioned contracts of sale, lease and pledge, it was stated that the person who knowingly kept silent should be punished, so in these contracts, the negligence of those for whose benefit they are entered into, should only be injurious to themselves. For it is certainly the fault of the mandator who directed the other party to purchase such-and-such a slave for himself, and it is also the fault of him who deposited the property that they were not more diligent in giving warning as to the character of the slave who was deposited.

(6) With reference to a loan for use there is, however, reason for holding a different opinion, since only the convenience of him who requested the use of the property is concerned. Therefore, he who has made a loan for use, as in a lease, cannot lose anything beyond the value of the slave, if he is not guilty of fraud. Moreover, in this instance we ought to be a little more indulgent in the interpretation of fraud, because (as has already been stated) the person who lends the property does not profit by doing so.

(7) I think that this is true if no blame attaches to him who undertook to execute the mandate, or to take charge of the deposit, where the owner himself gave him any silver plate or a sum of money for safe-keeping; but on the other hand, where the owner did not do anything of this kind, a different opinion should be adopted.

(8) I leased you a tract of land, and (as is customary) it was agreed that I should be entitled to the crops by way of pledge for the rent. He says that if you should secretly remove them, an action for theft can be brought against you. But if you should sell the crops to someone else before they have been gathered, and the purchaser removes them, the result will be that we must hold that they have been stolen; for as long as they are attached to the soil they constitute a part of the land, and therefore belong to the tenant, for the reason that he is considered to gather them with the consent of the owner; which certainly cannot properly be said in the present instance. For how can they become the property of the tenant, when the purchaser gathers them in his own name?

(9) A slave who was ordered to be free under the condition of paying ten *aurei* was defended by the heir in a noxal action. While the case was still pending, the slave, having paid the ten *aurei* to the heir, obtained his freedom. The question arose whether he should be discharged unless he gave to the plaintiff the ten *aurei* which the heir had received. It was held that the source from which the money had been obtained should be taken into consideration. If it came from somewhere else than the *peculium,* the heir should pay it; because, if the slave had not yet gained his freedom, and had been surrendered by way of reparation, he would have paid the money to the person to whom he was delivered. If, however, the money was derived from his *peculium,* for the reason that he paid to the heir what the latter ought not to have permitted him to give him, a contrary decision should be rendered.

64. *Marcianus, Rules, Book IV.*

He who shows the way to a fugitive slave does not commit *a* theft.

65. *Mocer, Public Prosecutions, Book II.*

The Governor of a province cannot prevent anyone who has been convicted of theft from being branded with infamy.

66. *Nerotius, Parchments, Book I.*

Titius, an heir, having been charged with the legacy of a slave to Seius, the said slave committed a theft against Titius, before the estate was entered upon. If, after it had been entered upon, Seius should wish to have the legacy, Titius could bring an action for theft against him, on account of the act of the slave, because when the latter committed the crime, he did not belong to Titius; and even though anyone should hold that if the slave had begun to belong to him against whom he committed the theft, the right of action for theft would be extinguished, so that even if he was alienated, suit could not be brought on this ground. The slave did not become the property of Titius until after the estate had been entered upon, because legacies pass directly from the person who leaves them to him to whom they are bequeathed.

67. *Ulpianus, On the Edict of the Curule JEdiles, Book I.*

He who has appropriated property belonging to another with the intention of profiting by it, even though, having changed his mind, he may afterwards restore it to the owner, is a thief; for no one by repentance ceases to be responsible for such a crime.

68. *Paulus., On Plautius, Book VII.*

Where anyone who has given an article in pledge sells it, although he is the owner, he commits a theft, whether he delivered it to the creditor or merely bound himself by a special agreement.

Julianus holds the same opinion.

(1) If anyone from whom property has been stolen should bequeath it to me, while it is in the hands of the thief, and the latter should afterwards appropriate it, will I be entitled to an action for theft? According to the opinion of Octavenus, such an action will only lie in my favor when the heir is not entitled to one in his name; because it is established that, no matter in what way the ownership of property may be changed, the owner will be entitled to bring the action for theft.

(2) The ancient authorities gave it as their opinion that where anyone brings a muleteer into court for fraud, and his mules die in the meantime, he will be liable to theft.

(3) Julianus says that where a slave is appointed for the collection of money, and collects it after he has been manumitted, he will be liable for theft.

The same rule applies to the case of a guardian to whom money is paid after puberty.

(4) If you have recommended Titius to me as being solvent, and as being one to whom I can lend money, and I make inquiries about him, and you afterwards introduce to me someone else as Titius, you will be guilty of theft; because I believe that he is Titius, and by all means if he who was brought to me knew of the fraud. If you were not aware of it, you will not be guilty of theft, and he who introduced him does not appear to have given his assistance, as no theft was committed; but an action *in factum* will be granted against the person who brought him.

(5) If I stipulate with you not to do anything to prevent the slave Eros from being given to me before such-and-such *kalends,* although it is to my interest that he should not be stolen, still, if he is stolen, you will not be liable under the stipulation; provided nothing was done by you to prevent him from being given to me, and I will not be entitled to an action for theft.

69. *Celsus, Digest, Book XII.*

No one commits a theft by denying that a deposit has been made with him. For the denial itself does not constitute an offence, although it comes very near doing so. But if the person should acquire possession of the property for the purpose of appropriating it, he perpetrates a

theft. It does not make any difference whether the bailor had a ring on his finger, or the box which contained it, if, when it was deposited with the bailee, the latter intended to appropriate it.

(1) If an article which you have promised to return on a certain day under a penalty is stolen from you, and, for this reason, you are required to bear the loss, this will also be taken into account in bringing the action for theft.

(2) A stolen child grew up in the hands of the thief. The latter is guilty of stealing the youth as well as the child, and still, there is but one theft; hence he is liable for double damages; an estimate being made of the greatest value that the child had at any time after having been stolen. As the action for theft can only be brought once, what reference does this have to the question above proposed? For, if he had been stolen from the thief, and then recovered by him from the other criminal, even if he had committed two thefts, the action could not be brought against the thief more than once.

I do not doubt that the estimate of the value of the youth rather than that of the infant should be made; for what would be so ridiculous as to consider the condition of the thief to be improved on account of the continuation of his crime?

(3) If the sale of a slave is annulled, the purchaser cannot bring the action of theft against the vendor, because the slave, after his purchase and before he was returned, stole something.

(4) When a stolen slave commits a theft against the thief himself, it is decided that the thief will be entitled to an action against the owner on this account, for fear that the crimes of such slaves may be committed with impunity to themselves, and be a source of profit to their masters, as the *peculium* of slaves of this kind is frequently increased by their thefts.

(5) If a tenant, after the expiration of his lease, remains for more than a year, and gathers the crops without the consent of the owner, let us see whether an action for the theft of the harvest and vintage cannot be brought against him. I do not think that there is any doubt that he is a thief, and if he consumes the stolen property suit can be brought to recover its value.

70. *Marcellus, Digest, Book Vill.*

Julianus denies that theft of property belonging to an estate can be committed, unless the deceased gave it in pledge, or lent it;

71. *Scsevola, Questions, Book IV.*

Or where the usufruct belongs to another.

72. *Marcellus, Digest, Book Vill.*

For he held that, in these instances, theft of property belonging to an estate could be committed, and usucaption be interrupted; and therefore that an action for theft would lie in favor of the heir.

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

When a person to whom an article has been lent for use steals it, an action for theft as well as one on loan can be brought against him, and if the one for theft should be brought, the right of action on loan will be extinguished; and if the one on loan is brought, an exception can be pleaded in bar of the action for theft.

(1) Where property is held by anyone in the capacity of heir, the possessor will not be entitled to the action for theft, although he can obtain the property by usucaption; because he who is interested in not having it stolen can bring the action for theft. This, however, seems to be the interest of the person who would suffer the injury, and not of him who would be pecuniarily benefited.

74. *Modestinus, Opinions, Book VII.*

Sempronia drew up a petition intending to give it to a centurion, in order that it might be filed in court; but she did not give it to him. Lucius read it in court as having been given to him officially. As it was not properly filed, or delivered to the centurion, of what offence is he guilty who presumed to read in court a petition stolen from the house of the person who drew it up, and who did not deliver it for that purpose? Modestinus answered that if he who took it did so secretly, he committed a theft.

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

If anyone who receives property in pledge should sell it, when no agreement had been made with reference to its sale while pledged, or if he should dispose of it before the day of sale arrives, and the debt is not paid, he renders himself liable for theft.

76. *The Same, Epistles, Book IV.*

I possess, in good faith, a female slave who had been stolen, and whom I purchased for two *aurei.* Attius stole her from me, and her owner and myself brought suit against him for theft. I ask, what assessment of damages should be made for both parties? The answer was double the amount of his interest for the purchaser, and for the master double the value of the woman.

The fact that the penalty for theft is paid to two persons should not cause any difficulty, because although this is done on account of the same property, it is paid to the purchaser by virtue of his possession, and to the owner on the ground of his ownership.

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

If anyone who represented himself to be an agent should induce me to promise to pay either him or the person to whom he delegated me, I cannot bring an action for theft against him, as there is no object which can be handled with the intention of stealing it.

78. *The Same, On Quintus Mucius, Book XXXVIII.*

He who uses property which has been lent to, or deposited with him, in a different way from that in which he was understood to receive it, not intending to do this against the consent of the owner, is not liable for theft; nor will he, under any circumstances whatsoever, be liable to an action on deposit. Will he be liable to an action on loan? The answer depends upon how far he was to blame; that is to say, whether he had reason to believe that the owner would not have permitted him to make use of the article as he did.

(1) If anyone commits a theft against another, and a third party steals from him what he himself appropriated, the owner of the property can bring suit against the last thief; but the first thief cannot do so, because the interest of the owner, and not that of the first thief is involved, as the stolen property is safe. This was stated by Quintus Mucius, and is true; for although it is to the interest of the thief that the property should be safe, because he is liable to a personal action, still the party in interest can bring an action against him, if his interest is based on a good title.

We do not adopt the opinion of Servius who held, if no owner of the stolen property had appeared, or should afterwards appear, that the thief would be entitled to the action of theft, for it could not then any the more be understood to belong to him who proposed to profit by it pecuniarily. Therefore, the owner will be entitled to an action for theft against both of them, and if he begins suit against one, his right to bring such an action against the other will continue to exist.

The same rule applies to a personal action, for both of them are liable for different acts.

79. *The Same, On Various Passages, Book XIII.*

Where anyone steals a bag containing money, he is also liable for stealing the bag, although

he may not have had the intention of doing so.

80. *Papinianus, Questions, Book Vill.*

When anyone gives an article to be examined, and he who receives it assumes the risk, he himself can bring the action for theft.

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

Where a debtor steals a pledge, he can, under no circumstances, recover what he has paid in an action for theft.

82. *The Same, Questions, Book XII.*

If I sell, but do not deliver a slave, and he is stolen without any fault of mine, the better opinion is that I will be entitled to an action for theft; and I am considered to be interested, either because the property was in my hands or because I will be obliged to assign my rights of action.

(1) When, however, the action of theft is postponed on account of the ownership, although it does not lie unless we have an interest, still, my benefit should be referred to the valuation of the article itself, even if I have no other interest. This is proved in the case of slaves who are to become free under a certain condition, and where a legacy is bequeathed conditionally. Otherwise, where an attempt is made to prove something else, the amount cannot be easily determined. Therefore, because the valuation solely depends upon the benefit, as the action for theft arises without taking the ownership into consideration, in instances of this kind the action for theft cannot be referred to the valuation of the article.

(2) If I have brought an action for the production of property, intending to make a choice of a slave who was bequeathed to me, and one of the slaves belonging to the estate has been stolen, the heir will be entitled to an action for theft, as he has an interest in the matter, and it makes no difference whether the slave should have been guarded.

(3) No matter how a robber perpetrates a theft, he should be considered a manifest thief.

(4) He, however, through whose fraudulent act a robbery is committed, is not liable for theft, but for robbery with violence.

(5) If Titius, in whose name a false agent has collected money which was not due, ratifies the payment, Titius, indeed, can himself bring an action for business transacted; but he who paid the money which was not due will be entitled to a personal action on that ground against Titius, and the action for theft will also lie against the false agent. But if Titius should be sued, he can not improperly avail himself of an exception on the ground of fraud, to compel the right of personal action for theft to be assigned to him. If, however, the money was due, and Titius ratifies the payment, the right of action for theft will be extinguished, because the debtor is released.

(6) A false agent can also commit a theft of money, if he deceives the debtor of another, by assuming the name of a genuine agent of the creditor. This also applies to the case of one who asserts that money is due to him as the heir of the creditor, Sempronius, when he is not the heir.

(7) A person who was accustomed to transact the business of Titius paid a false agent of his creditor in his name, and Titius ratified the payment. The right of action for theft will not arise in favor of Titius, because as soon as the money has been paid, the action can be brought by the person who paid it, as neither the ownership nor the possession of the money belong to Titius. Titius, however, will be entitled to a personal action for the recovery of money which was not due, and he who paid the money can bring the action for theft. If Titius is sued on voluntary agency, the money should be awarded to him by the decision of the court.

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

Anyone who steals money belonging to a municipality or a city is liable to an action for theft, and not for the crime of peculation.

84. *Paulus, Opinions, Book II.*

A fuller or a tailor who receives clothing for the purpose of cleaning and repairing it and makes use of it is, by doing so, considered to have committed a theft, because the clothing was not received by him for that purpose.

(1) Where crops are stolen from land, the tenant, as well as the owner, can bring the action for theft, because it was to the interest of both of them to recover the property.

(2) Anyone who steals a female slave, who is not a prostitute, for licentious purposes, will be liable to an action for theft; and if he conceals her, can be punished under the Favian Law.

(3) Anyone who steals accounts or notes is liable to an action for theft, for the amount contained in them. It does not make any diiference whether they have been cancelled or not, because, by means of them it can be proved that the debt was paid.

85. *Neratius, Opinions, Book I.*

Where anyone, thinking that a person is dead, who in fact is still living, takes possession of his property as his heir, he does not commit a theft.

(1) If, after having begun an action for theft against a man in his own name, you bring another against him for some article stolen by his slave, he cannot plead an exception on the ground that both thefts were committed at the same time.

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

Although stolen property cannot be acquired by usucaption unless it is returned to the owner; still, if its appraised value in court is paid to the latter, or he sells the property to the thief, it must be said that the right of usucaption is not interrupted.

87. *The Same, Manuals, Book II.*

He who has an interest in not having the property stolen is entitled to the action for theft, if he also has possession of it with the consent of the owner; that is to say, where, for instance, the property is. leased to him. He, however, who voluntarily administers affairs as a guardian, just like a regular guardian or curator, cannot bring an

action for theft on account of property which has been stolen through his fault.

Likewise, anyone to whom a slave is due either under the terms of a stipulation or by a will, although he has an interest, cannot bring the action for theft; nor can he do so who has become surety for a tenant.

88. *Tryphoninus, Disputations, Book IX.*

If property which has been stolen, or obtained by violence, comes into the hands of the owner, and he is ignorant of the fact, it will not be considered to have been restored to his control. Therefore, if after possession of this kind the property should be sold to a *bona fide* purchaser, usucaption cannot take place.

89. *Paulus, Decrees, Book I.*

An action for theft will lie in favor of a creditor for the value of a pledge, but not for the amount of the debt. But when the debtor himself steals the pledge, the contrary is true; so that the action for theft can be brought for the amount of money due, and for the interest on the same.

90. *The Same, On Concurrent Actions.*

Where anyone brings an action for robbery with violence, he cannot also bring one for theft. If, however, he should prefer to bring an action of theft for double damages, he can also bring one for robbery with violence; provided that fourfold the value of the property is not exceeded.

91. *The Same, On the Penalties of Civilians.*

If a freedman or a client commits a theft against his patron, or a day laborer steals from one who employs him, there will not be ground for an action of theft.

92. *Javolenus, On the Last Works of Labeo, Book IX.*

A fuller was released from liability to the owner in an action on hiring. Labeo denies that an action for theft will lie. Again, if he should bring an action for theft before the action for hiring was brought against him, and before judgment had been rendered with reference to the thief he should be released by the action on hiring, and the thief ought also to be discharged so far as he is concerned. If nothing of this kind previously occurred, judgment should be rendered against the thief in favor of the fuller, and this is the case because he has a right to the action for theft only to the extent of his interest.

(1) No one can give aid and advice to another who himself has no intention of committing a theft.

93. *Labeo, Epitomes of Probabilities by Paulus, Book II.*

If anyone, knowing that property is being stolen from him, does not prevent this from being done, he cannot bring an action for theft.

Paulus: The contrary is certainly true. For if anyone knows that property has been stolen from him, and keeps quiet because he cannot prevent it, he can bring an action for theft. If, however, he could have prevented it, but did not do so, he can still bring an action for theft. In this way patrons are accustomed to commit thefts against their freedmen, and also anyone who is entitled to such respect or reverence that it prevents him from being resisted by another in his presence, is accustomed to commit a theft.

94. *Ulpianus, On the Edict, Book XXXVIII.*

It must be remembered that thefts are generally prosecuted criminally, and that he who institutes a prosecution signs the accusation, not that the judgment may become public, but because it appears that the boldness of the culprit should be restrained by extraordinary punishment. Anyone, however, who wishes, can bring a civil action, if he desires to do so.

TITLE III. CONCERNING THE THEFT OF TIMBERS JOINED TO A BUILDING.

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

The Law of the Twelve Tables does not permit a beam which has been stolen to be detached from a house, or a stake to be removed from a vine, or an action be brought for its recovery; which provision has been prudently established by the law to prevent buildings from being demolished, or the culture of vines being interfered with, under this pretext. But where anyone is convicted of having united these things, the law grants an action for double damages against him.

(1) In the term "beam" are included all the materials of which a house is composed, and everything necessary for vines. Wherefore, certain authorities hold that tiles, stone, brick, and other materials which are useful in building (for the word beam is derived from the verb to cover), as well as lime and sand, are embraced in this appellation. Also, in the case of vines, everything required for their cultivation is included under this term, as, for instance, stakes and props.

(2) An action for the production of property is, however, granted, for he cannot be indulged who, knowing property to belong to another, includes it in, or joins it to, or connects it with his own building, for we do not sue as the possessor, but as one who has committed fraud to avoid being in possession.

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

If, however, you suppose that suit has been brought for stolen timbers joined to a house, the question may arise whether an action for the recovery of the property will lie independently. I do not doubt that it will.

## TITLE IV.

## WHERE ANYONE WHO IS ORDERED TO BE FREE BY THE TERMS OF A WILL, AFTER THE DEATH OF HIS MASTER AND BEFORE THE ESTATE IS ENTERED UPON, IS SAID TO HAVE STOLEN OR SPOILED SOMETHING.

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

If, through the fraud of a slave who was ordered to be free after the death of his master, and before the estate was entered upon, an act is said to have been committed with reference to the property of the person who directed him to be free, in order to prevent some of said property from coming into the hands of the heir, a suit for double damages will be granted against him within the available year.

(1) This action, however (as Labeo says), is founded rather on natural, than on civil equity. For, as a civil action is not applicable, it is but just, according to Natural Law, that the offender, emboldened by the hope of impunity, should not go unpunished; since, having the expectation of speedily obtaining his freedom, he believes that he cannot be chastised as a slave, nor be condemned as a freeman because he steals from the estate, that is to say from his owner; the master or the mistress cannot bring an action for theft against the slave, even though he should afterwards become free, or be alienated, unless he has also subsequently handled the property with the intention of stealing it. Therefore the Prastor thought that the cunning and impudence of those who despoil estates should be punished by an action for double damages.

(2) A freedman of this kind will not be liable unless he is alleged to have fraudulently wasted something. The fault and negligence of a slave after his freedom has been obtained is excused; but gross negligence very closely resembles fraud. Hence, if he committed some damage without fraud, this action will not lie; although otherwise, he would be liable under the Aquilian Law for having caused damage of any description whatsoever.

Therefore this action has certain restrictions, so that the slave must be guilty of fraud not only after the death of his master, but before the estate has been entered upon. But if he does not commit fraud, or does so during the lifetime of his master, he will not be liable to this action. Nay more, the action will not lie even after the death of his master and the acceptance of the estate, for when the estate has once been entered upon, he can be sued as a freeman.

(3) What, however, should be done, if he received his freedom under a condition? In this instance, he will not yet be free, but can be punished as a slave; and therefore it must be said that this action will not lie.

(4) Where, however, his freedom is already obtained, it must be said that this action can and should immediately be granted against him who has become free.

(5) When a slave who is absolutely bequeathed commits some illegal act against the estate before it has been entered upon, it must be said that there will be ground for this action, for the reason that the ownership of the slave is changed.

(6) And, generally speaking, we say that, in a case where the ownership of the slave is either

changed or lost, or he acquires his freedom within a short time after the estate has been entered upon, in this instance, this action should be granted.

(7) Where freedom is bestowed upon a slave under the terms of a trust, and he has committed some offence against the estate, can not the heir be prevented from manumitting him before he gives satisfaction? And, indeed, it has been frequently stated in Rescripts by the Divine Marcus, and by our Emperor together with his Father, that, under these circumstances, freedom granted unconditionally by a trust will not be prevented.

The Divine Marcus, however, stated in a Rescript that an arbiter must be immediately appointed before whom the account should be rendered. This Rescript has reference to the account to be rendered for acts which the slave performed in the course of his administration. I think, then, that in this instance the action will lie.

(8) Before the estate is entered upon, we should understand to mean before it is accepted by one person alone, for as soon as one person does so, freedom is acquired.

(9) Where a ward is appointed an heir, and freedom is granted as soon as he has a substitute, and, in the meantime, some damage is committed, if this takes place during the lifetime of the minor, there will be no ground for this action. If, however, it should be committed after his death, and before anyone succeeds him, there will be ground for it.

(10) This action will not only lie with reference to property belonging to the estate of the testator, but also where it is to the interest of the heir that fraud should not be committed to prevent the property from coming into his hands. Therefore Scsevola treats the question more fully, for if the slave has stolen property which the deceased received by way of pledge, this praetorian action can be brought; because we understand the case of the property in a broader sense as meaning utility. For if the Praator, on account of the condition of servitude existing, substituted this action instead of the one for theft, it is probable that he should have substituted it in every case in which an action for theft could be brought. And, in a word, this action is understood to lie with reference to property pledged, as well as to such as is held by *bona fide* possessors.

The same rule applies to articles lent to the testator.

(11) Likewise, if this slave, who has the prospect of his freedom, should steal crops which have been gathered after the death of the testator, there will be ground for this action. When the children of slaves, or the increase of cattle born after the death of the testator are involved, the same opinion must be given.

(12) Moreover, if a child under the age of puberty, after the death of his father, obtains the ownership of property, and the estate of the minor is stolen before it has been entered upon, it must be said that there will be ground for this action.

(13) This action can also be brought with reference to any property which it was to the interest of the heir not to have appropriated.

(14) This action not only applies to thefts, but also to all cases involving damage which the slave has committed against the estate.

(15) Sca3vola says that theft of possession can take place, for if there is no possessor, theft cannot be committed; therefore theft cannot be committed against an estate, because the latter has no possession, which is, indeed, a matter of fact and intention. The heir does not have possession before he actually obtains control of the property, because the estate only transmits to him that of which it is constituted, and possession forms no part of it.

(16) It is true that if the heir can, in any other way, obtain that to which he is entitled, the Praetorian Action should not be granted, since the decision is based upon what the person has an interest in acquiring.

(17) Besides this action, it is established that a suit for recovery will also lie, as this proceeding resembles one for theft.

(18) It must be said that this action will also lie in favor of the heir and other successors.

(19) Where several slaves have received their freedom, and have maliciously caused some injury, each of them can be sued for the entire amount, that is to say, for double damages; and as they are prosecuted on account of the crime as in the case of theft, none of them will be released, even though one should make payment after he has been sued.

2. *Gaiiis, On the Provincial Edict, Book XIII.*

If, a short time before the freedom granted takes place, the slave should secretly remove some article, or spoil it, the ignorance of the owner does not authorize this action; and therefore, although the heir may have no information whatever that the slave is to be free under a condition, or any other master may not be aware that property has been appropriated or spoiled by his slave, he cannot avail himself of any action after the slave has once obtained his freedom, although in many other cases just ignorance may be alleged as an excuse.

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

Labeo thought that where a slave, who was manumitted under a condition, secretly removed some article, and the condition was soon fulfilled, he would be liable to this action.

## TITLE V.

## CONCERNING THEFT COMMITTED AGAINST CAPTAINS OF VESSELS, INNKEEPERS, AND LANDLORDS.

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

An action is granted against those who have control of ships, inns, and other places of public entertainment, where anything is alleged to have been stolen by any one of them, or by persons in their employ; whether the theft was committed with the aid and advice of the proprietor himself, or the owner of the ship, or of those who were on board for the purpose of navigation.

(1) We understand the words "for the purpose of navigation," to refer to those who are employed to navigate a ship, that is to say, the sailors.

(2) This action is also for double damages.

(3) For when property is lost in an inn or on a ship, the owner or lessee of the vessel, or the landlord, is liable under the Edict of the Praetor; so that it is in the power of the person from whom the property was stolen to proceed against the proprietor under the praBtorian law, or against the thief under the Civil Law, whichever he may prefer.

(4) If the innkeeper or the owner of the ship received the property "to be safely cared for," the owner of the same cannot bring the action for theft, but he who assumed responsibility for its safe-keeping will be entitled to bring it.

(5) The owner of the ship, however, can release himself from liability incurred by the act of his slave, by surrendering the latter by way of reparation for the damage committed. Why then should not the owner be condemned, who permitted so bad a slave to remain on his ship? And why is he held liable for the entire amount for the act of a freeman, and not for that of the slave? unless when he employed a freeman, it was his duty to ascertain what his character was; but he should be excused so far as his slave is concerned, just as in the case of a bad domestic, if he is ready to surrender him by way of reparation for the damage he committed. If, however, he employed a slave belonging to another, he will be liable, as in the case of a freeman.

(6) An innkeeper is responsible for the acts of those who are in his house for the purpose of transacting his business, as well as for all permanent lodgers; he is, however, not responsible for the acts of travellers, since an innkeeper cannot select the travellers, nor can he exclude them while they are pursuing their journey. He, however, to a certain extent, selects his permanent lodgers, if he does not reject them, and he must be liable for their acts. In like manner, the captain of a ship is not liable for the acts of his passengers.

## TITLE VI.

## CONCERNING THEFTS ALLEGED TO HAVE BEEN MADE BY AN ENTIRE BODY OF SLAVES.

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

The Praetor introduced this most useful Edict in order to enable a master to provide against the offences of his slaves; for instance, where several of them had committed theft, they could not destroy the patrimony of their master if he was compelled to surrender all of them by way of reparation for the injury committed, or to pay the appraised value of each of them in court. Therefore, if he desires to admit that his slaves are liable for damage committed by them, he has the choice, under this Edict, to surrender all who participated in the theft; or if he prefers to tender their estimated value, he can tender as much as a freeman would be compelled to do, if he had committed a theft, and retain his slaves.

(1) This power is granted to a master, whenever the theft was committed without his knowledge. If, however, he was aware of it, this privilege will not be conceded to him, for he can be sued in a noxal action both in his own name and in the name of each of his slaves, and he cannot free himself from liability by paying the estimated value once, which a freeman can do. The word "aware" is understood to mean where he knew of the crime and could have prevented it, for we should consider knowledge as also including the will. If, however, he was aware of the theft and prevented it, it must be said that he is entitled to the benefit of the Edict.

(2) Where several slaves have caused damage through their negligence, it is but just that the same privilege should be granted their master.

(3) When several slaves steal the same article, and an action is brought against the master on account of one of them, proceedings against the others should remain in abeyance until the plaintiff, by the first judgment, recovers as much as he would have done if a freedman had committed the theft:

2. *Julianus, Digest, Book XXIII.*

That is to say, double damages by way of penalty, and simple damages in the personal action.

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

Whenever the master pays as much as he would if a single freeman had committed the theft, the right of action with reference to the others is extinguished, not only against the master himself but also against the purchaser, if any one of the slaves, who together had committed the theft, should be sold.

The same rule will apply if the slave should be manumitted. If the money had first been collected from the manumitted slave, then the action will be granted against the master of all the slaves; for it cannot be said that what was paid by the manumitted slave was, as it were, paid by all of them. I think it is clear that if the purchaser should pay, an action against the vendor ought to be denied; for payment was, to a certain extent, made by the vendor, against whom sometimes recourse can be had in such a case, and especially if he declared that the slave who was sold was not liable to be surrendered by way of reparation for damage, and was not guilty of theft.

(1) If an action should be brought against a legatee on account of a slave who has been bequeathed, or against a person to whom he has been donated, can proceedings also be instituted against the owner on account of the other slave? is a question which may be asked. I think that this ought to be admitted.

(2) The relief of this Edict is not only granted to him who, possessing slaves and having had judgment rendered against him, only pays as much as if a single freeman had committed the damage, but it also benefits him who was condemned because he committed fraud to avoid having possession.

4. *Julianus, Digest, Book XXII.*

The action to which a testator is entitled will lie in favor of the heirs of him against whom several slaves of the same household have committed a theft; that is to say, all of them will not recover any more than they would have done if a freeman had perpetrated the theft.

5. *Marcellus, Digest, Book Vill.*

A number of slaves owned in common committed a theft with the knowledge of one of their masters. An action for theft can be brought on account of all of them against the owner who was aware of the crime, but against the other owner only to the extent authorized by the Edict. If the former owner should pay, he can recover his share from the other, but not the amount due for the entire body of slaves.

Where a slave, owned in common, commits damage by order of one of his masters, and the other makes payment, he can recover from his partner on the ground of damage sustained by the property owned in common; provided he can bring suit against him under the Aquilian Law, or the Law of the Twelve Tables. Therefore, if I have only two slaves owned in common, an action can be brought against the master who was aware that the damage had been committed, and this will include both slaves, but he cannot recover more from his partner than if he had paid for one alone. If, however, he should desire to proceed against the master who did not know that any injury had been done, he can only collect double damages.

Let us see whether an action should not be granted against his partner, on account of the other slave, just as if he had paid in the name of all of them. In this case the decision of the Prsetor should be more severe, and no indulgence should be shown to the one who was aware of the act of the slaves.

6. *Sczevola, Questions, Book IV.*

If my co-heir has collected double damages on account of a theft perpetrated by a number of slaves, Labeo thinks I will not be prevented from bringing an action for double damages; and that, in this way, a fraud will be committed against the Edict; and that it is unjust for our heirs to collect more than we ourselves could have done.

He also says that if the deceased recovered less than double damages, his heirs cannot properly bring suit for more than equal portions ; but I think that the better opinion is that the heirs can sue for their shares, and that both heirs together cannot recover more than double damages including what the deceased collected.

## TITLE VII.

## CONCERNING TREES CUT DOWN BY STEALTH.

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

Where trees are cut down by stealth, Labeo says that an action should be granted under the Aquilian Law, as well as under the Law of the Twelve Tables. Trebatius, however, holds that both actions should be granted in such a way that the court, in rendering a decision in the second action, should deduct the amount recovered in the first, and give judgment for the

remainder.

2. *Gaius, On the Law of the Twelve Tables, Book I.*

It should be remembered that those who cut down trees, and especially vines, are also punished as thieves.

3. *Ulpianus, On Sabinus, Book XLH.*

The larger number of ancient authorities held that vines were included in the term "trees."

(1) Ivy, as well as reeds, are not improperly styled trees.

(2) The same may be said to apply to willows.

(3) But when anyone, for the purpose of planting willows, has inserted branches into the ground, and these are cut down or torn up, before they have taken root, Pomponius very properly says that the action for cutting down trees cannot be brought, as that cannot properly be called a tree which has not yet become rooted.

(4) If anyone removes a tree from a nursery, that is to say, with its roots, although it may not yet have taken hold of the soil, Pomponius, in the Nineteenth Book on Sabinus, says that it should be considered a tree.

(5) Therefore, that also may be considered a tree whose roots have ceased to live, although it still remains in the earth. This opinion is also adopted by Labeo.

(6) Labeo thinks that a tree can properly be so called which, having been torn out by the roots, cannot be replaced, or which has been removed in such a way that this can be done.

(7) Olive sprouts should be considered trees, whether they have thrown out roots or not.

(8) An action, therefore, can be brought on account of all the trees which we have above enumerated.

4. *Gaius, On the Law of the Twelve Tables.*

It certainly cannot be doubted that, where a sprout is still so small as to resemble a blade of grass, it should not be included in the number of trees.

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

To cut down is not merely to cut, but to cut with the intention of felling; to girdle is to remove the bark; to cut away is to cut underneath ; for one cannot be understood to have cut down a tree who has divided it with a saw.

(1) In this proceeding the cause of action is the same as in that under the Aquilian Law.

(2) He who has the usufruct in the land cannot bring this suit.

(3) He who has leased land belonging to the State can bring this suit, just as he can the action for taking care of rain-water and the one to establish boundaries.

6. *Pomponius, On Sabinus, Book XX.*

Where several persons have cut down the same tree by stealth, the action can be brought against each one of them for the entire amount.

(1) When, however, the same tree belongs to several persons, the penalty can only be collected once by all of them together.

(2) Where a tree has extended its roots into the soil of a neighbor, the latter cannot cut them off, but he can bring an action to show that the tree does not belong to him; just as he can do if a beam, or a projecting roof extends over his premises. When a tree is nourished by roots in the soil of a neighbor it, nevertheless, belongs to him from whose land it derives its origin.

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

Trees are considered to have been cut by stealth when they are felled without the knowledge of the owner, and with the intention of concealing it from him.

(1) Pedius says, that this action is not one of theft, as it is possible for a person to cut down trees by stealth without the intention of committing theft.

(2) If anyone should tear out a tree by its roots or extirpate it, he will not be liable to this action, for he did not cut it down, or cut it away, or cut it off. He will, however, be liable under the Aquilian Law for having broken it.

(3) Even if the entire tree has not been cut down, the action will properly be brought as if it had been cut down.

(4) A person will be liable under this action whether he girdles, cuts off, or cuts down trees with his own hands, or whether he orders his slave to do so.

The same rule applies when he gives such an order to a freeman.

(5) When a master did not order his slave, but the latter committed the act voluntarily, Sabinus says that a noxal action will lie, as in other offences. This opinion is correct.

(6) This action, although it is a penal one, is perpetual, and is not granted against an heir, but it will be granted in favor of an heir and other successors.

(7) Judgment in a case of this kind includes double damages.

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

In computing the amount of the interest of the owner in not having the damage committed, the value of the trees themselves should be deducted, and an appraisement made of what remains.

(1) Whoever cuts down a tree clandestinely cuts it down by stealth.

(2) Therefore, if he should cut and remove it for the purpose of profiting by it, he will be liable for the theft of the wood, and also to a personal action, as well as to one for the production of property.

(3) Anyone who, with the knowledge of the owner, cuts down a tree by violence, is not liable to this action.

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

When a tenant cuts down trees, suit can be brought against him under the lease; but it is clear that the plaintiff should be content with a single action.

10. *Julianus, On Minicius, Book HI.*

Where there are two parts of one tree, and they are united above the ground, they are regarded as a single tree. But if the point of union is not visible, there are as many trees as there are trunks above the surface.

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

Where, however, proceedings have been brought under the Aquilian Law for trees cut down, and judgment under the interdict *Quod vi aut clam* has been rendered, the defendant will be discharged, if, under the first decision, he has made a sufficient payment; but suit under the Law of the Twelve Tables can still be brought.

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

Anyone who sells a field, can, nevertheless, bring an action for the cutting of trees before the sale has been concluded.

## TITLE VIII.

## CONCERNING THE ROBBERY OF PROPERTY BY VIOLENCE, AND DISORDERLY ASSEMBLAGES.

1. *Paulus, On the Edict, Book XXII.*

Anyone who takes property by force is liable to the action of non-manifest theft for double damages, and to the action of robbery with violence for quadruple damages. If the action for robbery with violence is first brought, that of theft will be refused. If that for theft is first brought, the other will not be refused, but only what exceeds the amount included in the first suit can be recovered.

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

The Praator says: "If any damage is said to have been committed maliciously against anyone by persons unlawfully assembled, or his property is said to have been taken by violence, I will grant an action against whoever is alleged to have done these things. Likewise, if a slave is said to have committed these acts, I will grant a noxal action against his master."

(1) By this Edict, the Praetor has provided against illegal acts committed by force. For if anyone can prove that he has suffered violence, he can proceed by means of a public action against violence, and certain authorities hold that the private action should not prejudice the public one. It, however, seems to be more available, and although it may interfere with the operations of the *Lex Julia* having reference to private violence, still, an action ought not to be refused those who select the private remedy.

(2) He who commits robbery by violence not only perpetrates the crime maliciously, as stated in the Edict, but also when he seizes property by force, after having formed his plan, and collected armed men for the purpose of causing damage.

(3) Therefore, whether he himself assembles men, or makes use of those who already have been assembled by another in order to commit robbery, he is considered to have acted with malice.

(4) We should understand men who have been assembled to be such as are brought together for the purpose of causing damage.

(5) It is not added what kind of men, hence it makes no difference whether they are free or slaves.

(6) If only one man is called upon, we still say that men have been assembled.

(7) Again, if you suppose that only one has caused the damage, I do not think that the words of the Edict will fail to be applicable, for when it says, "Persons unlawfully assembled," we must understand this to mean that, whether one alone is guilty of violence, or whether he acts in company with others who are assembled and they are either armed or unarmed, he will be liable under this Edict.

(8) The mention of malice includes violence, for he who employs violence acts maliciously. It does not, however, necessarily follow that he who is malicious employs violence; hence malice suggests violence, and he who commits an act without violence But deceitfully is equally included.

(9) The Praetor says "damage." This word refers to every kind of injury, even that which is clandestine. I do not think, however, that all clandestine damage is included, but only such as is combined with violence. For anyone will give a suitable definition if he were to say that he who committed damage alone, and without violence, is not included in this Edict, and that if it was committed by persons who are assembled, even without violence, provided malice was present, it will come within the terms of this Edict.

(10) But neither the action of theft, nor that provided for by the Aquilian Law should be included in this Edict, although sometimes they coincide with it; for Julianus says that he who commits robbery by violence is a more unprincipled thief; and that he who commits any damage with the aid of assembled persons can also be held liable under the Aquilian Law.

(11) "Or his property is said to have been taken by violence." When the Prater says, "Property taken by violence," we must understand this to apply even where only one article has been obtained by force.

(12) If anyone does not himself assemble men, but is found among them, and either takes anything by violence, or causes some damage, he will be liable under this action. But does this Edict only refer to damage fraudulently or violently committed by men assembled by the defendant, or does it also refer to robbery by violence, or damage committed by the men aforesaid, although they may have been called together by another, is a question which has been asked. It is better to hold that this also is the case, so that all these things are comprehended, as well as any injury committed by persons assembled by another, so that he who assembled them, as well as he who joined them, may be considered to be included.

(13) In this action the true price of the property is quadrupled within the available year, but not the amount of the interest of the plaintiff.

(14) This action will also lie with reference to a household, with-.out it being necessary to show who among the members of the same committed the robbery by violence, or even the damage. The term "household" also includes the slaves, that is to say those that are in service, although it may be alleged that they are free, or are the slaves of others serving us in good faith.

(15) I do not think that by means of this action the plaintiff can proceed against the master on account of his slaves, because it will be sufficient for the master to once tender fourfold the amount involved.

(16) Under this suit for reparation, a surrender should not be made of the entire number of slaves, but only of those, or of him, who is proved to have caused the damage.

(17) This action is commonly styled one for property taken by violence.

(18) He alone is liable in this action who has been guilty of fraud. Therefore, if anyone forcibly seizes what is his own, he will not be liable for taking property in violence, but he will be fined in a different way. If, however, anyone should forcibly seize his own slave, of whom another has possession in good faith, he will, in like manner, not be liable under this action, because he removes his own property. But what if he takes away some article that had been encumbered to him? He will be liable.

(19) The action for property taken by violence will not be granted against a child under the age of puberty who is not capable of criminality, unless his slave, or his body of slaves, are alleged to have committed the offence, and, when this is the case, he will be liable in a noxal action for property taken by violence by his slave, or by a number of his slaves.

(20) If a farmer of the revenue should drive away my cattle, thinking that I have committed some offence against the tax law, although he may be mistaken, still, I cannot bring an action against him for property taken by violence, Labeo says, for he is not guilty of fraud.

Where, however, he shuts up the cattle in order that they may not feed, and causes them to perish with hunger, a praetorian action can be brought under the Aquilian Law.

(21) When anyone shuts up cattle which he has taken by violence, suit can be brought against him on this account.

(22) In this action we do not merely consider whether that which has been forcibly seized constitutes part of the property of the plaintiff, for, whether it does or does not, if it has any

connection with it, there will be ground for this proceeding. Therefore, whether the property is loaned for use, or leased, or even pledged, or deposited with me, and hence it is to my interest that it should not be removed, or if any of it is possessed by me in good faith; or I have an usufruct or any other right in it, so that it is to my interest that it shall not forcibly be taken away, it must be said that I will be entitled to this action, not that the ownership, but merely that what has been removed from my property, that is to say, from my substance, may be recovered.

(23) And, generally speaking, it must be held that an action for theft will lie in my favor for whatever has been done clandestinely in all these cases, and that I will be entitled to a right of action on this ground. Someone, however, may say that we are not entitled to an action for theft on account of property which has been deposited, but with reference to this, I have added: "If it is to our interest that the property should not be taken by violence," for then I am entitled to an action for theft.

(24) If, where property is deposited, I have become responsible for negligence, or if I have received the value of the deposit, but not as compensation, it is more proper to hold that even though the action for theft based on the deposit will not lie, one for property taken by force can be brought; because only a very small difference exists between one who acts clandestinely, and one who takes property by violence, as the former conceals his crime, and the other publishes his, and even commits it publicly. Therefore, when anyone proves that he has only a moderate interest in the matter, he should have an action for property taken by violence.

(25) If my fugitive slave buys articles to be used by himself, and they are taken away by force, for the reason that the said articles are included in my property, I can bring an action for robbery with violence.

(26) When property is taken by violence, an action can be brought for theft or wrongful damage, or a personal action will be available, or proceedings can be instituted for the recovery of each article.

(27) This action will lie in favor of the heir and other successors. It shall not, however, be granted against heirs and other successors, because a penal action cannot be brought against them. Let us see whether it should be granted for something by which they have become pecuniarily benefited. I think that the Praetor did not promise the action against the heirs for what comes into their hands, because he thought that the personal action was sufficient.

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

If a slave takes property by violence, and an action is brought against him when he becomes free, although he has the power to proceed against his master, suit cannot legally be brought against the manumitted slave after a year has elapsed; because, no matter against whom proceedings could have been instituted, the plaintiff will be excluded. If an action should be brought against the master within a year, and afterwards one is brought against the manumitted slave, Labeo says that an exception on the ground of *res judicata,* will operate as a bar.

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

The Praetor says: "When any damage is said to have been committed maliciously by one of a mob, I will grant an action for double damages against him within the year from the time when proceedings could have been instituted, and, after a year has elapsed, I will grant an action for simple damages."

(1) This Edict is introduced with reference to damage committed by any member of a disorderly crowd.

(2) Labeo says that the term "crowd" indicates a kind of riotous assemblage, and that it is

derived from a Greek term signifying to "make a tumult."

(3) How large a number shall we consider to constitute a crowd? If two persons engage in a quarrel, we should not understand this to be done by a crowd, because two persons cannot properly be said to compose one. If, however, there should be a larger number, for instance, ten or fifteen persons, they may be called a crowd. But what if there are only three or four?

This will not be a crowd. Labeo very properly says that there is a great difference between a tumult and a quarrel; because a tumult is the uproar and disturbance made by a multitude of men, and a quarrel is made by only two.

(4) Not only he who causes damage while in a tumultuous assemblage is liable under this Edict but also he who maliciously exerted himself in order that damage might result from the acts of the assemblage whether he was present or not, for malice can be manifested even if the person is absent.

(5) It must be said that he also is liable under this Edict who joined the crowd, and advised the damage to be committed; provided, however, he himself was present when it was done, and was there with evil intent, for it cannot be denied that the damage was committed by the crowd through his malicious interference.

(6) Where a man on his arrival excites or unites a crowd either by his cries, or by any act, either accusing someone, or arousing pity, and through his malicious conduct damage is committed, he will be liable; even if he did not have the intention of convoking the assemblage. For it is true that through his malice damage was committed by the crowd, and the Praetor does not require that it should be brought together by the person himself, but that the damage should be committed through the malicious instigation of one forming a part of it.

The following difference exists between this Edict and the former one, namely: in the first the Praetor speaks of damage maliciously committed by persons tumultuously assembled, or robbery with violence perpetrated by them where they were not assembled; but in the second, he refers to damage committed maliciously by a crowd, although the accused person did not convoke it, but where it was incited by his cries, or his languages, or because he aroused pity, even if another assembled the mob, for he himself constituted part of it.

(7) Therefore, on account of the atrocity of the deed, the first Edict presents a penalty of quadruple damages, and the latter one of double damages.

(8) Both of them, however, grant the power of bringing an action within a year, but, after the year has elapsed, an action for only simple damages will lie.

(9) Moreover, this Edict mentions damage which has been caused and property which has been lost, but it does not refer to robbery .with violence; still, suit can be brought for robbery with violence under the former Edict.

(10) Property is said to be lost which has been allowed by anyone to be destroyed, as for instance cut, or broken to pieces.

(11) Again, this action is *in factum,* and is granted for double the value of the property, which has reference to its true price and the estimate made at the present time, is always doubled within a year.

(12) The plaintiff must prove that the damage was caused by a mob. If, however, it was caused in any other way than by a mob, this action will not lie.

(13) If, when Titius struck my slave, a crowd assembled, and the slave lost something thereby, I can bring suit against the person who struck him, even though the crowd was responsible for the loss, and he began to strike him in order that injury might be committed.

The action, however, will not lie if any other cause for striking him existed.

(14) When, however, anyone himself assembles a crowd, and beats the slave in its presence for the purpose of doing him injury, and not with the intention of causing damage, the Edict will apply; for it is true that he who strikes anyone unjustifiably displays malice, and that he who is responsible for the commission of damage commits it.

(15) The Praetor grants an action against a slave, and against an entire body of slaves.

(16) What we have stated with reference to heirs and other successors being entitled to bring the action for property taken by violence may be repeated here.

5. *Gaius, On the Provincial Edict, Book XXI.*

It will not benefit the person guilty of robbery with violence to restore the property before judgment is rendered, with a view to avoiding the penalty.

6. *Venuleius, Stipulations, Book XVII.*

The law forbids property which has been possessed or taken by violence to be acquired by usucaption, before it again comes under the control of the owner, or his heir.

## TITLE IX.

## CONCERNING FIRE, DESTRUCTION, AND SHIPWRECK, WHERE A BOAT OR A SHIP IS TAKEN BY FORCE.

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

The Praetor says: "When it is alleged that anyone at a fire, in the destruction of a building, in a shipwreck, or in an attack on a boat or a ship, has taken anything by violence, or fraudulently appropriated property, or caused any loss, I will grant an action for quadruple damages within a year after the time when an action can be brought, and, when the year has elapsed, I will grant an action for double damages. I will also grant the action against a slave, and an entire body of slaves."

(1) The benefit of this Edict is evident, and its severity is perfectly justifiable, since it is to the interest of the public that nothing should be stolen under such circumstances. And, although these crimes can be prosecuted criminally, still, the Praetor very properly provides that civil actions may be brought, where offences of this kind have been perpetrated.

(2) How should we understand the words "at a fire?" Do they mean in the fire itself, or only in the place where the fire occurred? The better opinion is to understand them to mean on account of the fire, that is to say, that the property was stolen because of the confusion produced by the fire, or the fear resulting from it; just as we are accustomed to say "lost in war," with reference to anything which is lost by reason of war.

Hence, if anything should be stolen from the fields near where the fire took place, it must be said that there will be ground for the application of the Edict, because it is true that it was stolen on account of the fire.

(3) Likewise, the term "destruction" refers to the time when the demolition of the house took place, and not merely where anyone removed property from the fallen building, but also if he removed any from the adjacent houses.

(4) If there was a suspicion of a fire, or of the demolition of a house, and neither the fire nor the demolition occurred, let us see whether there will be ground for the application of this Edict. The better opinion is that there will be no ground for it, because nothing was taken either on account of the fire, or the demolition of the house.

(5) The Praetor also says, "If anything is taken in a shipwreck," and, in this instance, the question arises whether this means if anyone takes property at the time of the shipwreck, or if he takes it at some other time, that is to say, after the shipwreck has occurred; for anything

cast upon the shore after a shipwreck is said to belong to the vessel.

The better opinion is that this refers to the time of the shipwreck,

2. *Gaius, On the Provincial Edict, Book XXI.* As well as to the place.

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

Where anyone seizes property by violence in the place where the shipwreck occurs or has occurred, he is held to come within the terms of this Edict. He, however, who carries away articles cast upon the shore after the shipwreck has happened is in such a position that he should rather be considered a thief than liable under this Edict;'just as he who appropriates an article which has fallen from a vehicle, and one who removes property cast upon the shore are not considered to have taken it by force.

(1) Next, the Praetor says, "In an attack on a boat or a ship." He is considered to take property by force who, during a battle or a combat directed against a ship or a boat, either seizes it by violence, or does so while robbers are capturing the vessel.

(2) Labeo says it is only just that, if anything is taken by violence during an attack either upon a house in town or upon one in the country, there will be ground for proceeding under this Edict, for we can be annoyed and attacked by robbers no less upon the sea than upon the land.

(3) Not only he who has seized the property by force, but also he who received it, is liable in the above-mentioned instances, because receivers of stolen goods are not less guilty than the aggressors themselves. The word, "fraudulently," has been added, however, for the reason that everyone who receives property under such circumstances does not immediately become guilty, but only he who receives it with fraudulent intent. But what if he received it without knowing the facts? Or what if he received it for the purpose of taking care of it, and keeping it safely for the person who lost it? He certainly should not be held responsible.

(4) Not only he who took the property by force, but also he who removed it, or set it aside with the intention of removing it, or injured it, or concealed it, is liable in this action.

(5) It is, however, clear that it is one thing to take property by violence, and another to secretly appropriate it, since anything can be secretly appropriated without violence, but property cannot forcibly be taken without the employment of violence.

(6) Anyone who takes property by violence from a ship which has run aground is liable under this Edict. To run aground is what the Greeks term *i^pa.6^*.

(7) What the Prastor says with reference to causing damage only applies where the damage has been committed maliciously, for if malice is absent, the Edict will not be available. Hence, how must what Labeo stated be understood, namely: if, for the purpose of protecting myself from a fire, which has broken out, I demolish a building belonging to my neighbor, should an action be granted against me, and my slaves? For, as I did this for the purpose of protecting my own house, I certainly am free from malice. Therefore I think that what Labeo said is not true. But can an action be brought under the Aquilian Law? I do not think it can, for anyone who desires to protect himself does not act unjustly when he cannot do otherwise. Celsus, also, was of the same opinion.

(8) In the time of Claudius, the following Decree of the Senate was enacted: "If anyone, in a shipwreck, should remove the rudders of a vessel, or one of them, he will be liable for taking the whole ship."

It was likewise provided by another Decree of the Senate that those by whose fraud or advice shipwrecked persons were overcome by force, in order to prevent assistance being given to the ship, or to anyone on board who was in danger, would be liable to the penalties of the Cornelian Law relating to assassins. And, moreover, that those who took by violence, or fraudulently obtained anything from the wretched fortunes of the shipwrecked person, should

be compelled to pay as much into the Treasury as could be recovered by the Edict of the Praetor.

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

Pedius says that he who seizes property by violence while the terror which prevails during a shipwreck exists can be said to have taken it in the shipwreck.

(1) The Divine Antoninus stated as follows, in a Rescript having reference to those who are guilty of pillage during a shipwreck: "What you wrote me concerning the shipwreck of a vessel or a boat was done for the purpose of ascertaining what penalty I think should be inflicted upon those who have stolen something from the vessel. I think that this can be easily determined, for there is a great difference where persons take property which is about to be lost, and where they criminally seize that which can be saved. Therefore, if considerable booty appears to have been obtained by force, you will, after conviction, banish freemen for three years, after having them whipped; or, if they are of inferior rank, you will sentence them to labor on the public works for the same time; and you will sentence slaves to the mines after having scourged them. When the property is not of great value, you can discharge the freemen, after having whipped them with rods; and the slaves, after having scourged them. And, by all means, in other cases, as well as in those of this description, the condition of the persons and the nature of the property should be carefully considered, in order that no more severity or indulgence may be exercised than the circumstances demand."

(2) These actions are granted to heirs, as well as against them, according to the amount of property which comes into their hands.

5. *Gaius, On the Provincial Edict, Book XXI.*

If anyone should remove by stealth, or take by violence anything which has been rescued from a shipwreck, a fire, or the destruction of a house, and placed elsewhere, he will be liable either to an action for theft, or to one for property taken by violence; especially if he did not know that it came from a shipwreck, a fire or the destruction of a building.

Where anyone carries away property which has been lost in a shipwreck, and is lying on the shore where it was cast by the waves; many authorities hold the same opinion, and it is correct, if some time intervened since the shipwreck took place. Otherwise, if this occurred at the very time of the shipwreck, it makes no difference whether the goods were taken from the sea itself or from the wreck, or from the shore. We should make the same distinction where they were taken from a boat or a vessel in distress.

6. *Callistratus, On the Monitory Edict, Book I.*

*A* ship is in distress when it is plundered, or submerged, or broken open, or has a hole made in it, or its cables are cut, or its sails torn, or its anchors are carried away by the sea.

7. *The Same, Questions, Book II.*

Many precautions have been taken to hinder property from being stolen during a shipwreck, or to prevent strangers from coming in and taking possession of it. For the Divine Hadrian provided by an Edict that those who owned land on the shore of the sea should, when a ship either badly damaged or broken up within the boundaries of any of them, see that nothing was stolen from the wreck; and that the Governors of provinces should grant actions against them in favor of those who were searching for the property of which they had been deprived, to enable them to recover anything which they could prove had been taken from them during the shipwreck, by those who had possession of the same. With reference to such as are proved to have taken the property, the Governor should impose a severe sentence upon them, as upon robbers.

And in order to render proof of the commission of crimes of this kind more easy, he permitted

those who complained of having suffered any loss to go before the Prefect and give their evidence, and search for the guilty parties, in order that they might be sent before the Governor either in chains, or under bond, in proportion to the gravity of their offences. He also directed that security be taken from the owner of the property alleged to have been stolen not to desist from the prosecution. The Senate also decreed that neither a soldier, nor any private individual, nor a freedman, nor a slave of the Emperor, should interfere in the collection of articles dispersed by shipwreck.

8. *Neratius, Opinions, Book II.*

If your boat has been carried by the force of the stream upon my land, you cannot remove it, unless you give me security for any damage which may have been caused by it.

9. *Gaius, On the Law of the Twelve Tables, Book IV.*

Anyone who sets fire to a house, or a pile of grain near a house, shall be chained, scourged, and put to death by fire, provided he committed the act knowingly and deliberately. If, however, it occurred by accident, that is to say, through negligence, he shall be ordered to make good the damage; or, if he is insolvent, he shall receive a light chastisement. Every kind of building is included in the term house.

10. *Ulpianus, Opinions, Book I.*

The vigilance of the governors of provinces must be diligently exercised to prevent fishermen from showing lights at night in order to deceive sailors, thereby indicating that they are approaching some port, and in this way bringing ships and those on board of them into danger, and .preparing for themselves a detestable booty.

11. *Marcianus, Institutes, Book XIV.*

Where a fire takes place by accident it is excusable, unless there was such gross negligence as to resemble illegality or fraud.

12. *Ulpianus, On the Duty of Proconsul, Book Vill.*

It is established that anyone can collect his shipwrecked property, and this was stated by the Emperor Antoninus and his Divine Father in a Rescript.

(1) Persons of low rank who designedly cause a fire in a town shall be thrown to wild beasts, and those of superior station shall suffer death, or else be banished to some island.

## TITLE X.

## CONCERNING INJURIES AND INFAMOUS LIBELS.

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

Something done contrary to law is designated an injury, for everything which is illegal is held to be injurious. This, generally speaking, is the case, but, specifically, an injury is defined to'be an insult. Sometimes, by the term "injury" damage caused by negligence is meant, as we are accustomed to state in the Aquilian Law. At other times, we call injustice an injury, as where anyone has rendered a wrongful or inequitable decision, and this is styled an injury because it is in violation of law and justice as not being legal. The term "insult" is derived from the verb "to despise."

(1) Labeo says that an injury can be caused by a thing, or by words. By a thing, when the hands are employed; by words, when the hands are not used, and the outrage is committed by speech.

(2) Every injury involves either the person or the honor of him who is the object of it, and has a tendency to render him infamous. It is directed against the person, when he is beaten; against his honor, when a matron is deprived of her attendant; and it tends to render anyone

infamous when his or her modesty is attacked.

(3) Again, an injury is committed against anyone by a person himself, or by others: by the person himself, where it is committed directly against the head, or the mother of a family; by others, where it is committed indirectly, as for instance, against my children, my slaves, my wife, or my daughter-in-law. For injury concerns us when it is directed against those who are subject to our authority, or are entitled to our affection.

(4) If an injury is perpetrated against the body of a deceased person, of whose estate we are the heirs, or the praetorian possessors, we can bring an action for injury in our own name; for an injury committed in this manner involves our reputation.

The same rule applies if the reputation of him whose heirs we are is attacked.

(5) Moreover, any injury committed against our children is an attack upon our honor; so that, if anyone sells a son with his own consent, his father will be entitled to an action for injury in his own name, but the son will not, because no injury is committed against one who consents.

(6) Whenever an injury is committed against the funeral of a testator, or his corpse, and this is done after the estate has been entered upon, it must be said that it is, to a certain extent, committed against the heir, for it is always to the interest of the latter to protect the reputation of the deceased. If it was committed before the estate was entered upon, the action will rather be acquired by the estate, and transmitted by it to the heir.

Finally, Julianus says, there is no doubt that if the body of the testator is detained before the estate has been entered upon, the right of action will be acquired by the estate. He also thinks that the same rule will apply if any injury is committed against a slave belonging to the estate before it has been entered upon, because the right of action is acquired by the heir through the estate.

(7) Labeo says that if anyone, before the estate has been entered upon, strikes a slave forming part of it, who has been manumitted by will, the heir can bring an action for injury. But if he should be struck after the estate has been entered upon, whether he knows that he is free or not, he can bring the suit.

(8) But whether he knows that it is my son or my wife, or whether he does not, Neratius says that I will be entitled to this action in my name.

(9) Neratius also says that from one injury sometimes a right to proceed against three persons will arise, and that the right of action of one is not extinguished by that of another; as, for instance, when an injury has been committed against my wife who is a daughter under paternal control, the action for injury will lie in favor of me, of her father, and of the woman herself.

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

When an injury is committed against a husband, his wife cannot bring the action, because it is proper for wives to be defended by their husbands, and not husbands by their wives.

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

It is said, by way of reciprocity, that those who can suffer an injury can also commit it.

(1) There are, however, some persons who cannot do this, for example, a lunatic, and a minor who is not capable of criminality, since they can suffer injuries but cannot commit them; for as an injury can only take place with the intention of him who commits it, and the result will be that such persons, whether they resort to blows, or use insulting language, are not considered to have committed injury.

(2) Hence, anyone can suffer an injury without perceiving it, but he cannot commit one unless he is aware of it, even if he does not know against whom it is committed.

(3) Therefore, if anyone strikes another in jest, or while he is contending with him, he will not be liable for committing an injury.

(4) When anyone strikes a freeman, thinking that he was his slave, he is in such a position that he will not be liable to an action for injury committed.

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

If, when intending to strike my slave with my fist, I should unintentionally strike you, while you were standing near him, I will not be liable for injury.

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

The Cornelian Law relating to injuries has reference to a person who wishes to bring suit for injury, because he says that he has been struck and beaten, or that his house has been entered by force. It is provided by this law that he cannot, in such a case, preside as judge, who is either the son-in-law, father-in-law, stepfather, stepson, cousin, or is any more nearly connected with the plaintiff by either relationship or affinity, or who is the patron, or the father of any of the abovementioned persons.

Therefore, the Cornelian Law grants an action for two causes, namely, where anyone has been struck or beaten, or where his house has been forcibly entered. Hence it is apparent that every injury which can be committed by the hands is included in the Cornelian Law.

(1) The following difference exists between striking and beating, so Ofilius says: to beat is to cause pain, to strike is to inflict blows without pain.

(2) We should understand the word "house" to be not merely one which is owned by the plaintiff, but the one in which he resides. Therefore this law will be applicable, whether the aggrieved person lives in his own house, or in one which he has leased, or occupied gratis, or is one where he happens to be a guest.

(3) When he lives in a house in the country, or one surrounded by gardens, what should be done? The same rule should be adopted.

(4) If the owner should lease a tract of land, and it is entered by force, the tenant, and not the landlord, can bring the action.

(5) Where, however, anyone enters the land of another which is cultivated by the owner, Labeo denies that this action can be brought by the owner of the land, under the Cornelian Law, because he cannot have his residence everywhere, that is to say, in all his farmhouses.

I think that this law applies to every habitation in which the head of a household resides, although he may not have his domicile there. For suppose someone goes to Rome for the purpose of pursuing his studies, he certainly does not reside at Rome, and still it should be said that if his house is entered by force, there will be ground for the application of the Cornelian Law. Therefore it does not apply to temporary lodgings, or to stables. It is, however, applicable to those who remain in a place for a very short time, although they may not have their domicile there.

(6) The question is asked, whether the head of a household can bring .the action for injury under the Cornelian Law, if a son under his control has sustained an injury. It has been decided that he cannot do so. This rule applies in all cases. The praetorian action for injury will, however, lie in favor of the father, and that of the Cornelian Law in favor of the son.

(7) A son under paternal control can bring the action under the Cornelian Law for any of these reasons, and he need not provide that his father will ratify his act; for Julianus has stated that a son who brings an action for injury under any other law cannot be compelled to give security for ratification.

(8) By this law, the plaintiff is permitted to tender the oath, in order that the defendant may

swear that he has not committed any injury. Sabinus, however, in his work on Assessors, says that even Praetors must follow the example of the law. And this is the fact.

(9) When a person writes anything for the purpose of defaming another, or composes, or publishes it, or maliciously procures this to be done, even though it may be published in the name of someone else, or without any name, he can be prosecuted under this law, and if he should be convicted, he will be declared incapable of testifying in court.

(10) He who publishes any inscriptions, or anything else, even if it is written, for the purpose of libelling another, will incur the same penalty, under the Decree of the Senate, as a person will who has caused any of these things to be purchased, or sold.

(11) Anyone, whether he be free or a slave, who gives information of the guilty party shall be rewarded by the judge in proportion to the wealth of the accused person; and where the informer is a slave, he may, perhaps, be granted his freedom. For why not, if the public welfare is promoted by his information?

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

This Decree of the Senate is necessary, when the name of him against whom the act was committed is not mentioned. Then, for the reason that proof is difficult, the Senate wished that the crime should be punished by a public prosecution. If, however, the name of the person is mentioned, he can bring suit for injury under the Common Law, for he should not be prevented from bringing a private action because it prejudices a public prosecution, as private interests are concerned. It is evident that if a public prosecution is instituted, a private action must be denied, and *vice versa.*

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

The Prsetor provides in his Edict as follows: "Anyone who brings an action for injury must state positively what injury was sustained," because he who brings an action which may render another infamous should not make a vague accusation admitting of a distinction which may affect the good name of another, but he must designate and specify clearly the injury which he alleges he has suffered.

(1) When it is said that a slave has been killed for the purpose of causing injury, should not the Prsetor permit the public action to be prejudiced by the private one of the Cornelian Law, just as if anyone should desire to bring suit, because you gave poison for the purpose of killing a man? He will, therefore, act more properly, if he does not grant an action of this kind.

We are, however, accustomed to hold that, in cases which can be publicly prosecuted, we ought not to be prevented from bringing private actions. This is true only where the action which should be publicly prosecuted is not vitally concerned. What, then, must we say with reference to the Aquilian Law, for this action has principally reference to this? The slave who was killed was not the principal object of the action which was brought mainly on account of the loss sustained by his owner; but, in the action for injury, proceedings are instituted with reference to murder and poisoning, for the purpose of inflicting punishment, and not for reparation of damage. But what if anyone should desire to bring the action for injury, because he has been struck on the head with a sword ? Labeo says that he should not be prevented from bringing it, as the case is not one which demands public punishment. This is not true, for who doubts that the aggressor can be prosecuted under the Cornelian Law ?

(2) Besides, the nature of the injury which the person suffered must be specifically stated, in order that we may ascertain whether judgment should be rendered against a patron in favor of his freedman. For it must be remembered that an action for injury is, not always but only occasionally, granted to a freedman against his patron, where the injury he has sustained is atrocious; for instance, if it is one which may be inflicted upon a slave.

Moreover, we allow a patron to inflict a light punishment upon his freedman; and the Prsetor will not receive his complaint as having sustained an injury, unless he is impressed by the atrocity of the act. For the Prsetor should not permit the slave of yesterday who is the freedman of today to complain that his master has insulted him, or struck him lightly, or corrected him. It will, however, be perfectly just for the Prastor to come to his relief, if his master has scourged him, or severely beaten him, or seriously wounded him.

(3) If one of several children, who are not subject to paternal authority, desires to bring suit against his father, an action for injury cannot be rashly instituted, unless the atrocity of the deed should induce this to be done, but certainly those who are under paternal control are not entitled to this action, even if the injury was atrocious.

(4) When the Prsetor says, "Must state positively what injury was sustained," how should this be understood? Labeo holds that he states anything positively who mentions the name of the injury, without any ambiguity (for instance, "either this or that"), but alleges that he has suffered such-and-such an injury.

(5) If you inflict several injuries upon me, for example, where a disorderly crowd having assembled, you enter my house, and in consequence I am insulted and beaten at the same time; the question arises, can I bring separate actions against you for each injury? Marcellus, in accordance with the opinion of Neratius, approves of the union in a single action of all the injuries that anyone has suffered at the same time.

(6) Our Emperor stated in a Rescript that, at present, civil actions can be brought for all kinds of injuries, even such as are of an atrocious character.

(7) We understand an atrocious injury to be one which is more than usually insulting and serious.

(8) Labeo says that an atrocious injury is committed with reference to the person, or the time, or the thing. An injury to the person becomes more atrocious when it is committed against a magistrate, a parent, or a patron. With reference to time, when it is committed at the games, and in public, or in the presence of the Praetor, or in private, for he asserts that there is a great difference, as an injury is more atrocious when it is committed in public. Labeo says that an injury is atrocious with reference to the thing, as for instance, where a wound is inflicted, or anyone is struck in the face.

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

The size of the wound constitutes the atrocity, and sometimes the place where it is inflicted, for example, when the eye is struck.

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

While we are discussing the point that the injury becomes atrocious on account of the thing itself, the question arises whether, in order for it to be atrocious, it must be inflicted upon the body, or whether it can be such if it is not corporeal, for instance, where clothing is torn, or an attendant is taken away, or insulting language is used.

Pomponius says that an injury can be called atrocious without inflicting a blow, the atrocity being dependent upon the person.

(1) When, however, one person strikes and wounds another in the theatre or in some other public place, he perpetrates an atrocious injury even though it is not serious.

(2) It makes little difference whether the injury is inflicted upon the head of a household, or on a son under paternal control, for it will be considered atrocious.

(3) If a slave inflicts an atrocious injury and his master is present, proceedings can be instituted against the latter. If his master is absent, the slave should be delivered to the

Governor, who shall cause him to be scourged. When anyone makes immodest advances to either a woman or a man, or to a freeborn person, or to a freedman, he will be liable to an action for injury. If the modesty of a slave is attacked, the action for injury can be brought.

10. *Paulus, On the Edict, Book LV.*

The modesty of a person is said to be attacked when an attempt is made to render a virtuous person depraved.

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

Not only is he liable to an action for injury who commits the injury, that is to say, he who delivered the blow, but he also is in-

cluded who, either by malice or through his efforts, causes anyone to be struck with the fist, for instance, upon the cheek.

(1) The action for injury is founded on right and justice. It is extinguished by dissimulation; for if anyone should abandon an injury, that is to say, if, after having suffered it, he does not recall it to mind, and should afterwards repent of having neglected to do so, he cannot revive it. According to this, equity is considered to abolish all apprehension of an action, whenever anyone opposes what is just. Hence, if an agreement with reference to an injury is entered into, or a compromise is made, or an oath is exacted in court, the action for injury will not survive.

(2) Anyone can bring the action for injury either by himself or by another; as, for example, by an agent, a guardian, or any other persons who are accustomed to act in behalf of others.

(3) If an injury is committed against anyone by my direction, most authorities hold that both I, who gave the order, and the person who received it, are liable to the action for injury.

(4) Proculus very properly says that if I hire you to commit an injury, suit can be brought against each of us, because the injury was committed by my agency.

(5) He says that the same rule will apply, if I direct my son to commit an injury against you.

(6) Atilicinus, however, says that if I persuade anyone to commit an injury who otherwise would be unwilling to obey me, an action for injury can be brought against me.

(7) Although the action for injury is not granted to a freedman against his patron, it can be brought by the husband of a freedwoman, in her name, against her patron; for the husband, when his wife has suffered any injury, is considered to bring the action in her name; which opinion Marcellus accepts. I, however, have made a note on him to the effect that I do not think that this applies to every injury. For why should light chastisement of a freedwoman even if she is married, or strong language, which is not obscene, be denied to a person? But if the woman was married to a freedman, we should say that an action for injury ought, by all means, to be granted to the husband against the patron. This is the opinion of many authorities. Hence it is apparent that our freedmen not only cannot bring an action for injury against us for injuries inflicted upon themselves, but not even for such as are inflicted upon those whom it is to their interest should not suffer injury.

(8) It is clear that if the son of a freedman, or his wife, should wish to bring an action for injury sustained, this ought not to be refused them because the action is not granted to the father or the husband, since they bring suit in their own names.

(9) There is no doubt that anyone who is said to be a slave and asserts that he is free can bring the action for injury against one who alleges that he is his master. This is true, whether from being free he desires to introduce him into slavery, or whether the slave wishes to obtain his freedom, for we use this law without making any distinction.

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

When an action is brought to reduce anyone from freedom to servitude whom the plaintiff knows to be free, and he does not do this on account of eviction, in order to preserve it for himself; he will be liable to the action for injury.

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

The action for injury sustained is not granted in favor of, or against an heir. The same rule applies where an injury has been inflicted upon my slave, for, in this instance, the action for injury will not be granted to my heir. But after issue has once been joined, this right of action passes even to successors.

(1) He who has recourse to a public law is not understood to do so for the purpose of causing injury, for the execution of the law does not inflict injury.

(2) Where anyone is arrested for not having obeyed the decree of the Praetor, he is not in a position to bring suit for injury founded on the order of the Praetor.

(3) If anyone should unjustly summon me before a tribunal of the magistrate, in order to annoy me, I can bring the action for injury against him.

(4) If, when honors are to be conferred, anyone should not suffer this to be done, as, for instance, where a statue, or something else of this kind has been decided upon, will he be liable to the action for injury? Labeo says that he will not be liable, even though he may do this for the sake of insult; for he says it makes a great deal of difference where something is done by way of insult, or where a person does not permit an act to be performed in honor of another.

(5) Labeo also says that where one person was entitled to an embassy, and the duumvir imposed this duty upon another, the action for injury cannot be brought on the ground of labor enjoined; for it is one thing to impose a duty upon a person, and another to inflict an injury upon him. This rule should be adopted with reference to other offices and duties which are unjustly bestowed. Hence, if anyone should render a decision for the purpose of causing injury, the same opinion should prevail.

(6) No act of a magistrate performed by virtue of his judicial authority renders the action for injury applicable.

(7) Where anyone prevents me from fishing, or casting a net in the sea, can I bring the action for injury against him? Some authorities hold that I can do so, and among them is Pomponius. The majority, however, hold that the case is similar to that of a person who is not suffered to bathe publicly, or seat himself in a theatre, or go into, sit down, or associate with others in any public place, or where anyone does not permit me to make use of my own property, for he can be sued in an action for injury.

The ancients granted an interdict to anyone who leased these public places, for it was necessary to prevent force from being used against him by which he would be unable to enjoy his lease.

But if I prevent anyone from fishing in front of my residence, or farm-house, what must be said? Am I liable to an action for injury, or not? For the sea, as well as the shore and the air, is common to all persons, and it has very frequently been stated in rescripts that no one can be prevented from fishing, or hunting birds, but he can be prevented from entering upon land belonging to another. It has, nevertheless, improperly, and without the authority of law, been assumed that anyone can be prohibited from fishing in front of my residence or my farm-house; therefore, when anyone is prevented from doing so, he can still bring the action for injury. I, however, can prevent anyone from fishing in a lake which is my property.

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

It is evident that, where anyone has a private right to any part of the sea, he will be entitled to the interdict *Uti possidetis,* if he should be hindered from exercising it, as this relates to a private matter and not to a public one, since the enjoyment of a right based on a private title, and not on a public one, is involved; for interdicts have been introduced for private and not for public reasons.

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

The question is also asked by Labeo, if anyone should alienate the mind of a person by drugs, or by any other means, whether there will be ground for the action for injury. He says that the action for injury can be brought against him.

(1) Where a man has not been beaten, but hands have been threateningly raised against him, and he has been repeatedly alarmed at the prospect of receiving blows, without having actually been struck, the offender will be liable to an equitable action for injury sustained.

(2) The Prsetor says: "I will grant an action against anyone who is said to have abused another, or to have caused this to be done, in a way contrary to good morals."

(3) Labeo says that vociferous abuse by several individuals constitutes an injury.

(4) The expression, "Vociferous abuse by several individuals," is said to be derived from the terms "tumult," or "assembly," that is to say the union of several voices, for where those are united it receives this appellation, just as if someone had said an "assembly of voices."

(5) But what is added by the Prsetor, that is to say, "Contrary to good morals," shows that he noted not all the united clamor, but merely that which violates good morals, and which has a tendency to render someone infamous, or detested.

(6) He also says that the expression, "Contrary to good morals," should not be understood to refer to those of the person who commits the offence, but, in general, to mean in opposition to the morals of this community.

(7) Labeo says that the abusive clamor of many voices can not only be raised against a person who is present, but also against one

who is absent. Hence, if anyone, under such circumstances, should come to your house when you are not there, a clamor of many voices may be said to have occurred. The same rule applies to your lodging, or to your shop.

(8) Not only is he considered to have caused a disturbance who has himself uttered cries, but also he who has instigated others to cry out, or who has sent them for that purpose.

(9) The words, "Abused another," were not added without a cause, for if the clamor was raised against a person who was not designated, there could be no prosecution.

(10) If anyone should attempt to incite a clamor against another, but does not succeed, he will not be liable.

(11) From this it is apparent that every kind of abuse is not the clamor of several voices, but that alone which is uttered with vociferation.

(12) Whether one or several persons have uttered these expressions in a disorderly crowd, it is an united clamor. But anything which has not been spoken in a tumultuous assemblage, or in loud tones, cannot properly be designated an united clamor, but speech with a view to defamation.

(13) If an astrologer, or anyone who promises unlawful divination, after having been consulted should say that another was a thief, when in fact he was not, an action for injury sustained cannot be brought against him, but he can be prosecuted under the Imperial

Constitutions.

(14) The action for injury, which is based on general clamor, is not granted either against or in favor of heirs.

(15) If anyone should speak to young girls who are attired in the garments of slaves, he will be considered to be guilty of a minor offence; and still less, if they are dressed as prostitutes, and not as respectable women. Therefore, if a woman is not dressed as a respectable matron, anyone who speaks to her or takes away her female attendant will not be liable to the action for injury.

(16) We understand an attendant to mean one who accompanies and follows anyone (as Labeo says), whether it be a freedman or a slave, a man or woman. Labeo defines an attendant to be one who is appointed to follow a person for the purpose of keeping him or her company, and is abducted either in a public or a private place. Teachers are included among attendants.

(17) He is considered to have a"bducted an attendant (as Labeo says), not where he has commenced to do so, but where he has absolutely taken the attendant away from his or her master or mistress.

(18) Moreover, he is not only understood to have abducted an attendant who does so by the employment of force, but also he who persuades the attendant to leave her mistress.

(19) Not only he who actually abducts an attendant is liable under this Edict, but also anyone who addresses or follows one of them.

(20) To "address" is to attack the virtue of another by flattering words. This is not raising a tumultuous clamor, but is a violation of good morals.

(21) He who makes use of foul language does not attack the virtue of anyone, but is liable to the action for injury.

(22) It is one thing to address, and another to follow a person, for he addresses a woman who attacks her virtue by speech; and he follows her who silently and constantly pursues her, for assiduous pursuit is sometimes productive of a certain degree of dishonor.

(23) It must, however, be remembered that everyone who follows or addresses another cannot be sued under this Edict; for he who does this in jest, or for the purpose of rendering some honorable service, will not come under the terms of this Edict, but only he who acts contrary to good morals.

(24) I think that a man who is betrothed should also be permitted to bring this action for injury; for any insult offered to his intended wife is considered an injury to himself.

(25) The Prastor says: "Nothing shall be done for the purpose of rendering a person infamous, and if anyone violates this provision, I will punish him according to the circumstances of the case."

(26) Labeo says that this Edict is superfluous, because we can bring a general action for injury committed, but it appears to Labeo himself (and this is correct) that the Praetor, having examined this point, wished to call attention to it specifically; for where acts publicly performed are not expressly mentioned, they seem to have been neglected.

(27) Generally speaking, the Praetor forbade anything to be done which would render anyone infamous; hence, whatever a person does or says, which has a tendency to bring another into disrepute, will afford ground for an action for injury sustained. Such are almost all those things which cause disgrace; as, for instance, the use of mourning garments or clothing that is filthy, or allowing the hair or the beard to grow, or the composition of poetry, or the publication or singing of anything which may injure anyone's modesty.

(28) When the Praetor says, "If anyone violates this provision, I will punish him according to

the circumstances of the case," this should be understood to mean that the punishment by the Praetor will be more severe; that is, that he will be influenced either by the personal character of him who brings the action for injury, or by that of him against whom it is brought, or by the matter itself, and the nature of the injury as alleged by the plaintiff.

(29) If anyone attacks the reputation of another by means of a memorial presented to the Emperor, or to anyone else, Papinianus says that the action for injury can be brought.

(30) He also says that he who sells the result of a decision, before any money has been paid, can be condemned for injury, after having been whipped by order of the Governor, as it is apparent that he committed an injury against the person whose judgment he offered for sale.

(31) Where anyone seizes the property of another, or even a single article, for the purpose of causing him damage, he will be liable to an action for injury.

(32) Likewise, if anyone has given notice of the sale of a pledge, and states that he is about to sell it, as having received it from me, and does this for the purpose of insulting me, Servius says that an action for injury can be brought.

(33) If anyone, in order to injure another should refer to him as his debtor, when he is not, he will be liable, to the action for injury.

(34) The PraBtor says: "If anyone is said to have beaten the slave of another contrary to good morals, or to have put him to torture without the order of his master, I will grant an action against him. Likewise, where any other illegal act is said'to have taken place, I will grant an action after proper cause is shown."

(35) If anyone causes an injury to a slave in such a way as to inflict one upon his master, I hold that the master can bring the action for injury in his own name; but if he did not do this for the purpose of insulting the master, the Praetor should not leave the injury done to the slave himself unpunished, and, by all means, if it was effected by blows, or by torture; for it is clear that the servant suffered by it.

(36) If one joint-owner beats a slave held in common, it is clear that he will not be liable to this action, as he did this by the right of a master.

(37) If an usufructuary should do this, the owner can bring an action against him; or if the owner did it, the usufructuary can sue him.

(38) He adds, "Against good morals," meaning that everyone who strikes a slave is not liable, but everyone who strikes him against good morals is liable. Where, however, anyone does so with a view to his correction or reformation, he will not be liable.

(39) Therefore, if a municipal magistrate should wound my slave with a whip, Labeo asks if I can bring suit against him because he beat him contrary to good morals. And he says the judge should inquire what my slave did to cause him to be whipped; as, if he impudently sneered at his office, or the insignia of his rank, he should be discharged from liability.

(40) "To beat" is improperly applied to one who strikes with his fist.

(41) By "torture," we .should understand the torment and corporeal suffering and pain employed to extract the truth. Therefore, a mere interrogation or a moderate degree of fear does not justify the application of this Edict. In the term "torment" are included all those things which relate to the application of torture. Hence when force and torment are resorted to, this is understood to be torture.

(42) If, however, torture should be applied by order of the master himself, and it exceeds the proper limits, Labeo says he will be liable.

(43) The Praetor says, "Where any other illegal act is said to have taken place, I will grant an action, after proper cause is shown." Hence, if a slave has been severely beaten, or put to the

question,

judgment can be rendered against the guilty party without any further investigation. If, however, he suffered any other injury, the action will not lie, unless proper cause is shown.

(44) Therefore the *Praetor* does not promise the action for injury in the name of the slave, for every kind of cause. For if he was lightly struck, or not grossly abused, he will not grant it. If his reputation has been assailed by any act, or by any written verses, I think that the investigation of the Praetor should be extended so as to include the character of the slave. For there is a great difference between the characters of slaves, as some are frugal, orderly, and careful; others are common, or employed in menial occupations, or of indifferent reputation. And what if the slave was shackled, or of bad character, or branded with ignominy?

Therefore, the Praetor must take into consideration not only the injury which was committed, but also the reputation of the slave against whom it is said to have been perpetrated, and thus he will either permit or refuse the action.

(45) Sometimes the injury done to the slave falls back upon his master, and sometimes it does not; for if anyone, thinking that he belonged to someone else and not to me, should beat a man who alleged that he was free, and he would not have beaten him if he had known that he was mine, Mela says that he cannot be sued for having committed an injury against me.

(46) If anyone should bring an action for injury on account of a slave who had been beaten, and afterwards an action for wrongful damage, Labeo says that this is not the same thing, because one of the actions has reference to damage caused by negligence, and the other to insult.

(47) If I have the usufruct in a slave, and you have the ownership in him, and he has been beaten or subjected to torture, I, rather than the owner, will be entitled to bring the action for injury sustained.

The same rule applies, if you have beaten my slave whom I possessed in good faith, for the master has the better right to bring an action for injury.

(48) Again, when anyone beats a freeman who was serving me in good faith as a slave, it should be ascertained whether he struck him for the purpose of insulting me, and if he did, an action for injury will lie in my favor. Therefore, we grant an action for injury with reference to the slave of another who is serving me in good faith, whenever the injury was committed with the intention of insulting me; for we grant it to the master of the name of the slave himself. If, however, he touches and beats me, I can also bring an action for injury. The same distinction must be made with reference to the usufructuary.

(49) If I beat a slave belonging to several masters, it is perfectly clear that they all will be entitled to bring the action for injury sustained.

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

It is not just, however, as Pedius says, that judgment should be rendered for a larger sum than the value of the share of the owner, and therefore it is the duty of the judge to make an estimate of the different shares.

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

If, however, I have done this with the permission of one alone, and thinking that he was the sole owner of the slave, the action for injury will not lie in favor of anyone. If I knew that the slave belonged to several persons, the action will not lie in favor of the owner who permitted me to strike the slave, but it will lie in favor of the others.

(1) Where torture has been inflicted by order of a guardian, an agent, or a curator, it must be said that the action for injury will not

lie.

(2) My slave was scourged by our magistrate at your solicitation, or upon your complaint. Mela thinks that an action for injury should be granted me against you for an amount which may seem to the court to be equitable. And Labeo says that if the slave should die, his master can bring suit, because damage committed by means of injury is involved. This opinion was adopted by Trebatius.

(3) Some injuries inflicted by freemen seem to be slight and of no importance, but when inflicted by slaves they are serious; for the insult increases on account of the person who offered it.

(4) When a slave inflicts an injury, it is clear that he commits an offence. Therefore, it is reasonable, as in the case of other crimes, that a noxal action for damages sustained should be granted under such circumstances. The master, however, if he prefers to do so, can bring the slave into court in order to have him whipped, and in this way satisfy the person who sustained the injury. It will not be necessary for the master to give him up to be whipped, but the power will be granted him to surrender his slave for that purpose; or if the injured party is not satisfied- with having him whipped, the slave should be surrendered by way of reparation, or the amount of damages appraised in court should be paid.

(5) The Praetor says, "In the discretion of the judge," which means that of a good citizen, in order that he may impose the measure of the punishment.

(6) If, before the master produces the slave in court to be whipped, in order to satisfy the complainant, this having been done by the authority of a -magistrate, the plaintiff afterwards should insist upon bringing an action for injury, he should not be heard, for he who has received satisfaction has abandoned the injury he sustained; for if he acted voluntarily, it may undoubtedly be said that the right of action for injury will be extinguished no less than if it had been annulled by lapse of time.

(7) If a slave should inflict an injury by the order of his master, the latter can certainly be sued, even in his own name. Where, however, it is stated that the slave has been manumitted, it is held by

Labeo that an action can be granted against him, because the injury follows the person, and a slave should not obey his master in all things. But if he should kill anyone by order of his master, we exempt him from the operation of the Cornelian Law.

(8) It is clear when he commits some act for the purpose of defending his master, that he has reason in his favor, and that he can plead an exception if he is prosecuted for what he has done.

(9) If the slave, in whom I have the usufruct, commits an injury against me, I can bring a noxal action against his owner, nor should my condition be rendered any worse because I have only an usufruct in him, than if I did not have it.

The rule is otherwise where the slave is owned in common, for then we will not grant an action to the other joint-owner, for the reason that he himself is liable to one for injury.

(10) The Praetor says: "If someone is alleged to have committed an injury against a person who is under the control of another, and he to whose authority he is subject, or anyone who can act in his name as agent is not present, I will, upon proper cause being shown, grant an action to him who is said to have sustained the injury."

(11) When a son under paternal control has suffered an injury, and his father was present, but cannot bring suit on account of being insane, or because of some other affection of the mind, I think that an action for injury will lie; for in this instance the father is considered as being absent.

(12) If the father is present, but is unwilling to bring suit, either because he wishes to postpone it, or abandon, or pardon the injury, the better opinion is that the right of action should not be granted to the son; for, when the father is absent, the action is granted to the son for the reason that it is probable that his father would have brought it if he had been present.

(13) Sometimes, however, we think that even if the father excuses the injury, the action should be granted to the son, for instance, if the character of the father is vile and abject, and that of the son is honorable; for a father who is extremely contemptible should not estimate the insult offered to his son by his own degradation. Suppose, for example, the father to be a person for whom, by law and reason, a curator should be appointed by the Praetor.

(14) If, however, the father, after issue has been joined, should depart or neglect to prosecute the case, or is of inferior rank, it must be said that the right of action can be transferred to the son, if proper cause is shown.

The same rule will apply where the son is emancipated.

(15) The Praetor gave the preference to the agent of the father over the persons themselves who suffered the injury. When, however, the agent neglects the case, is in collusion with the other parties, or is not able to prosecute those who have committed the injury, the action will rather lie in favor of him who suffered it.

(16) We understand an agent to be not a person who has been specially appointed an attorney to conduct an action for injury, but it will be sufficient if the administration of all the property has been entrusted to him.

(17) Where, however, the Praator says that if proper cause is shown an action will be granted to him who is said to have sustained the injury, this must be understood to mean that when the investigation is made, it must be ascertained how long the father has been absent, and when he is expected to return, and whether the person who desires to bring suit for injury is indolent, or altogether worthless, and not capable of transacting any business, and on this account is not fitted to bring this action.

(18) When he afterwards says, "Who has sustained the injury," this must sometimes be understood to mean that his father will be entitled to bring the action; for instance, where the injury has been inflicted upon a grandson, and his father was present, but his grandfather was not. Julianus says that the action for injury should be granted to the father rather than to the grandson himself, for he holds it is the duty of the father, even while the grandfather is living, to protect his son against everything.

(19) Julianus also says that the son can not only bring the action himself, but can also appoint an attorney to do so. Otherwise, he says, if we do not permit him to appoint an attorney, and he should happen to be prevented from appearing by illness, and there is no one to conduct the action for injury, it must be dismissed.

(20) He also says that when an injury is inflicted upon a grandson, and there is no one to bring suit in the name of the grandfather, the father should be permitted to do so, and can appoint an attorney; for the power of appointing an attorney is conceded to all those who have the right to bring suit in their own names. Moreover, he asserts that a son should be considered as bringing the action in his own name, for, when his father fails to do so, the Praetor will give him permission to bring it.

(21) If a son under the control of his father brings the action for injury, it will not lie in favor of his father.

(22) He also says that an action on account of injury is granted to a son under paternal control when there is no one who can act in the name of the father, and that, in this instance, he is considered the head of the household.

Wherefore, if he has been emancipated, or should be appointed a testamentary heir, or even if he is disinherited or has rejected his father's estate, authority to conduct the case shall be granted him; for it would be perfectly absurd that anyone, whom the Prater would permit to bring the action, while he was under the control of his father, should be rendered incapable of avenging his injuries, after he had once become the head of a household, and that this privilege should be transferred to his father, who had abandoned him as far as it was in his power to do so; or (which is still more improper) if it should be transferred to the heirs of the father, who, there is no doubt, are not in any way interested in an injury inflicted upon a son under paternal control.

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

It is neither proper nor just for anyone to be condemned for speaking ill of a person who is guilty; for it is both necessary and expedient for the offences of guilty persons to be known.

(1) When one slave inflicts an injury upon another, an action should be brought just as if he had injured his master.

(2) If a daughter under paternal control, who is married, should sustain an injury, both her husband and her father can bring the action for injury. Pomponius very properly holds that judgment against the defendant should be rendered in favor of the father for an amount equal to what it would have been if she were a widow; and in favor of the husband, for the same amount, just as if she was independent; because the injury sustained by each party has its own distinct valuation. Therefore, if the married woman is under no one's control, she cannot bring the action, because her husband can bring it in her name.

(3) If an injury should be inflicted upon me by someone to whom I am unknown, or if anyone thinks that I am Lucius Titius, when I am Gaius Seius, the principal matter here will have the preference, that is, the fact that he desired to injure me. For I am a certain individual, although he may think that I am some other person than myself, and therefore I will be entitled to an action for injury.

(4) But when anyone thinks that a son under paternal control is the head of a household, he cannot be considered to have committed an injury against the father of the latter any more than against the husband, if he believes his wife to be a widow, because the injury is not personally aimed at the parties concerned, and cannot be transferred from their children to them by a mere effort of the mind; since the intention of him who inflicts the injury does not extend beyond the aggrieved person, who is regarded as the head of the household.

(5) If, however, he was aware that he was a son under paternal control, but still did not know whose son he was, I would hold (so he says) that the father could bring an action for injury in his own name, just as a husband could do, if he knew that the woman was married; for he who is aware of these things intends to inflict an injury through the son, or the wife, upon any father or husband whomsoever.

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

If my creditor, whom I am ready to pay, should attack my sureties for the purpose of injuring me, he will be liable to an action for injury.

20. *Modestinus, Opinions, Book XII.*

If Seia, for the purpose of inflicting injury, seals up the house of her absent debtor, without the authority of the magistrate who has the right and the power to allow this, he gave it as his opinion that the action for injury could be brought.

21. *Javolenus, Epistles, Book IX.*

The estimate of the injury sustained should not date from the time when judgment was rendered, but from the time when the injury was committed.

22. *Ulpianus, On the Edict of the Prastor, Book I.*

If a freeman is arrested as a fugitive slave, he can bring an action for injury against the person who seizes him.

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

Ofilius says that anyone who enters the house of another against the will of the owner, even though the latter may be summoned to court, he will be entitled to an action for injury against him.

24. *Ulpianus, On the Edict of the Prsetor, Book XV.*

Where anyone is prevented by another from selling his own slave, he can bring an action for injury sustained.

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

If anyone should have intercourse with a female slave, an action for injury will be granted to her master, but if he conceals the slave, or does something else with the intention of stealing, he will also be liable to an action for theft; or, if anyone should have intercourse with a young girl who was not mature, some authorities think that the action under the Aquilian Law will also lie.

26. *Paulus, On the Edict, Book XIX.*

If anyone makes a laughing-stock of my slave or my son, even with his consent, I will still be considered to have sustained an injury; as, for instance, if he takes him to a tavern, or induces him to throw dice. This will always be the case when the person who persuades him does so with the intention of injuring me. However, evil advice may be given by one who does not know who the master is, and hence the action for corrupting a slave becomes necessary.

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

If the statue of your father, erected on his monument, is broken by having stones thrown at it, Labeo says that an action for violating a tomb cannot be brought, but that one for injury can.

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

The action for injury does not affect our property until issue has been joined.

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

If you manumit or alienate a slave, on whose account you are entitled to an action for injury, you will retain the right to bring- the action.

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

Who doubts that, after a slave has been manumitted, an action will not lie for an injury which he sustained while in servitude?

(1) If an injury has been inflicted upon a son, while the right of action will be acquired by the son as well as the father, the same estimate should not be made for both:

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

As the injury done to the son may be greater than that done to the father, on account of the superior rank of the former.

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

Magistrates are not allowed to do anything by which an injury may be caused. Therefore, if a magistrate, either as a private individual, or in his magisterial capacity, is instrumental in committing injury, he can be sued for injury. But will it be necessary to wait until he has relinquished his office, or can the suit be brought while he still holds it? The better opinion is,

that if he is a magistrate who cannot legally be summoned to court, it will be necessary to wait until he relinquishes his office. If, however, he is one of the inferior magistrates, that is to say, one of those not invested with supreme jurisdiction or authority, he can be sued, even while he is still discharging his judicial duties.

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

When anything is done in compliance with the dictates of morality for the purpose of protecting the interests of the State, and this causes anyone to be insulted, nevertheless, for the reason that the magistrate did not act with the intention of causing injury, but had in view the vindication of the majesty of the Republic, he will not be liable to an action for injury.

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

Where several slaves together have beaten someone, or have raised a tumultuous clamor against him, each of them, individually, is guilty of the offence, and the injury is all the greater, since it was committed by slaves; and, indeed, there are the same number of injuries as there are persons responsible for them.

35. *Ulpianus, On All Tribunals, Book III.*

Where anyone commits an atrocious act who can, on account of his infamous character and poverty, disregard a judgment rendered against him in an action for injury, the Prater should exercise all his severity in the prosecution of the case, and the punishment of those who committed the injury.

36. *Julianus, Digest, Book XLV.*

If I desire to bring an action in the name of a son against his father, and the latter appoints an attorney, the son is not considered

to be defended unless he gives security for the payment of the judgment; and therefore an action should be granted against him just as if he was not defended by his father.

37. *Marcianus, Institutes, Book XIV.*

It is provided by the Imperial Constitutions that anything placed upon public monuments for the purpose of defaming another shall be removed.

(1) The action for injury can even be brought civilly under the Cornelian Law, and the amount of the judgment be estimated by the judge.

38. *Scsevola, Rules, Book IV.*

It is provided by a decree of the Senate that no one shall carry the statue of the Emperor for the purpose of exciting odium against anyone, and that he who violates it shall publicly be placed in chains.

39. *Venuleius, Public Prosecutions, Book II.*

No one is permitted to wear filthy clothing or long hair in public under the name of an accused person, unless he is so closely connected with him by affinity that he cannot be compelled to testify against him in opposition to his will.

40. *Macer, Public Prosecutions, Book II.*

The Divine Severus wrote to Dionysius Diogenes, as follows: "Anyone who has been condemned for an atrocious injury cannot belong to the Order of Decurions; and the error of a governor or of anyone else who has rendered a different decision on the point in controversy will not benefit you, nor will that of those who, in opposition to the established law, held that you still retained your membership in the Order of Decurions."

41. *Neratius, Parchments, Book III.*

A father, against whose son an injury has been committed, should not be prevented from bringing suit for his own injury and that of his son, by two different proceedings.

42. *Paulus, Sentences, Book V.*

Parties who are conducting a case should not raise their voices against the judge, otherwise they will be branded with infamy.

43. *Gaius, Rules, Book III.*

Anyone who brings an action for injury against another for the purpose of annoyance shall be condemned by extraordinary proceedings, that is to say he shall either suffer exile, deportation, or expulsion from his order.

44. *Javolenus, On the Last Works of Labeo, Book IX.* If the owner of a lower house causes smoke to affect the building of his neighbor above him, or if a neighbor occupying a higher house throws or pours anything upon that of another, which is situated below, Labeo says that an action for injury cannot be brought.

I think that this is not true provided it was thrown down upon the neighbor's premises for the purpose of injuring him.

45. *Hermogenianus, Epitomes, Book V.*

So far as injuries are concerned, it is customary at present to pass sentence arbitrarily, according to the circumstances and the person.

Slaves who have been scourged are restored to their masters; freemen of inferior ranks are whipped with rods; and others are punished either with temporary exile, or by the interdiction of certain property.

## TITLE XI.

## CONCERNING THE ARBITRARY PUNISHMENT OF CRIME.

1. *Paulus, Sentences, Book IV.*

The seducers of married women, as well as other disturbers of the marital relation, even though they may be unable to consummate their crimes, are punished arbitrarily on account of the tendency of their destructive passions.

(1) An injury is committed against good morals, for instance, where one person throws manure upon another, or smears him with filth, or mud; or defiles water, canals, or reservoirs; or fouls anything else for the purpose of injuring the public; and upon persons of this kind it is customary to inflict the most condign punishment.

(2) Anyone who persuades a boy to submit to lewdness, either by leading him aside, or by corrupting his attendant, or anyone who attempts to seduce a woman or a girl, or does anything for the purpose of encouraging her in debauchery either by lending his house, or by paying her money, in order to persuade her, and the crime is accomplished, shall be punished with death, and if it is not accomplished, he shall be deported to some island. Attendants who have been corrupted shall suffer the extreme penalty.

2. *Ulpianus, Opinions, Book IV.*

Unlawful assembles must not be attempted, even by veteran soldiers, under the pretext of religion, or that of performing a vow.

3. *The Same, On Adultery, Book III.*

The actions for embezzlement and the exploitation of estates include an accusation, but they are not criminal prosecutions.

4. *Marcianus, Rules, Book I.*

The Divine Severus and Antoninus stated in a Rescript that a woman who purposely produces an abortion on herself should be sentenced to temporary exile by the Governor; for it may be considered dishonorable for a woman to deprive her husband of children with impunity.

5. *Ulpianus, On the Duties of Proconsul, Book V.*

In addition to liability to the action for corrupting a slave, which is authorized by the Perpetual Edict, anyone at whose instigation a slave is proved to have sought sanctuary at the foot of a statue, for the purpose of defaming his master, shall be severely punished.

6. *The Same, On the Duties of Proconsul, Book Vill.*

Those who are accustomed to embrace every opportunity to increase the price of food are called *dardanarii,* and provision has been made by the Imperial Decrees and Constitutions for the repression of their avarice. It is provided as follows in the Decrees: "Moreover, expectation of an unproductive season, so that the price of food may not be raised.

The punishments imposed upon such persons, however, vary greatly, for generally, if they are merchants, they are only prohibited from engaging in trade, and sometimes they are deported, but those of low rank are condemned to the public works.

(1) The price of food is also increased by the use of false balances, with reference to which the Divine Trajan promulgated an Edict, by which Edict he renders such persons liable to the penalty of the Cornelian Law; just as if under that section of this law, which has reference to wills, anyone had been condemned for having written, sealed, or published a forged testament.

(2) The Divine Hadrian also condemned to deportation anyone who had false measures in his possession.

7. *The Same, On the Duties of Proconsul, Book IX.*

Persons who carry bags, and make use of them for forbidden purposes, by purloining or carrying away portions of property, and also those called *derectarii,* that is to say, such as introduce themselves into apartments with the intention of stealing, should be punished more severely than ordinary thieves, and therefore they are sentenced for a term to the public works, or are scourged and then discharged, or are deported for a certain time.

8. *The Same, In the Same Book.*

There are, besides, crimes over which the Governor has jurisdiction; as, wherever anyone alleges that documents belonging to him have treacherously been given to another, for the prosecution of this offence was assigned by the Divine Brothers to the Prefect of the City.

9. *The Same, In the Same Book.*

There are certain offences which are punished in accordance with the customs of the provinces in which they are committed; as, for instance, in the Province of Arabia a certain crime, designated "the placing of stones," is known, the nature of which is as follows: The majority of the people are accustomed to set stones in the field of an enemy, which indicate that if anyone cultivates the field, he will suffer death through the snares of those who deposited the stones there. This proceeding causes such fear that no one dares approach the field in apprehension of the cruelty of those who placed the stones on the land. Governors are accustomed to inflict the extreme penalty for the commission of this offence, because it itself threatens death.

10. *The Same, In the Same Book.*

In Egypt, anyone who breaks or injures dykes (these are levees which retain the water of the

Nile) are also punished in an arbitrary manner, according to their civil condition, and the measure of the offence. Some of them are sentenced to the public works, or to the mines. Anyone, also, who cuts down a sycamore tree, can also be sentenced to the mines, according to his rank, for this offence is also punished arbitrarily, and by a severe penalty, because these trees strengthen the dykes of the Nile by which the inundations of that river are distributed and restrained, and the diminution of its volume arrested. The dykes, as well as the channels cut through them, afford ground for the punishment of those who interfere with their operation.

11. *Paulus, Sentences, Book I.*

An action in proportion to the gravity of the offence will be granted against mountebanks who carry around and exhibit serpents, when any damage results through fear of these reptiles.

## TITLE XII.

## CONCERNING THE VIOLATION OF SEPULCHRES.

1. *Ulpianus, On the Edict of the Pr&tor, Book II.*

The action for violating a sepulchre brands a person with infamy.

2. *The Same, On the Edict of the Praetor, Book XVIII.*

Where anyone demolishes a sepulchre, the Aquilian Law does not apply, but proceedings can be instituted under the interdict *Quod vi out clam.* This opinion was also stated by Celsus with reference to a statue torn from a monument. He also asks if it was not fastened with lead, or attached to the tomb, in any way, whether it should be considered a part of the monument, or a part of our property. Celsus says that it is a part of the monument, as a receptacle of bones, and therefore the interdict *Quod vi aut clam,* will be applicable.

3. *Ulpianus, On the Edict of the Prsetor, Book V.*

The Prsetor says: "If a sepulchre is said to have been violated by anyone maliciously, I will grant an action *in factum* against him, in order that he may be condemned for an amount which may appear to be just, in favor of the party interested. If there is no one who is interested, or if there is and he declines to bring suit, and anyone else is willing to do so, I will grant him an action for a hundred *aurei.* If several persons should desire to institute proceedings, I will grant power to do so to him whose cause appears to be the most just. Where anyone, with malicious intent, inhabits a sepulchre, or constructs any other edifice than that which is intended for a tomb, I will grant an action for two hundred *aurei* to anyone who is willing to bring it in his own name."

(1) The first words of this Edict show that he who violates a sepulchre with malicious intent is punished by it. Therefore, if there is no malicious intent, the penalty will not apply. Hence, those who are not capable of criminality, as, for instance, children under the age of puberty, as well as persons who did not approach the sepulchre with the intention of violating it, are excused.

(2) Every place of sepulture is understood to be included in the term sepulchre.

(3) If anyone should place a body in an hereditary tomb, even though it be the heir, he will still be liable to the action for violation of a sepulchre, if he did so against the wish of the testator; for a testator is permitted to provide that no one shall be buried in his tomb, as is stated in the Rescript of the Emperor Antoninus, for his wish must be complied with. Therefore, if he says that only one of the heirs can inter persons therein, this must be observed, so that the designated heir alone may do so.

(4) It is provided by an Edict of the Divine Severus that bodies may be transferred, which have not been buried in one place for all time; and by this Edict it is directed that the

transportation of bodies shall not be delayed, or meddled with, or they shall not be prevented from being conveyed through territory belonging to cities.

The Divine Marcus, however, stated in a Rescript that those who transported bodies on the highways through villages or towns were not liable to any penalty, although this should not be done without the permission of those who have the right to grant it.

(5) The Divine Hadrian, by a Rescript, fixed a penalty of forty *aurei* against those who buried dead bodies in cities, and he ordered the penalty to be paid to the Treasury. He also directed the same penalty to be inflicted against magistrates who suffered this to be done; and ordered the place to be sold by auction, and the body to be removed. But what if the municipal law permits burial in a city? Let us see whether this right has been annulled by the Imperial Rescripts, for the reason that Rescripts are of general application. The Imperial Rescripts must be enforced and are valid everywhere.

(6) Where anyone lives in a sepulchre or has a building on the ground, whoever desires to do so can bring the action.

(7) Governors are accustomed to proceed more severely against those who despoil dead bodies, especially if they go armed; for if they commit the offence armed like robbers, they are punished capitally, as the Divine Severus provided in a Rescript; but if they commit it unarmed, any penalty can be inflicted up to sentence to the mines.

(8) Those who have jurisdiction of the action for violating a sepulchre must estimate the amount of the interest in proportion to the injury which has been inflicted, as well as in proportion to the advantage obtained by the person guilty of the violation; or to the damage which resulted; or to the audacity of him who committed the offence. Still, judgment should be rendered for a smaller sum where the parties interested are the accusers than where a stranger brought the suit.

(9) If the right of sepulture belongs to several persons, shall we grant an action to all of them, or to the one who manifested the most diligence? Labeo very properly says that the action ought to be granted to all, because it is brought for the individual interest of each one.

(10) If the party in interest does not wish to bring suit for violation of the sepulchre, but, having changed his mind before issue was joined, says that he desires to proceed, he shall be heard.

(11) If a slave lives in a sepulchre, or builds a house there, a noxal action will not lie, and the Praetor promises this action against him. If, however, he does not live there, but uses the place as a resort, a noxal action will be granted, provided he appears to retain possession of the ground.

(12) This action is a popular one.

4. *Paulus, On the Edict of the Prsetor, Book XXVII.*

The sepulchres of enemies are not religious places in our eyes, and therefore we can make use of any stones which have been removed from them for any purpose whatsoever, without becoming liable to the action for violating a sepulchre.

5. *Pomponius, On Plautius, Book IX.*

It is our practice to hold that the owners of land, in which they have set apart places of sepulture, have the right of access to the sepulchres, even after they have sold the land. For it is provided by the laws relating to the sale of real property that a right of way is reserved to sepulchres situated thereon, as well as the right to approach and surround them for the purpose of conducting funer"al ceremonies.

6. *Julianus, Digest, Book X.*

The action for violating a sepulchre is, first of all, granted to him to whom the property belongs, and if he does not proceed, and someone else does, even though the owner may be absent on business for the State, the action should not be granted a second time against one who has paid the damages assessed. The condition of the person who was absent on business for the State cannot be held to have become worse, as this action does not so much concern his private affairs as it does the public vengeance.

7. *Marcianus, Institutes, Book III.*

It is forbidden to make the condition of a sepulchre worse, but it is lawful to repair a monument which has become decayed, and ruined, but without touching the bodies contained therein.

8. *Macer, Public Prosecutions, Book I.*

The crime of violating a sepulchre may be considered as coming within the terms of the Julian Law relating to public violence, and that part in which it is provided that he shall be punished who prevents anyone from celebrating funeral ceremonies, or burying a corpse; because he who violates a sepulchre commits an act preventing interment.

9. *The Same, Public Prosecutions, Book II.*

A pecuniary action is also granted for violating a sepulchre.

10. *Papinianus, Questions, Book Vill.*

The question arose whether the right of action for violating a sepulchre belongs to the necessary heir, when he has not meddled with the property of the estate. I held that he can very properly bring this action, which is introduced in accordance with what is good and just. And, if he should bring it, he need have no apprehension of the creditors of the estate; for although this action is derived from it, still nothing is received through the will of the deceased, nor is anything obtained from the pursuit of the property, but only in consequence of the punishment inflicted by the law.

11. *Paulus, Sentences, Book V.*

Persons guilty of having violated sepulchres, and who have removed bodies or the bones, are punished with the extreme penalty if they are of low rank; those of higher rank are deported to some island; others still are either relegated, or condemned to the mines.

## TITLE XIII.

## CONCERNING EXTORTION.

1. *Ulpianus, Opinions, Book V.*

If extortion is committed under a pretended order of the Governor, the Governor of the province shall order the property surrendered through terror, to be restored, and shall punish the crime.

2. *Macer, Public Prosecutions, Book I.*

The prosecution of extortion is not public, but if anyone has received money because he threatened another with a criminal accusation, the prosecution may become public under the Decrees of the Senate, by which all those are ordered to be liable to the penalty of the Cornelian Law who have joined in the denunciation of innocent persons, and have received money in consideration of accusing, or not accusing others, or of giving, or not giving testimony against them.

## TITLE XIV.

## CONCERNING THOSE WHO STEAL CATTLE.

1. *Ulpianus, On the Duties of Proconsul, Book Vill.*

The Divine Hadrian, at the Council of Bsetica, stated in a Rescript relating to cattle-thieves, "When those who drive away cattle are punished most severely, they are ordinarily condemned to the sword." They are not, however, punished with the greatest severity everywhere, but only in those places where this species of offence is most frequently committed; otherwise, they are sentenced to hard labor in the public works, and sometimes only temporarily.

(1) Those are properly considered cattle-thieves who remove cattle from pastures, or from droves, and prey upon them, as it were; and they exercise this occupation of stealing cattle as a regular trade when they take horses or cattle from the droves of which they form a part. If, however, anyone should drive away an ox that is lost, or horses which have been left alone, he does not belong to this category, but is merely an ordinary thief.

(2) He, however, who drives away a sow, a she-goat, or a sheep should not be punished as severely as one who steals larger animals.

(3) Although Hadrian established the penalty of the mines, or that of labor on the public works, or that of the sword for this offence; still, those who do not belong to the lowest rank of society should not be subjected to this penalty, for they either should be relegated or expelled from their order. Those, however, who-drive away cattle, while armed, are not unjustly thrown to wild beasts.

(4) Anyone who drives away cattle whose ownership is in dispute should be subjected to a civil investigation, as Saturninus says; but this rule ought only to be adopted where no pretext for stealing the cattle is sought, but the accused person, induced by good reasons, actually believed that the cattle belonged to him.

2. *Macer, Public Prosecutions, Book I.*

The crime of driving away cattle is not subject to public prosecution, because it is rather to be classed as a theft; but since most offenders of this description go armed, if they are arrested, they are usually more severely punished on this account.

3. *Callistratus, On Legal Investigations, Book VI.* Sheep, in proportion to the number driven away, either render a man a common thief, or an appropriator of cattle. Certain authori-

ties have held that ten sheep constitute a flock, just as four or five hogs, when they are driven away from a drove; but a cattle-thief commits this crime if he steals but one horse or ox.

(1) He also should be more severely punished who drives away a tame flock from a stable, and not from a forest, or one forming part of a larger flock.

(2) Those who have often perpetrated this offence, although they may have taken only one or two animals at a time, are nevertheless, classed as cattle thieves.

(3) Those who harbor offenders of this kind should, according to an Epistle of the Divine Trajan, be punished by being banished from Italy for ten years.

## TITLE XV.

## CONCERNING PREVARICATION.

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

A prevaricator is a person who takes both sides, and assists the adverse party by the betrayal of his own case. This term, Labeo says, is derived from a varying contest, for he acts in this

manner who, apparently being on one side, actually favors the other.

(1) A prevaricator, properly so called, is one who appears as accuser in a criminal prosecution. An advocate, however, is not correctly said to be a prevaricator. What then should be done with him if he should be guilty of this offence, in either a private or a public proceeding, that is to say, if he has betrayed his own side ? It is usual for him to be punished arbitrarily.

2. *Ulpianus, On the Duties of Proconsul, Book IX.* It should be remembered that, at present, those who are guilty of this offence are punished with an arbitrary penalty.

3. *Macer, Public Prosecutions, Book I.*

The judgment for prevarication is either public or introduced by custom.

(1) If the defendant opposes the prosecutor in a criminal case, alleging that he already has been accused of the same crime by another and acquitted, it is provided by the Julian Law relating to public prosecutions that he cannot be prosecuted until the crime charged by the first accuser and the judgment rendered with reference to it have been investigated. Therefore, the decision of cases of this kind is understood to belong to the category of public prosecutions.

(2) Where the crime of prevarication is said to have been committed by an advocate, a public prosecution cannot be instituted; and it makes no difference whether he is said to have committed it in a public or a private proceeding.

(3) Therefore if anyone is accused of having abandoned a public prosecution, the case will not be public, because no provision was made for this by any law; and a public accusation is not authorized by that

decree of the Senate which prescribes the penalty of five pounds of gold against anyone who abandons a case.

4. *The Same, Public Prosecutions, Book II.*

If a person against whom an action for slander cannot be brought is convicted of being a prevaricator in a criminal case, he will become infamous.

5. *Venuleius Saturninus, Public Prosecutions, Book II.* An accuser convicted of prevarication cannot afterwards bring an accusation under the law.

6. *Paulus, On Public Prosecutions.*

It was stated in a Rescript by our Emperor and his Father that, in the case of crimes which are opposed as being extraordinary, prevaricators shall be punished with the same penalty to which they would have been liable, if they themselves had violated the law by which the defendant was acquitted through their treacherous instrumentality.

7. *Ulpianus, On Taxes, Book IV.*

In all cases except those in which the shedding of blood is involved, anyone who corrupts the informer is considered as convicted, according to the Decree of the Senate.

## TITLE XVI.

## CONCERNING THOSE WHO HARBOR CRIMINALS.

1. *Marcianus, Public Prosecutions, Book II.*

The harborers of criminals constitute one of the worst classes of offenders, for without them no criminal could long remain concealed. The law directs that they shall be punished as robbers. They should be placed in the same class, because when they can seize robbers they permit them to go, after having received money or- a part of the stolen goods.

2. *Paulus, On the Punishment of Civilians.*

Persons by whom a thief, who is either their connection by affinity or their blood relative, is concealed, should neither be discharged, nor severely punished, for their crime is not as serious as that of those who conceal robbers who are in no way connected with them.

## TITLE XVII.

## CONCERNING THIEVES WHO STEAL IN BATHS.

1. *Ulpianus, On the Duties of Proconsul, Book Vill.*

Nocturnal thieves should be arbitrarily tried and punished when proper cause is shown, provided we take care that no greater penalty is inflicted than that of labor on the public works. The same rule applies to thieves who steal in baths. If, however, the thieves defend themselves with weapons, or if they have broken in, or have done anything of this kind, but have not struck anyone, they shall be sentenced to the mines, and those of superior social position shall be exiled.

2. *Marcianus, Public Prosecutions, Book II.*

If they commit theft in the daytime, they should be tried in the ordinary way.

3. *Paulus, On the Punishment of Soldiers.*

A soldier who has been caught stealing a bath should be dishonorably discharged from the service.

## TITLE XVIII.

## CONCERNING THOSE WHO BREAK OUT OF PRISON, AND PLUNDERERS.

1. *Ulpianus, On the Duties of Proconsul, Book Vill.*

The Divine Brothers stated in a Rescript addressed to ^milius Tiro, that persons who break out of prison should suffer death. Satur-ninus also adopts the opinion that those who have escaped from prison whether by breaking down the doors, or by conspiring with others confined with them, should be capitally punished, but if they escaped through the negligence of the guards, they should undergo a lighter penalty.

(1) Robbers, who are more atrocious thieves (for this is the meaning of the word) should be sentenced to labor on the public works either for life, or for a certain term of years; those, however, who are of superior rank should be temporarily dismissed from their order, or compelled to depart beyond the boundaries of their country; but no special penalty has been imposed upon them by the Imperial Rescripts. Therefore, where proper cause is shown, the magistrate having jurisdiction can pronounce judgment according to his discretion.

(2) In like manner, thieves who carry bags, *directarii,* and those who break into buildings, shall be punished in the same way. The Emperor Marcus ordered that a Roman knight who had stolen money, after having broken through a wall, should be banished from the Province of Africa from whence he came, as well as from the City, and from Italy, for the term of five years. It is, however, necessary, after proper cause has been shown, to render a decision with reference to both those who break into houses, and the other offenders above mentioned, according to the circumstances attending the crime; provided that no one shall be sentenced to a more severe penalty than that of labor on the public works, if he is a plebeian, and if he is of higher rank, shall suffer no more severe punishment than that of exile.

2. *Paulus, On the Duties of the Prefect of the Night Watch.* Different penalties are inflicted upon persons who break into houses, for those who break in at night are the more 'atrocious, and hence they are usually scourged and sentenced to the mines. Those, however, who break in by day, are first whipped, and then sentenced to hard labor for life or for a specified time.

## TITLE XIX.

## CONCERNING THE SPOLIATION OF ESTATES.

1. *Marcianus, Institutes, Book III.*

When anyone plunders the estate of another, it is customary for him to be punished arbitrarily, by means of the accusation of despoiling an estate, as is provided by a Rescript of the Divine Marcus.

2. *Ulpianus, On the Duties of Proconsul, Book IX.*

In prosecuting the crime of plundering an estate, the Governor of the province should take judicial cognizance of the same; for when the action for theft cannot be brought, recourse to the Governor alone remains.

(1) It is evident that the offence of plundering an estate can only be prosecuted under circumstances where the action for theft is not available, that is to say, before the estate has been entered upon, or after it has been entered upon, but before the property has been taken possession of by the heir; for it is clear that, in this instance, the action of theft will not lie, although there is no doubt that one for the production of property can be brought, if anyone desires this to be done in order to enable him to claim it.

3. *Marcianus, Public Prosecutions, Book II.*

The Divine Severus and Antoninus stated in a Rescript that anyone who desired to prosecute extraordinarily the crime of plundering an estate could do so either before the Prefect of the City or the Governor ; or he could demand the estate from the possessors by the ordinary course of procedure.

4. *Paulus, Opinions, Book III.*

The property of an estate belongs in common to all the heirs, and therefore he who brings an accusation for the crime of plundering it, and gains his case, is also considered to have benefited his co-heir.

5. *Hermogenianus, Epitomes of Law, Book II.*

A wife cannot be accused of the crime of plundering an estate, because the action of theft cannot be brought against her.

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

If, not knowing that certain property belongs to an estate, you take it, Paulus says that you commit a theft. Theft of property belonging to an estate is not committed any more than that of property which has no owner, and the opinion of the person who steals it does not change the character of the action in any respect.

## TITLE XX.

## CONCERNING STELLIONATUS.

1. *Papinianus, Opinions, Book I.*

The action of *Stellionatus* is not included in public prosecutions or in private actions.

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

*A* judgment for this offence does not brand anyone with infamy, but it is followed by extraordinary punishment.

3. *The Same, On the Duties of Proconsul, Book HI.*

The accusation of *Stellionatus* comes within the jurisdiction of the Governor.

(1) It must be remembered that those who have committed any fraudulent act can be prosecuted for this crime, that is to say, if there is no other of which they can be accused, for what in private law gives rise to an action for fraud is the basis for a criminal prosecution in an accusation of *Stellionatus.* Hence, whenever where the offence lacks a name, we designate it *Stellionatus.* Especially, however, does this apply to anyone who exchanges or gives property in payment through deceit, where the property has been encumbered to another, and he conceals the fact; for all instances of this kind include *stellion-atus.* And, where anyone has substituted some article for another; or has put aside goods which he was obliged to deliver, or has spoiled them, he is also liable for this offence. Likewise, if anyone has been guilty of imposture, or has been in collusion to bring about the death of another, he can be prosecuted for *Stellionatus.* And, generally speaking, I should say that where the name of any crime is wanting, an accusation for this offence can be brought, but it is not necessary to enumerate the different instances.

(2) No punishment, however, is legally prescribed for *Stellionatus,* since, under the law, it is not a crime. It is, however, customary for it to be punished arbitrarily, provided that, in the case of plebeians, the penalty inflicted is not more severe than that of condemnation to the mines. But, in the case of those who occupy a higher position, the sentence of temporary exile, or expulsion from their order should be imposed.

(3) Anyone who has fraudulently concealed merchandise can be specially prosecuted for this crime.

4. *Modestinus, On Punishments, Book III.*

When anyone swears in a written instrument that property pledged belongs to him, thereby committing perjury, it becomes *Stellionatus,* and therefore the culprit should be sent into temporary exile.

## TITLE XXI.

## CONCERNING THE REMOVAL OF BOUNDARIES.

1. *Modestinus, Rules, Book Vill.*

The penalty for the removal of boundaries is not a pecuniary fine, but should be regulated according to the social position of the guilty parties.

2. *Callistratus, On Judicial Inquiries, Book III.*

The Divine Hadrian stated the following in a Rescript. There can be no doubt that those who remove monuments placed to establish boundaries are guilty of a very wicked act. In fixing the penalty, however, its degree should be determined by the rank and intention of the individual who perpetrated the crime, for if persons of eminent rank are convicted, there is no doubt that they committed the act for the purpose of obtaining the land of others, and they can be relegated for a certain time, dependent upon their age; that is to say, if the accused is very young, he should be exiled for a longer time; if he is old, for a shorter time.

Where others have transacted their business, and have furnished their services, they shall be chastised and sentenced to hard labor on the public works for two years. If, however, they removed the monuments through ignorance, or accidentally, it will be sufficient to have them whipped.

3. *The Same, On Judicial Inquiries, Book V.*

A pecuniary penalty was established by the agrarian law which Gaius Caesar enacted against those who fraudulently removed monuments beyond their proper place, and the boundaries of their land; for it directed that they should pay to the Public Treasury fifty *aurei* for every boundary mark which they took out or removed, and that an action should be granted to anyone who desired to bring it.

(1) By another agrarian law, introduced by the Divine Nerva, it is provided that if a male or female slave, without the knowledge of his or her master, commits this offence with malicious intent, he or she shall be punished with death, unless his or her master or mistress prefers to pay the fine.

(2) Those, also, who change the appearance of the place in order to render the location of the boundaries obscure, as by making a shrub out of a tree; or plowed land out of a forest; or who do anything else of this kind, shall be punished in accordance with their character and their rank, and the violence with which their acts were committed.

## TITLE XXII.

## CONCERNING ASSOCIATIONS AND CORPORATIONS.

1. *Marcianus, Institutes, Book HI.*

By the Decrees of the Emperors, the Governors of provinces are directed to forbid the organization of corporate associations, and not even to permit soldiers to form them in camps. The more indigent soldiers, however, are allowed to put their pay every month into a common fund, provided they assemble only once during that time, for fear that under a pretext of this kind they may organize an unlawful society, which the Divine Severus stated in a Rescript should not be tolerated, not only at Rome, but also in Italy and in the provinces.

(1) To assemble for religious purposes is, however, not forbidden if, by doing so, no act is committed against the Decree of the Senate by which unlawful societies are prohibited.

(2) It is not legal to join more than one association authorized by law, as has been decided by the Divine Brothers. If anyone should become a member of two associations, it is provided by a rescript that he must select the one to which he prefers to belong, and he shall receive from the body from which he withdraws whatever he may be entitled to out of the property held in common.

2. *Ulpianus, On the Duties of Proconsul, Book VII.*

Anyone who becomes a member of an unlawful association is liable to the same penalty to which those are subject who have been convicted of having seized public places or temples by means of armed men.

3. *Marcianus, Public Prosecutions, Book II.*

If associations are illegal, they will be dissolved by the terms of Imperial Mandates and Constitutions, and Decrees of the Senate. When they are dissolved, the members are permitted to divide among themselves the money or property owned in common, if there is any of this kind.

(1) In a word, unless an association or any body of this description assembles with the authority of the Decree of the Senate, or of the Emperor, this assembly is contrary to the provisions of the Decree of the Senate and the Imperial Mandates and Constitutions.

(2) *It* is also lawful for slaves to be admitted into associations of indigent persons, with the consent of their masters; and those who have charge of such societies are hereby notified that they cannot receive a slave into an association of indigent persons without the knowledge or consent of his master, and if they do, that they will be liable to a penalty of a hundred *aurei* for every slave admitted.

4. *Gaius, On the Law of the Twelve Tables, Book IV.*

Members are those who belong to the same association which the Greeks call *Iraipia.* They are legally authorized to make whatever contracts they may desire with one another, provided they do nothing in violation of the public law.

The enactment appears to have been taken from that of Solon, which is as follows: "If the people, or brothers, or those who are associated together for the purpose of sacrifice, or sailors, or those who are buried in the same tomb, or members of the same society who generally live together, should have entered, or do enter into any contract with one another, whatever they agree upon shall stand, if the public laws do not forbid it."

## TITLE XXIII.

## CONCERNING POPULAR ACTIONS.

1. *Paulus, On the Edict, Book Vill.*

We call that a popular action which protects the rights of the party who brings it, as well as those of the people.

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

Where several persons bring a popular action at the same time, the Praetor shall select the most suitable one of them.

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

If suit is brought several times for the same cause, when the same act is involved, the ordinary exception of *res judicata* can be pleaded.

(1) In popular actions, the party in interest is given the preference.

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

*A* popular action is granted to a person whose rights are unimpaired, that is to say, to one who can bring suit under the Edict.

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

Where anyone is sued in a popular action, he can appoint an attorney to defend him, but he who brings the suit cannot appoint one.

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

Popular actions are not granted to women and minors, unless they are interested in the matter.

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

Popular actions do not pass to him to whom an estate has been restored under the Trebellian Decree of the Senate.

(1) The person entitled to bring these actions is not considered to be pecuniarily benefited on this account.

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

All popular actions are not granted against heirs, nor is the right to bring them extended beyond the term of a year.